

## **The Convention on the Rights of Persons with Disabilities: Will Ratification Lead to a Holistic Approach to Postsecondary Education for Persons with Disabilities?**

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## I. INTRODUCTION

The Convention on the Rights of Persons with Disabilities (CRPD) is the first human rights convention of the twenty-first century. As drafted and implemented, it is one of the most far-reaching international documents in history for the protection of marginalized individuals with disabilities, emphasizing the impact that attitudinal and environmental barriers in society have on the enjoyment of human rights.<sup>1</sup> By focusing on these barriers, the CRPD, in its unadulterated form, represents a paradigm shift from an accommodation approach for persons with disabilities to a human rights mandate for society. However, the CRPD, as likely to be implemented by the United States, will fail to deliver on this potential for Americans with disabilities. Therefore, with or without ratification, a new conceptual framework is needed to achieve equality for persons with disabilities. This conceptual framework is embodied in the theory of universal design.

The United States Senate, in its efforts to ratify the CRPD, has attached reservations, understandings, and declarations that dilute its holistic, human rights approach to persons with disabilities back to the social model of U.S. disability law,<sup>2</sup> as codified in the Americans with Disabilities Act (ADA).<sup>3</sup> Such an effort is a missed opportunity to further the high ideals envisioned by the CRPD and its drafters with respect to social, cultural, and political rights. Regardless of ratification, the principles embodied in the CRPD can and should be adopted as a normative framework by state policy-makers, courts, and legislatures to advance social, cultural, and political rights, specifically the rights of postsecondary students with disabilities to higher education in the United States. The proponents of universal design, which seeks to accommodate both persons with disabilities and

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<sup>1</sup> The Convention on the Rights of Persons with Disabilities was adopted by United Nations General Assembly on December 13, 2006, and entered into force on May 3, 2008. G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, (2007) [hereinafter CRPD]; Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Sept. 2–4, 2009, New York, U.S., U.N. Doc. CRPD/CSP/2009/2 (Jan. 11, 2010), *available at* [http://www.un.org/disabilities/documents/COP/crpd\\_csp2\\_2009\\_2.pdf](http://www.un.org/disabilities/documents/COP/crpd_csp2_2009_2.pdf). The CRPD text, along with its drafting history, resolutions, and updated list of State Parties, is available on the United Nations ENABLE website at <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>.

<sup>2</sup> *See* S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, S. EXEC. DOC. NO. 112-6, at 2–7 (2d Sess. 2012), *available at* <http://www.foreign.senate.gov/download/?id=3AC78EBA-11DA-432D-B121-F2A31B4685F7>.

<sup>3</sup> 42 U.S.C. §§ 12101–12213 (2012).

persons who are not disabled by addressing the inaccessible environments in which they find themselves, have already begun to incorporate these holistic principles into higher education. Likewise, state courts, through their decisions, can implement the holistic principles set forth in the CRPD in order to conceptualize a human rights approach to higher education and disability law in the United States.

The CRPD evolved from almost a decade of work by the United Nations, beginning with the formation by the United Nations General Assembly in 2001 of an Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.<sup>4</sup> Prior to the advent of the CRPD, none of the United Nations human rights treaties specifically protected persons with disabilities with respect to a “disability-related characteristic” or status solely as a person with a disability.<sup>5</sup> And for the most part, those treaties that did recognize persons with disabilities viewed their legitimate and natural role in society as “separate but equal,”<sup>6</sup> rather than promoting one of inclusion and equal accessibility in society as a fundamental precept of the human rights agenda. Now, through the CRPD, over 650 million people with disabilities may assert their rights to mobility, employment, and education, along with other essential day-to-day activities, as not only internationally recognized, but internationally protected.<sup>7</sup>

In providing protection, the CRPD combines the civil and political rights commonly found in anti-discrimination legislation (often called negative or first-generation rights)<sup>8</sup> with the full

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<sup>4</sup> G.A. Res. 56/168, U.N. Doc. A/RES/56/168 (Feb. 26, 2002). The Government of Mexico provided the impetus for the UN General Assembly to act. The Ad Hoc Committee’s mission was to develop proposals for a comprehensive convention to promote and protect persons with disabilities “based on the holistic approach in the work done in the fields of social development, human rights, and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development.” *Id.*

<sup>5</sup> Michael Ashley Stein, *A Quick Overview of the United Nations Convention on the Rights of Persons with Disabilities and its Implications for Americans with Disabilities*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 679 (2007).

<sup>6</sup> Gerard Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities*, in 1 EUR. Y.B. OF DISABILITY L. 89, 89–90 (Intersentia 2009).

<sup>7</sup> CRPD, *supra* note 1; Michael Ashley Stein & Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 HUM. RTS. Q. 689, 689 (2010).

<sup>8</sup> First generation civil and political rights “include prohibitions against State interference with rights that include life, movement . . . expression, association . . . and political participation.” Michael Ashley Stein & Penelope J.S Stein, *Beyond*

spectrum of social, cultural, and economic rights (often called positive or second-generation rights).<sup>9</sup> The drafters of the CRPD recognized that “disability should be seen as the result of the interaction between a person and his/her environment, that disability is not something that resides in the individual as the result of some impairment.”<sup>10</sup> Recognizing both negative and positive rights in the CRPD will allow “civil rights law [to] prospectively prevent prejudicial harm, while equality measures [will] remedy inequities that exist due to past practices.”<sup>11</sup> By incorporating this deliberative understanding, the CRPD recognizes that “disability is an evolving concept,” and that domestic legislation promulgated to meet its goals should be “adapted to reflect positive changes within society.”<sup>12</sup>

In addressing both past and future discrimination, the CRPD’s approach to disability emphasizes the significant impact that attitudinal and environmental barriers in society may have on the enjoyment of the human rights of persons with disabilities.<sup>13</sup> People with disabilities routinely face discrimination in postsecondary education, health care, transportation, and employment.<sup>14</sup> A person in a wheelchair might have difficulties with public transportation, not because of his condition, but because environmental obstacles, such as inaccessible buses, prevent full accessibility. Students with intellectual disabilities might have difficulties, not only as a result of their physical limitations, but also due to professors’ attitudes, inflexibility of administrations, and overprotective parents, all of whom are unable to adapt to students with different learning capacities. An individual with limited vision who is seeking employment might face difficulties, not due to the lack of necessary electronic assistive equipment, but from bias and prejudice from employers and co-workers. Yet, the quality of life for persons with disabilities is improved quantitatively and qualitatively thorough

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*Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1206 n.16 (2007).

<sup>9</sup> *Id.* at 1205–06. Second-generation rights are rights granted through measures that focus on improving standards of living through concepts such as availability of housing and access to education. *Id.* at 1206 n.16.

<sup>10</sup> U.N. DEP’T OF ECON. & SOC. AFFAIRS, ET AL., FROM EXCLUSION TO EQUALITY: REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES, HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL 4 (2007) [hereinafter EXCLUSION TO EQUALITY], available at <http://www.ipu.org/PDF/publications/disabilities-e.pdf>.

<sup>11</sup> Stein, *supra* note 5, at 680.

<sup>12</sup> EXCLUSION TO EQUALITY, *supra* note 10, at 4.

<sup>13</sup> CRPD, *supra* note 1, at pmb1.

<sup>14</sup> Robert A. Stodden & Peter W. Dowrick, *Postsecondary Education and Employment of Adults with Disabilities*, 25 AM. REHABILITATION 19 (Winter 1999/2000).

participation in meaningful employment.<sup>15</sup>

Rather than approach disability-related issues from the perspective of a medical view of disability or from the societal view of a barrier placed before the person with a disability, the CRPD promotes and protects persons with disabilities by safeguarding the rights of these individuals as basic human rights.<sup>16</sup> This approach combats society's predisposition to judge persons with disabilities. In other words, the CRPD no longer focuses on a medical or social welfare model that seeks to remedy or correct an inability or impairment as a way to "mainstream" differences, but rather encompasses a "social-human rights model" that desires inclusion and capability as a way to remove environmental and attitudinal barriers.<sup>17</sup> By redirecting efforts to inclusion and capability, the CRPD is "comprehensively elaborating the full range of internationally-protected human rights from a disability perspective."<sup>18</sup> The CRPD therefore represents a paradigm shift in attitudes and approaches with respect to persons with disabilities—a shift that is reflected domestically in the United States with the advent of a universal design approach to disability.

Universal design ensures that environments are "usable by all people . . . without the need for adaptation or specialized design."<sup>19</sup> Universal design is premised upon the notion that a variety of environments are, themselves, disabling to individuals.<sup>20</sup> Universal design, as an equitable approach that is mirrored in the human rights paradigm shift of the CRPD, focuses on redesigning these environments to be usable by all individuals, whether or not a disability exists, and no matter what the disability may be.<sup>21</sup> The

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<sup>15</sup> The Supreme Court inherently recognized this very issue when discussing the applicability of the Rehabilitation Act in *School Board of Nassau County v. Arline*, in which it stated that "accumulated myths and fears about disability and disease" can be just as debilitating as the individual's physical impairment. 480 U.S. 273, 284 (1987).

<sup>16</sup> Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 94 (2007).

<sup>17</sup> Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37 (2007).

<sup>18</sup> *Id.* at 44.

<sup>19</sup> SHERYL BURGSTAHLER, UNIV. OF WASH., UNIVERSAL DESIGN: PROCESS, PRINCIPLES, AND APPLICATION (2012), available at <http://www.washington.edu/doi/Brochures/PDF/ud.pdf>.

<sup>20</sup> KATHERYNE STAEGER-WILSON, MO. STATE UNIV., COMMITMENT TO UNIVERSAL DESIGN AT MISSOURI STATE UNIVERSITY (2012), available at <http://www.missouristate.edu/assets/disability/UDWhitepaper.pdf> ("[L]imitation is not found within the person who has the disability, but in the design of our architecture, curriculum, policies, programs, and services.").

<sup>21</sup> BETTYE ROSE CONNELL ET AL., N.C. ST. UNIV. CTR. FOR UNIVERSAL DESIGN, THE

principles of universal design found their origin in architecturally addressing issues of disability, which laid the foundation to create the concepts for universal design in education and learning.<sup>22</sup>

This shift in approach has significant ramifications for disability law in the United States, particularly with respect to institutions of higher education because both the CRPD as originally drafted and universal design require a holistic, rather than societal, approach to interacting with and accommodating persons with disabilities.<sup>23</sup> This paradigm shift transforms the area of disability law from viewing the person as an object of his disability to a focus on the human rights of the person with disabilities. Recognizing that civil rights laws can only prevent discrimination prospectively, holistic approaches, as embodied in the human rights mandate of the CRPD and equitable application of universal design, seek to remedy inequities that exist due to past practices. Imperative in the scope of the CRPD and universal design in learning is the desire to remedy the social stigma and attitudes that have subjugated persons with disabilities to second-class (or worse) status in society.

Through the holistic application of the CRPD and universal design in learning, this Article conceptualizes and envisions a human rights approach to U.S. higher education and disability law. Part II discusses why providing and ensuring postsecondary education to persons with disabilities is important in ameliorating the disproportionate treatment of persons with disabilities, and explains the current U.S. law for protection of persons with disabilities under the Americans with Disabilities Act, focusing primarily on access to education. After looking at U.S. domestic law and its attempts to remedy deficiencies in the access provided to, and achieved by, persons with disabilities, Part III of the Article explains the aspirational developments in disability rights as envisioned by the Convention on the Rights of Persons with Disabilities, specifically addressing Article 24 of the CRPD, which develops a right to education. Part III will also explain the paradigm shift in the understanding of disabilities by moving from a medical or social approach to persons with disability to a human rights model. Finally, Part III will consider the shortcomings of the CRPD due to the

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PRINCIPLES OF UNIVERSAL DESIGN (version 2.0 1997), *available at* <http://www.ncsu.edu/project/design-projects/udi/center-for-universal-design/the-principles-of-universal-design/>.

<sup>22</sup> *About UDL*, CTR. FOR APPLIED SPECIAL TECH., <http://www.cast.org/udl/index.html> (last visited Mar. 13, 2013).

<sup>23</sup> Stein & Stein, *supra* note 8, at 91.

limitations placed on it by the United States. Part IV of the Article then advances the theory that the CRPD can best be utilized as a normative framework to advance the rights of postsecondary students with disabilities in the United States through the principles of universal design, specifically universal design in learning and instruction. Part V of the Article argues that the holistic approach of the CRPD, as implemented domestically through the principles of universal design, is the most cost-effective and efficient approach to benefiting all persons with or without disability in higher education. Additionally, Part V opines that state courts are in the unique position to further these holistic goals through decisions that implement the normative cultural, political, and social rights embodied in the CRPD.

## II. POSTSECONDARY EDUCATION AND THE AMERICANS WITH DISABILITIES ACT

### A. *Educational Opportunities for Persons with Disability Prior to and After the Passage of the Americans with Disabilities Act*

Prior to the passage of the ADA<sup>24</sup> in 1990, little social awareness existed in the United States regarding the challenges confronted by students with disabilities attempting to access institutions of higher learning. Persons with disabilities faced a disproportionate challenge, as compared to their non-disabled peers, in their ability to successfully navigate the educational system.<sup>25</sup> For instance, “only two percent of children with disabilities in [the developing world] receive formal [education],”<sup>26</sup> and “the global literacy rate for adults with disabilities is approximately three percent . . . .”<sup>27</sup> In 1978, less than three percent of postsecondary students reported a disability.<sup>28</sup> Federal legislation such as the American with Disabilities Act and the Individuals with Disabilities Education Act (IDEA), however, increased accessibility to postsecondary education for students with disabilities.<sup>29</sup> With the advent of the ADA, postsecondary institutions

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<sup>24</sup> 42 U.S.C. §§ 12101–12213 (2012).

<sup>25</sup> “[C]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.” *Id.* at § 12101(a).

<sup>26</sup> Stein, *supra* note 5, at 679 (citing GERARD QUINN ET AL., HUMAN RIGHTS AND DISABILITIES 11 (2002)).

<sup>27</sup> Quinn, *supra* note 6, at 89.

<sup>28</sup> Stodden & Dowrick, *supra* note 14, at 19.

<sup>29</sup> Robert A. Stodden & Megan A. Conway, *Supporting Individuals with Disabilities*

were required to “provide any reasonable accommodation that may be necessary for those people with an identified disability to have equal access to the educational opportunities and services available to non-disabled peers, if requested . . . .”<sup>30</sup>

Four years after the passage of the ADA, the number of postsecondary students reporting a disability rose to nine percent in 1994.<sup>31</sup> In the seven years after the ADA became law, the number of postsecondary program opportunities that allowed adults with disabilities to continue their education increased by ninety percent.<sup>32</sup> As a result, “in the 2003–2004 academic year, more than two million postsecondary students reported some type of disability,” which represented “more than 11 percent of postsecondary students.”<sup>33</sup> These two million postsecondary students reported a range of disabilities, including “visual, speech and hearing impairments; specific learning disabilities; attention deficit disorder; mental illness; developmental disabilities; [and] orthopedic disorders.”<sup>34</sup> Due to these disabilities, these postsecondary students are less likely than peers without disabilities to persevere and complete a degree or certificate, and those that finish often take twice as long to complete their degree.<sup>35</sup> Individuals with disabilities who do not obtain a degree in postsecondary education face limited prospects for finding meaningful employment. The National Organization of Disability found in a 1998 survey that only twenty-nine percent of adults with disabilities worked either full- or part-time.<sup>36</sup> Adults with disabilities

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*in Postsecondary Education*, 27 AM. REHABILITATION 24 (2003).

<sup>30</sup> ROBERT A. STODDEN, OHIO DEVELOPMENTAL DISABILITIES COUNSEL, PEOPLE WITH DISABILITIES AND POSTSECONDARY EDUCATION (Sept. 15, 2003), *available at* <http://ddc.ohio.gov/Pub/PWDposteduc.htm>.

<sup>31</sup> Stodden & Dowrick, *supra* note 14, at 19.

<sup>32</sup> *Id.*

<sup>33</sup> STEPHANIE MONROE, ASSISTANT SEC’Y, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: TRANSITION OF STUDENTS WITH DISABILITIES (Mar. 16, 2007), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20070316.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> ROBERT A. STODDEN, NAT’L COUNCIL ON DISABILITY, PEOPLE WITH DISABILITIES AND POSTSECONDARY EDUCATION (Sept. 15, 2003), *available at* <http://www.ncd.gov/publications/2003/Sept152003>.

<sup>36</sup> Stodden & Dowrick, *supra* note 14, at 19. *See also* Ravi Malhotra & Robin F. Hansen, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education*, 29 WINDSOR Y.B. OF ACCESS TO JUSTICE 73, 80 (2011) (“[M]any people with disabilities have been too frequently excluded from opportunities in employment, both because of barriers in the workplace and because of a relative lack of education compared to their able bodied counterparts.”).

participated less readily in the competitive employment market, and when hired, earned significantly lower wages than people without disabilities.<sup>37</sup> In light of the changing economy and weakening job market, access to postsecondary education is critical in achieving high quality job placement.

Even with the advent of the ADA and greater opportunities for persons with disabilities to attend postsecondary institutions, students with disabilities are obstructed by “a host of systemic, sociocultural, financial, and personal factors that contribute to low postsecondary enrollment rates.”<sup>38</sup> Despite greater opportunities and accommodations that the ADA provides, according to a 1996 study, only nineteen percent of high school students with disabilities attend a postsecondary school within two years of graduating from high school.<sup>39</sup> Many of these students are stymied by a continuing need for technical assistance.<sup>40</sup> Additionally, limited numbers of faculty, staff, and administrators are themselves persons with disabilities, which “depriv[es] students with disabilities of [effective] role models for postsecondary [educational] success.”<sup>41</sup> Absent exemplars after whom to model themselves, coupled with low expectations from primary and secondary school teachers and counselors, students with disabilities have significant psychological barriers to pursuing higher education.<sup>42</sup>

Further complicating the process for persons with disabilities is the ADA’s requirement that postsecondary students must initiate the process of accommodation. Postsecondary students are responsible for initiating, designing, and ensuring their educational accommodation.<sup>43</sup> In order to access, participate, and perform in the graduate institution, postsecondary students with disabilities are responsible for informing school officials of their disability, providing documents that support the diagnosis of the disability, and proposing viable options to the institution to accommodate the specific education requirements of the disability.<sup>44</sup> In addition, the services often focus on advocacy and informational services, rather than on support for independent learning and self-reliance.<sup>45</sup> Furthermore,

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<sup>37</sup> Stodden & Conway, *supra* note 29, at 31.

<sup>38</sup> Stodden & Dowrick, *supra* note 14, at 20.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Stodden & Conway, *supra* note 29, at 25.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 26.

this quality of service varies from state to state and from campus to campus,<sup>46</sup> despite the requirements that programs under the ADA should be accessible to students with disabilities, by providing “academic adjustments and reasonable modifications” and “auxiliary aides and services” through “reasonable accommodations.”<sup>47</sup> According to Dr. Megan Conway, coordinator and assistant professor for the Center on Disability Studies, National Center for the Study of Postsecondary Educational Supports, National Center on Secondary Education and Transition, University of Hawaii at Manoa, Honolulu, Hawaii, who described her postsecondary experience as a person with a disability: “[i]f the institutional atmosphere around service provision had been one of enhancing student success rather than one of providing no more than ‘reasonable accommodation,’ I think I would have had greater opportunities for wider participation during my graduate studies, and my experience would have been much more positive.”<sup>48</sup> And even with the ADA, many universities and graduate programs are woefully unprepared to understand the accessibility needs of persons with disabilities and provide the necessary and required support. As stated by Dr. Conway,

[m]y most stunning memory of postsecondary experience, unfortunately, is when a disability support provider at my university told me that I was not ‘deaf-blind enough’ because I could carry on a conversation without the use of a sign language interpreter and could walk into a room without bumping into a wall.<sup>49</sup>

*B. The Americans with Disabilities Act*

Prior to the 1970s, virtually no thought was given to prohibiting discrimination in education on the basis of disability.<sup>50</sup> After the passage of Section 504 of the Rehabilitation Act of 1973<sup>51</sup> and the 1975 Individuals with Disabilities Education Act,<sup>52</sup> and fifteen years of litigation concerning mostly procedural and jurisdictional issues,<sup>53</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 27.

<sup>49</sup> *Id.*

<sup>50</sup> Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 845, 846 (2010).

<sup>51</sup> Pub. L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394 (codified at 29 U.S.C. § 794).

<sup>52</sup> IDEA has been amended and reauthorized many times, most recently in 2004. Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2715 (codified at 20 U.S.C. § 1415).

<sup>53</sup> Rothstein, *supra* note 50, at 846.

Congress recognized the need to improve access for persons with disabilities. In 1990, Congress passed the ADA<sup>54</sup> with the support of a coalition of disability groups to protect Americans with disability from discrimination in employment, education, and other major activities.<sup>55</sup> The ADA was intended to promote a change in the way society viewed persons with disabilities by “provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>56</sup> In passing the ADA, Congress recognized that physical and mental disabilities did not, and should not, prevent a person from exercising his or her right to fully participate in every aspect of society, but that persons with disabilities were often precluded from enjoying these basic and fundamental rights due to “prejudice, antiquated attitudes, or the failure to remove societal or institutional barriers.”<sup>57</sup>

The ADA was enacted to provide equal opportunities to persons with disabilities in employment, public accommodations, and transportation.<sup>58</sup> In order to protect individuals with disabilities, the ADA defined disability as a physical or mental impairment that substantially limits one or more major life activities, such as mobility, sight, hearing, speech, or self-care.<sup>59</sup> “Major life activities” include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>60</sup> A physical or mental impairment will “substantially limit” a major life activity when it significantly restricts or prevents an individual from performing a specific activity.<sup>61</sup> The ADA operates in conjunction with Section 504 of the Rehabilitation Act of 1973,<sup>62</sup>

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<sup>54</sup> 42 U.S.C. §§ 12101–12213 (2012).

<sup>55</sup> JANET E. LORD, NAT’L COUNCIL ON DISABILITY, UNDERSTANDING THE ROLE OF AN INTERNATIONAL CONVENTION ON THE HUMAN RIGHTS OF PERSONS WITH DISABILITIES (2002), available at [http://www.ncd.gov/rawmedia\\_repository/fab40111\\_e273\\_4616\\_b451\\_d7c642b3b42b?document.pdf](http://www.ncd.gov/rawmedia_repository/fab40111_e273_4616_b451_d7c642b3b42b?document.pdf).

<sup>56</sup> Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3353 (2008).

<sup>57</sup> *Id.* at § 2(a)(2).

<sup>58</sup> U.S. EQUAL EMP’T OPPORTUNITY COMMISSION, U.S. DEP’T OF JUSTICE: CIVIL RIGHTS DIV. AMERICANS WITH DISABILITIES ACT: QUESTIONS AND ANSWERS (2008), available at <http://www.ada.gov/q&aeng02.htm>.

<sup>59</sup> 42 U.S.C. § 12102 (2008).

<sup>60</sup> § 12102(2)(A). Prior to the 2008 Amendments, ADA regulations defined “major life activities” to include, *inter alia*, breathing, walking, seeing, hearing, speaking, and learning. 28 C.F.R. § 35.104 (2011); 29 C.F.R. § 1630.2(i) (2012).

<sup>61</sup> 29 C.F.R. § 1630.2(j) (2011).

<sup>62</sup> 29 U.S.C.A. § 701 (West 1998). Prior to the passage of the ADA, guidance in the decision-making process was provided in the form of regulations promulgated in

which likewise prohibits discrimination by entities receiving federal funding, including postsecondary educational institutions, against an individual based on that person's disability.<sup>63</sup>

One of the first cases to address the question of the rights of persons with disabilities with respect to admission to a postsecondary institution was *Southeastern Community College v. Davis*,<sup>64</sup> in which the Supreme Court reviewed the denial of admission to nursing school of an individual who was deaf.<sup>65</sup> The Court, in analyzing Section 504 of the 1973 Rehabilitation Act, determined that the individual must be able to meet the essential requirements of the program with or without reasonable accommodation, that fundamental alterations are not required, that the institution need not lower standards or provide accommodations that are unduly burdensome.<sup>66</sup> The Supreme Court specifically stated that, "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."<sup>67</sup> In wake of this landmark case, professional education programs geared toward licensing were afforded substantial deference concerning what constituted the essential requirements of the program and what would be unduly burdensome.<sup>68</sup>

In 1990, a federal appellate court opined on higher-education institutional responsibility under Section 504 of the Rehabilitation

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support of Section 504 governing admissions and recruitment, the treatment of students, academic adjustments, housing, financial and employment assistance, and non-academic services. 34 C.F.R. §§ 104.41–104.47 (2000). Section 504 of the Rehabilitation Act requires that "[n]o other qualified handicapped individual . . . shall solely be the reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (2002). Since most colleges and universities receive some form of financial aid, they are subject to Section 504 of the Rehabilitation Act.

<sup>63</sup> Suzanne E. Rowe, *Learning Disabilities and the Americans with Disabilities Act: The Conundrum of Dyslexia and Time*, 15 J. LEGAL WRITING INST. 167, 171 (2009). For a discussion of the relationship between the ADA and Section 504, see Suzanne E. Rowe, *Reasonable Accommodations for Unreasonable Requests: The Americans with Disabilities Act in Legal Writing Courses*, 12 J. LEGAL WRITING INST. 3, 8–10 (2006). See also *Stern v. U. of Osteopathic Med. & Health Sci.*, 220 F.3d 906, 908 (8th Cir. 2000) (explaining that ADA and Rehabilitation Act cases are "interchangeable"); *Dubois v. Alderson-Broadus Coll., Inc.*, 950 F. Supp. 754, 757 (N. D.W. Va. 1997) (explaining that Rehabilitation Act cases have been considered precedential for many ADA decisions).

<sup>64</sup> 442 U.S. 397 (1979).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 406.

<sup>68</sup> Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis: Emerging Issues for Students with Disabilities*, 34 J.C. & U.L. 167, 185 (2007).

Act regarding payments for accommodations and auxiliaries. The Eleventh Circuit in *United States v. Board of Trustees* held that universities may require students to first seek state vocational-rehabilitation funding or other sources of funding to pay for services.<sup>69</sup> The court declared that only when these services were not available would the university be required to provide them, unless the university could demonstrate that it would be unduly burdensome to do so.<sup>70</sup>

In 1991, the First Circuit in *Wynne v. Tufts University Medical School*<sup>71</sup> established the standard for determining what constitutes reasonable accommodations. The court explained that in denying a reasonable accommodation the institution must submit “undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or substantial program alteration.”<sup>72</sup>

Thus, under the strictures of the ADA as interpreted by the courts, a student with a disability in a postsecondary institution must demonstrate to the institution that a disability exists and request an accommodation. The student must provide “recent, relevant, and trustworthy” documentation to the institution that indicates the scope and nature of the disability.<sup>73</sup> Generally speaking, once an institution that is covered by the ADA has determined that a disability exists,<sup>74</sup> the institution has a responsibility to provide a reasonable accommodation.<sup>75</sup> Reasonable accommodations must be provided

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<sup>69</sup> 908 F.2d 740 (11th Cir. 1990).

<sup>70</sup> *Id.*

<sup>71</sup> 932 F.2d 19 (1st Cir. 1991).

<sup>72</sup> *Id.* at 26.

<sup>73</sup> Rowe, *Learning Disabilities*, *supra* note 63, at 172. According to Professor Rowe, documents are considered recent if the testing surrounding the disability was performed within three years of the request; documents are relevant if they specifically address the disability at issue; and documents are trustworthy if they are prepared by a qualified evaluator. *Id.* at 172, n.25.

<sup>74</sup> Title II prohibits disability discrimination by all public entities at the local (i.e., school district, municipal, city, county) and state level. These regulations cover access to all programs and services offered by the entity. 42 U.S.C. § 12131 (2012). Under Title III, no individual may be discriminated against on the basis of disability with regards to the full and equal enjoyment of the goods, services, facilities, or accommodations of any place of *public accommodation* by any person who owns, leases (or leases to), or operates a place of *public accommodation*. “Public accommodations” include lodging, such as hotels and motels, recreation, transportation, education, and dining. 42 U.S.C. § 12181 (2012).

<sup>75</sup> Institutions that must provide reasonable accommodations to persons with

for any program a covered entity or institution offers, including extracurricular activities.<sup>76</sup>

Graduate institutions, however, have wide discretion in the type and manner of reasonable accommodation provided to a person with a disability.<sup>77</sup> Postsecondary schools can provide reasonable accommodations by providing auxiliary aids and personal services necessary for effective communication and/or by modifying policies, practices, and procedures.<sup>78</sup> Postsecondary institutions must provide these services, unless providing these services would fundamentally alter the program or would result in an undue financial burden.<sup>79</sup>

An analysis of the student's disability and the reasonableness of the accommodation must be performed on a case-by-case basis<sup>80</sup> and making a reasonable accommodation for a person with a disability does not mandate a change to a core requirement of the educational program. According to the Office for Civil Rights of the U.S. Department of Education,

[i]nstitutions of postsecondary education must provide appropriate academic adjustments based on students'

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disabilities include both private and state-funded postsecondary educational institutions. Title II of the ADA covers state funded schools, including state universities, community colleges and vocational schools. 42 U.S.C. § 12131. Title III of the ADA covers private colleges and private vocational schools. 42 U.S.C. § 12181.

<sup>76</sup> 42 U.S.C. §§ 12132, 12182. *See also ADA Obligations of Private Schools, Classes, or Programs*, NAT'L ASS'N OF THE DEAF, <http://www.nad.org/issues/education/other-opportunities/ada-obligations> (last visited Mar. 13, 2013); *Section 504 and ADA Obligations of Public Schools*, NAT'L ASS'N OF THE DEAF, <http://www.nad.org/issues/education/k-12/section-504-and-ada-obligations> (last visited Mar. 13, 2013).

<sup>77</sup> DEBORAH LEUCHOVIVUS, PACER CENTER, ADA Q & A: SECTION 504 & POSTSECONDARY EDUCATION, *available at* <http://www.pacer.org/parent/php/PHP-c51g.pdf>.

<sup>78</sup> *Id.* "Qualified interpreters, assistive listening systems, captioning, TTYs, qualified readers, audio recordings, taped texts, Braille materials, large print materials, materials on computer disk, and adapted computer terminals are examples of auxiliary aids and services that provide effective communication." *Id.* at 2.

<sup>79</sup> According to a 1992 publication on the ADA and postsecondary education by the Association on Higher Education and Disability (AHEAD), the Department of Education has never accepted an argument for undue financial burden under Section 504. *Id.* at 2.

<sup>80</sup> *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 2003) ("Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards."); *Childress v. Clement*, 5 F. Supp. 2d 384, 391 (E.D. Va. 1998) (stating that the ADA requires a case-by-case determination by an educational institution to determine whether a student is otherwise qualified despite the disability).

disabilities and individual needs when necessary to avoid discrimination. In providing an academic adjustment, a postsecondary institution does not have to eliminate or lower essential requirements, or make modifications that would result in a fundamental alteration of the programs or activities being offered or impose an undue burden on the institution.<sup>81</sup>

In determining whether a reasonable accommodation would create an undue burden, the cost of the accommodations must be balanced against the financial resources of the school.<sup>82</sup>

Yet, even with the successful passage of the ADA and the strides made in recognizing that persons with disabilities deserve equal access and equal opportunity, “only 54 percent of American adults with disabilities had even heard of the ADA.”<sup>83</sup> In conjunction with this lack of awareness, Supreme Court decisions over the course of two decades have narrowed the definition of disability and abridged the scope and purpose of the ADA.<sup>84</sup> This narrowing caused some persons with disabilities to lack protection from discrimination under the ADA.<sup>85</sup> Courts have focused on class membership, that is, “[i]s the individual disabled?” rather than the substantive question of “[h]as there been discrimination or a reasonable accommodation request?”<sup>86</sup>

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<sup>81</sup> MONROE, *supra* note 33, at 3.

<sup>82</sup> See 42 U.S.C. § 12111 (2012) (defining “undue hardship”); 28 C.F.R. § 36.104 (2011) (providing list of factors).

<sup>83</sup> LORD, *supra* note 55.

<sup>84</sup> *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (involving an airline pilot who was nearsighted and whose vision was corrected with eyeglasses); *Murphy v. United Parcel Servs., Inc.*, 527 U.S. 516 (1999) (focusing on a truck driver with monocular vision); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 525 (1999) (reviewing the case of an individual with high blood pressure controlled by medication). The Court explained that in finding whether a disability existed, the question was whether the condition substantially limited activity, and in making this determination it must take into account the effect of mitigating measures, such as medication, assistive technology, and coping mechanisms. *Sutton*, 527 U.S. at 487. Based on this reasoning, the Court decided that the individuals’ conditions in these cases did not meet the required test. *Id.* As a result, individuals who had epilepsy, cancer, or diabetes, and who were presumed to be covered by the ADA, were no longer protected. Rothstein, *supra* note 50, at 864.

<sup>85</sup> Individuals were dismissed from their job, but could not successfully sue under the ADA as their disabilities were not recognized by the ADA. Rowe, *supra* note 63, at 172; see also Joseph Shapiro, *Revamped Disabilities Rights Bill on Fast Track*, NPR (June 18, 2008), <http://www.npr.org/templates/story/story.php?storyID=91625706>.

<sup>86</sup> AHEAD et. al., *Joint Comments Submitted Regarding: “Regulation to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended; Notice of Proposed Rule Making,”* 74 Fed. Reg. 183 (Sept. 23, 2009), available at

When making determinations about accommodations for students with disabilities, institutions of higher education typically focused on whether the individual was “otherwise qualified” and on the reasonableness of the requested accommodation.<sup>87</sup> After the 1999 *Sutton* trilogy decisions<sup>88</sup> however, questions regarding the nature and type of disability became more frequent.<sup>89</sup> Challenges to the scope of disability therefore led to court cases addressing conditions such as epilepsy, panic attacks, and post-traumatic stress disorder, with the conclusion that none of these conditions substantially limit a major life activity, and therefore none qualified as a disability that warranted reasonable accommodations.<sup>90</sup> For instance, the Sixth Circuit in *Swanson v. University of Cincinnati* held that a surgical resident’s major depression did not substantially limit any major life activities.<sup>91</sup> The court stated that the resident’s difficulty in concentration was not only temporary, but also was alleviated by medication.<sup>92</sup> The court also asserted that his communications issues were sparse, short term, and caused by medication, and thus reasonable accommodations were not required.<sup>93</sup>

C. *The 2008 Amendments to the Americans with Disabilities Act*

In response to the Court’s dramatic weakening of protections for persons with disabilities,<sup>94</sup> Congress, working with the disability rights and business communities, passed the 2008 Amendments to the ADA (“the Amendments”), which became effective January 1, 2009.<sup>95</sup> The Amendments reflected not only a cognizance on the part of the United States government that what constitutes a disability is

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<http://www.ahead.org/resources/government-relations>.

<sup>87</sup> Rothstein, *supra* note 50, at 855.

<sup>88</sup> See cases cited *supra* note 84.

<sup>89</sup> Rothstein, *supra* note 50, at 863.

<sup>90</sup> *Chenoweth v. Hillsborough Cnty.*, 250 F.3d 1328 (11th Cir. 2001) (epilepsy); *Hewitt v. Alcan Aluminum Corp.*, 185 F.Supp.2d 183 (M.D. Pa. 2005) (post-traumatic stress disorder); *Schriner v. Sysco Food Serv.*, No. Civ. 1CV032122, 2005 WL 1498497 (M.D. Pa. June 23, 2005) (post-traumatic stress disorder); *Todd v. Academy Corp.*, 57 F.Supp.2d 448 (S.D. Tex. 1999) (epilepsy).

<sup>91</sup> *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 317 (6th Cir. 2001).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Courts have relied on various factors to weaken the protections afforded certain major life activities, including that they are “insufficiently significant to society at large, too narrow, too infrequent, or voluntary, and therefore not covered.” Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA ST. U. L. REV. 641, 647 (2009).

<sup>95</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553.

evolving, but also a further shift in the attitude of society to persons with disabilities. Congress intended through the Amendments to retain the ADA's basic definition of disability as an impairment that substantially limits one or more major life activities,<sup>96</sup> but changed the way the statutory terms should be interpreted to rectify the holdings of the Supreme Court that limited the definition of the scope of disability and constricted the application of the ADA.<sup>97</sup> Most significantly, the Amendments expanded the definition of major life activities by including two non-exhaustive lists. The first list included previously recognized activities such as walking, as well as others, such as concentrating and thinking, that the EEOC had not previously recognized, but which could have major implications for accommodations in higher education.<sup>98</sup> The second list includes major bodily functions.<sup>99</sup> The Amendments also directed the EEOC to revise its regulations that define the term "substantially limits."<sup>100</sup> Under this new guidance, the regulations reinstated the principle that if an individual is protected by the ADA, the ameliorative effects of mitigating measures will not be considered.<sup>101</sup> Thus, with the

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<sup>96</sup> "It is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking." See 154 CONG. REC. S8342 (daily ed. Sept. 11, 2008); H.R. REP. NO. 110-730, pt. 1, at 10 (2008).

<sup>97</sup> See *supra* note 84 and accompanying text; ADA Amendments Act of 2008, *supra* note 95, at § 2(a)(4) (stating that "the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect").

<sup>98</sup> 42 U.S.C. § 12102(2) (2012). Establishing protection for learning disabilities that impact reading, concentrating, learning, thinking, and communicating based upon the amended definition of "major life activities" will greatly improve ADA coverage for those covered by the definition. Notably, the EEOC has interpreted the legislative history to reject any notion that individuals who performed well academically could not still be substantially limited in activities such as learning or thinking. 76 Fed. Reg. 16978, 16981 (Mar. 25, 2011).

<sup>99</sup> ADA Amendments Act of 2008, *supra* note 95.

<sup>100</sup> *Id.* See *Peters v. Univ. of Cincinnati Coll. of Med.*, No. 1:10-CV-906, 2012 WL 3878601, at \*5 (S.D. Ohio, Sept. 6, 2012) (citing 29 C.F.R. § 1630.2(j)(1) (2012) to determine that "substantially limits" was not a demanding standard, but rather was to be construed broadly in order to grant expansive coverage).

The primary object . . . in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

29 C.F.R. § 1630.2(c)(4), (j)(1)(iii).

<sup>101</sup> 42 U.S.C. § 12102(4)(E)(i) (2012) as amended. A person with a disability that "substantially limits a major life activity should not be penalized when seeking

advent of the Amendments to the ADA, the meaning of “major life activity” was clarified, such that walking, seeing, hearing, speaking, breathing, learning, and concentrating would constitute major life activities, and a disability that impacted any of these activities would mandate reasonable accommodations by an institution of higher education.<sup>102</sup>

As the Amendments have clarified the definition of disability and the EEOC has provided regulations that interpret how a disability will be determined, litigation is now more likely to focus on whether the individual with a disability was provided a reasonable accommodation.<sup>103</sup> However, the Amendments give wide discretion for interpreting the parameters of what action satisfies a reasonable accommodation. Per the terms of the Amendments, the term “reasonable accommodation” may include “appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”<sup>104</sup> In interpreting this language, in *Rush v. National Board of Medical Examiners*, the court issued a decision regarding a medical student who had a learning disability that prevented him from successfully completing the required medical board exams within the time allotted.<sup>105</sup> The court

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protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.” 154 CONG. REC. H8294 (daily ed. Sept. 17, 2008) (statement of Rep. George Miller); *see also* 154 CONG. REC. H8290-91 (daily ed. Sept. 17, 2008) (rejecting the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, and speaking and thereby abrogating the findings in *Price v. National Board of Medical Examiners*, *Gonzalez v. National Board of Medical Examiners*, and *Wong v. Regents of University of California*). The Amendments therefore focus the analysis of substantial limitation on the “conditions, manner and duration under which an individual can undertake an activity not their ultimate performance outcome.” *Gov’t Relations, ADA Amendments Act of 2008 Policy Implications for Accommodating Students with Disabilities*, ASS’N ON HIGHER EDUC. & DISABILITY, <http://www.ahead.org/resources/government-relations> (last visited Mar. 13, 2013).

<sup>102</sup> *Weidow v. Scanton Sch. Dist.*, 460 F. App’x 181, 185 (3d Cir. 2012) (quoting 42 U.S.C. § 12102(2) to the effect that major life activities “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working”).

<sup>103</sup> Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 228 (2008); *see also Gov’t Relations*, *supra* note 101 (stating that as a result of the Amendments to the ADA, focus will shift from diagnostic evidence of a disability to supporting the need for reasonable accommodations).

<sup>104</sup> 42 U.S.C. §12111(9) (2012).

<sup>105</sup> *Rush v. Nat’l Bd. of Med. Examiners*, 268 F. Supp. 2d 673 (N.D. Tex. 2003).

found that Rush was “substantially limited in the major life activities of reading and learning when compared to most people,” and as such, the failure to grant reasonable time accommodations resulted in the exam not testing Rush’s mastery of the subject matter, but rather the level of his disability.<sup>106</sup> As such, the court ordered the National Board of Medical Examiners to reasonably accommodate the plaintiff by granting him twice the normal time allowed to take the exam.<sup>107</sup>

Extrapolating this decision to the classroom scenario, under the Amendments to the ADA, a university could still provide a reasonable accommodation through a reader for a person with limited vision or a sign language interpreter for a person who is deaf. This reasonable accommodation would not present an undue hardship for the university or fundamentally alter the nature of the curriculum. While a reader for a person with limited vision or additional time to complete course requirements are not only appropriate, but legally mandated, a fundamental restructuring of the course, such as the elimination of an examination altogether, would go beyond the broad parameters of what might be required as a reasonable accommodation.<sup>108</sup> In this fashion, under the mandate of reasonable accommodation, courts must not create blanket rules that run counter to what now seems to be a required case-by-case approach to analyzing individual disability claims.<sup>109</sup>

The accommodation approach to learning, as codified in the ADA, requires that access for the person who is disabled must be addressed by the person who is disabled and the institution providing the accommodation. Addressing the access barrier, which is retroactive and reconsidered each time an individual with a disability is engaged in the learning process, is only achieved through accommodation or retrofitting existing requirements.<sup>110</sup> This

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<sup>106</sup> *Id.* at 678.

<sup>107</sup> *Id.* at 679.

<sup>108</sup> *See, e.g.,* *Maples v. Univ. of Texas Medical Branch at Galveston*, No. G-10-552, 2012 WL 4510524 (S.D. Tex. Sept. 28, 2012) (finding that the university was not required to fundamentally alter the nature of the program or alter eligibility criteria for a student who received two “Cs” and one “F” which warranted dismissal under school policy).

<sup>109</sup> Paul Klein, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 485 (2010).

<sup>110</sup> *Universal Design*, UNIV. OF ARK. AT LITTLE ROCK, <http://ualr.edu/pace/index.php/home/hot-topics/ud> (last visited Mar. 13, 2013); Heather Mole, *A U.S. Model for Inclusion of Disabled Students in Higher Education Settings: The Social Model of Disability and Universal Design*, 14 WIDENING PARTICIPATION & LIFELONG LEARNING 62 (2013).

accommodation approach to disability fails to create “expert learners”—learners that are resourceful and knowledgeable, learners that are strategic and goal directed, and learners that are purposeful and motivated.<sup>111</sup> As a result, the ADA fails to meet its mandate to prevent discrimination by incorporating persons with disabilities into society through equal access to employment and education.<sup>112</sup>

Students who have had to challenge determinations regarding disability and reasonable accommodations made by educational institutions may achieve limited success, but usually through protracted and costly litigation. Instead, better success rates may be achieved for supporting people with disabilities in their access to postsecondary education through focused attention on overcoming sociological and emotional barriers through normative inclusion of persons with disabilities in critical higher education roles and by identifying and requiring educational accommodations, including individualized assistive technologies, which will promote the successful completion of postsecondary education requirements.<sup>113</sup> These goals, which are recognized components of universal design in learning,<sup>114</sup> helped motivate the drafters of the CRPD to create a document that would promote and protect the rights of persons with disabilities who were continually denied their human rights and marginalized by society.

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<sup>111</sup> *UDL and Teaching All Learners, What is Universal Design for Learning*, CTR. FOR APPLIED SPECIAL TECH., <http://wiki.cast.org/display/UDLandTAL/UDL+and+Teaching+All+Learners> (last visited Mar. 13, 2013). “The accommodation model of disability services is currently the most prevalent model in the postsecondary setting. Many disability service professionals would defend this model as a social model approach. When we explore it closely and compare it to the universal design approach, it is clear that it is more aligned with medical model thinking.” Mole, *supra* note 110. *See also infra* Section IV (using universal design to develop inclusive and sustainable learning).

<sup>112</sup> *See* Hansel, *supra* note 94, at 652.

<sup>113</sup> Stodden & Conway, *supra* note 29, at 28–29. (“Access to technology and other learning supports is critical to the success of students with disabilities in postsecondary education.”)

<sup>114</sup> *See infra* Section IV.

### III. MOVING FROM A SOCIAL MODEL TO A HOLISTIC MODEL—THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

#### A. *The Convention on the Rights of Persons with Disabilities*

The U.S. signed the CRPD in 2009,<sup>115</sup> indicating that “all nations [should] guarantee rights like those afforded under the ADA.”<sup>116</sup> The CRPD was designed to be a comprehensive instrument promoting and protecting persons with disabilities “based on the holistic approach in the work done in the fields of social development,

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<sup>115</sup> The CRPD evolved from almost a decade of work by the United Nations, beginning with the formation by the United Nations General Assembly in 2001 of an Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. G.A. Res. 56/168, *supra* note 4.

<sup>116</sup> Remarks by President Barack Obama on Signing of U.N. Convention of the Rights of Persons with Disabilities Proclamation (July 24, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-rights-persons-with-disabilities-proclamation-signing> [hereinafter Remarks by President Barack Obama]. The United States has not signed the Optional Protocol, which is the enforcement vehicle for this Convention. As of October 10, 2012, ninety nations have signed the Optional Protocol, with ratification of the Optional Protocol by seventy-four of those nations. *Convention and Optional Protocol Signatures and Ratifications*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/countries.asp?navid=17&pid=166#U> [hereinafter *Convention and Optional Protocol Signatures and Ratifications*] (last visited Mar. 13, 2013). Where the CRPD details the necessary procedures nations need to implement in order to provide equally for persons with disabilities, the Optional Protocol details methods for persons with disabilities to inform nations of discrimination in violation of the CRPD. Under the Optional Protocol, each signing-nation accepts the competence of the Committee on the Rights of Persons with Disabilities in receiving and reviewing complaints from persons with disabilities who claim to be victims of discrimination. Optional Protocol to the Convention on the Rights of Persons with Disabilities, art. 1. Article thirty-four of the CRPD creates a Committee on the Rights of Persons with Disabilities (hereinafter the “Committee”) tasked with reviewing reports submitted by nations on their efforts to abide by the terms of the Convention, make suggestions to nations based on the findings of those reports, and form a Committee report on the progress of all nations under the Convention. CRPD, *supra* note 1, at art. 34. The Committee is comprised of twelve experts, who are persons with recognized experience and competence in the area of disability rights, serve in their own individual capacity, and are elected to four years terms. *Id.* at art. 34(3). For further discussion of the Committee and its role in monitoring State Parties, *see* Stein, *supra* note 5. After bringing the complaint to the attention of the accused nation, that nation has the duty of remedying the discrimination, thereafter submitting a report explaining the remedy taken by the nation. Optional Protocol to the Convention on the Rights of Persons with Disabilities, art. 3. In accordance with the Optional Protocol, the Committee must issue recommendations to offending nations. *Id.* at art. 5. The Committee is tasked with verifying the validity of any complaint and must follow guidelines regarding what complaints may and may not be reviewed. *Id.* at art. 2. The Committee’s mandate also empowers it to monitor reports of State Parties, issue general comments and recommendations, and transmit a biennial report to the General Assembly. CRPD, *supra* note 1, at arts. 35–37, 39.

human rights and non-discrimination.”<sup>117</sup> Since the CRPD was opened for signature, it has been signed by 153 nations.<sup>118</sup> Since that time, and as of August 1, 2012, the CRPD has been ratified by 118 nations.<sup>119</sup> President Obama transmitted the CRPD to the Senate for advice and consent on May 17, 2012.<sup>120</sup> The Senate Foreign Relations Committee held hearings on the CRPD on July 12, 2012.<sup>121</sup> After a mark-up of the CRPD on July 26, 2012, where several reservations, understandings, and declarations were added, by a committee vote of 13-6, the SFRC recommended ratification to the full Senate, twenty-two years to the day after passage of the Americans with Disabilities Act.<sup>122</sup> On December 4, 2012, the United States Senate in a floor vote of 61 to 38, failed to ratify the CRPD.<sup>123</sup>

<sup>117</sup> G.A. Res. 56/168, *supra* note 4.

<sup>118</sup> *Convention and Optional Protocol Signatures and Ratifications*, *supra* note 116. On July 24, 2009, President Barack Obama announced that he had instructed Susan Rice, the U.S. Ambassador to the United Nations, to sign the U.N. Convention on the Rights of Persons with Disabilities. Remarks by President Barack Obama, *supra* note 116. The United States signed the CRPD on July 30, 2009. *Convention and Optional Protocol Signatures and Ratifications*, *supra* note 116.

<sup>119</sup> *Convention and Optional Protocol Signatures and Ratifications*, *supra* note 116. At the signing, President Barack Obama, recognizing the United States' reputation as a leader in protecting persons with disabilities, stated that “allowing all Americans to engage in our society and our economy is in our national interest, especially now, when we all have a part to play to build a new foundation for America's lasting prosperity.” Remarks by President Barack Obama, *supra* note 116.

<sup>120</sup> Message from the President of the United States transmitting The Convention on the Rights of Persons with Disabilities Adopted by the United Nations General Assembly on December 13, 2006, and signed by the United States of America on June 30, 2009 (The “Convention”), Treaty Doc. 112-7, 112th Cong., 2d Sess. (May 17, 2012).

<sup>121</sup> See S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2.

<sup>122</sup> S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 2, 7.

<sup>123</sup> Bobby Caina Calvan, *Treaty for Disabled Rights Falls Short in Senate*, BOS. GLOBE, Dec. 5, 2012, available at <http://www.bostonglobe.com/news/politics/2012/12/04/treaty-for-disabled-falls-short-ratification/27SajXdwiYQB3geMid2XaL/story.html>.

For a treaty to be ratified, the Constitution requires a two-thirds majority of the Senate. U.S. CONST., art. II, § 2. Secretary of State John Kerry, the former Chairman of the Senate Foreign Relations Committee, intended to again schedule hearings on the CRPD, with the goal of bringing the CRPD back to the full Senate during its 2013 winter session. Transcript of Andrea Mitchell Reports, MSNBC (Dec. 5, 2012), available at <http://video.msnbc.msn.com/mitchell-reports/50089222#50089222>; Erin Delmore, *Treaty Backers Slam GOP for 'Amazing Slap in the Face' to Disabled*, MSNBC (Dec. 5, 2012), <http://tv.msnbc.com/2012/12/05/treaty-backers-slam-gop-for-amazing-slap-in-the-face-to-disabled>. Whether or not the CRPD is ultimately ratified, its principles and goals can be incorporated by educational institutions and states in order to improve postsecondary educational opportunities for persons with disabilities. See *infra* Section V.

The CRPD tasks a signing nation with taking measures to create, modify, or abolish “laws, regulations, customs, and practices that constitute discrimination against persons with disabilities.”<sup>124</sup> In developing legislation and regulations which promote respect for persons with disabilities, the CRPD calls on nations to include persons with disabilities in the decision making process.<sup>125</sup> Along with promoting and enacting legislation, a nation must also commit resources to research and develop new technologies, as well as promote the availability of those new technologies, to persons with disabilities.<sup>126</sup> The CRPD further requires a nation to strive to eliminate “discrimination on the basis of disability by any person, organization or private enterprise.”<sup>127</sup> States can fulfill their obligations under the CRPD by “adopt[ing] all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.”<sup>128</sup> The CRPD specifically requires a nation to “promote the training of professionals and staff working with persons with disabilities.”<sup>129</sup>

Most importantly, the CRPD requires nations to take steps that guarantee “persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.”<sup>130</sup> The CRPD is explicit in its admonition that accessibility is only achieved through ensuring that persons with disabilities can live independently and fully participate in all aspects of life.<sup>131</sup>

In applying the CRPD’s articles, however, the drafters noted that the CRPD should not take precedent over preexisting domestic laws that already provide for greater protection against discrimination of persons with disabilities.<sup>132</sup> The provisions of the CRPD only apply

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<sup>124</sup> CRPD, *supra* note 1, at art. 4(1)(b).

<sup>125</sup> *Id.* at art. 4(3).

<sup>126</sup> *Id.* at art. 4(1)(g).

<sup>127</sup> *Id.* at art. 4(1)(e).

<sup>128</sup> *Id.* at art. 4(1)(a).

<sup>129</sup> *Id.* at art. 4(1)(i).

<sup>130</sup> CRPD, *supra* note 1, at art. 9.

<sup>131</sup> *See id.* While failing to provide a sign language interpreter in a classroom for a person who is deaf would certainly deny that person accessibility to the learning environment, attitudinal behaviour with respect to the person who is deaf is also a barrier to accessibility. Accessibility means that the environment is accessible to all persons with disabilities in order to facilitate living independently and participating fully in all aspects of life.

<sup>132</sup> *Id.* at art. 4(4).

when preexisting discrimination laws are too lenient or no discrimination laws exist.<sup>133</sup> This flexibility allows nations to apply the CRPD within their preexisting national systems.

The purpose of the CRPD is unequivocally to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>134</sup> To achieve this holistic goal, the CRPD implements the principles of “[r]espect for inherent dignity,” “[n]on-discrimination,” and “[e]quality of opportunity” for persons with disabilities.<sup>135</sup> These primary principles further the intrinsic purpose of the CRPD: equal enjoyment of all human rights for all people.<sup>136</sup> In promoting respect through inclusion, persons with disabilities become more visible. Their visibility allows persons without disabilities the opportunity to learn and grow from the experiences of persons with disabilities.

While the drafters of the CRPD were explicit about the purpose and scope of the CRPD, a definition of disability was not included within the provisions of the Convention. Rather, the drafters of the CRPD recognized the social construct of disability as those “who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>137</sup> Thus, disability is not limited to the individual’s limitation or impairment, but rather the encompassing umbrella of the CRPD sweeps into the ambit of disability the environment within which the person lives, works, and socializes, a much broader view than the definition codified in the ADA.<sup>138</sup>

The CRPD also incorporates the concept of reasonable accommodation. Specifically, Article 2 of the CRPD defines a “reasonable accommodation” as a “necessary and appropriate modification and adjustments not imposing a disproportionate or

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at art. 1. The CRPD drafters affirmatively decided not to define disability, but rather explained the contours of disability within the purpose section of the Convention, thereby demonstrating the flexible application of the CRPD. The CRPD’s lack of a concrete definition of disability, however, is in stark contrast to the Americans with Disabilities Act, upon which the CRPD is predicated.

<sup>135</sup> *Id.* at art. 3.

<sup>136</sup> CRPD, *supra* note 1, at pmbl. (a), (e).

<sup>137</sup> *Id.* at art. 1.

<sup>138</sup> Under the ADA, a person is disabled if the person has “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . .” 42 U.S.C. § 12102(1) (2012).

undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>139</sup>

*B. The Disability Paradigm—Moving from a Medical Model to a Holistic Model*

Since the drafters of the CRPD were guided by disability principles found in U.S. law, in order to fully understand the CRPD as a human rights document, one needs to understand how disability has been traditionally viewed in the United States. Originally, disability was viewed through the prism of religion, which reflected notions of sin or sanctity.<sup>140</sup> This model eventually gave way during the Eighteenth Century Age of Enlightenment to the medical model, which treated disability as an inherent attribute of the individual.<sup>141</sup>

Under the medical model, persons with disability were marginalized as the disability was viewed as a medical issue that should be resolved on an individual basis.<sup>142</sup> Through the new wealth of knowledge that developed in the medical field, doctors became confident that scientific answers existed that would cure and rehabilitate the disabled.<sup>143</sup> The medical model paradigm therefore fixated on the categories “disabled” and “non-disabled,” with the result that the disabled person was the “sole locus” of any difficulties encountered as a result of the person’s disability.<sup>144</sup> The focus resided on the disability, and not on the person, as reflected in the terminology traditionally used at the time, which referenced the “disabled” person. Therefore, under the medical model lens, it was

<sup>139</sup> CRPD, *supra* note 1, at art. 2. Although reasonable accommodation is not defined in Title II of the ADA, in *School Board of Nassau County v. Arline*, the Supreme Court stated an “[a]ccommodation is not reasonable if it either imposes ‘undue financial and administrative burdens’ on a grantee . . . or requires ‘a fundamental alteration in the nature of [the] program.’” 480 U.S. 273, 287, n.17 (1987) (citing *Se. Cmty. Coll. v. Davis*, 422 U.S. 397, 412 (1979)).

<sup>140</sup> Jayne Clapton & Jennifer Fitzgerald, *The History of Disability: A History of ‘Otherness’*, NEW RENAISSANCE MAG., [http://www.ru.org/index2.php?option=com\\_content&do\\_pdf=1&id=180](http://www.ru.org/index2.php?option=com_content&do_pdf=1&id=180).

<sup>141</sup> Bradley A. Areheart, *When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 189 (2008).

<sup>142</sup> Clapton & Fitzgerald, *supra* note 140.

<sup>143</sup> “Since many disabilities have medical origins, people with disabilities were expected to benefit from coming under the direction of the medical profession.” *Understanding the Social Model of Disability and What It Means When Raising Disability in the School Curriculum*, MICH. DISABILITY RIGHTS COAL., <http://www.copower.org/models-of-disability/181-medical-model-of-disability.html> (last visited Mar. 13, 2013).

<sup>144</sup> LORD, *supra* note 55, at 35.

the individual's disability that was the barrier to equal access, and therefore it was the "disabled individual" who had to ameliorate or eliminate the barrier through appropriate medical treatment.<sup>145</sup>

This model, despite being the predominant paradigm of the general public, gradually faced concerted criticism from the disability community,<sup>146</sup> as it reinforced paternalistic attitudes about those with disabilities, viewing them as victims in need of medical or rehabilitative services in order to overcome their disability.<sup>147</sup> The medical model assumed that the eventual solution was to find a cure or to aid people with disabilities to lead "normal" lives.<sup>148</sup> Because of the medical model's focus on the biological traits of the individual, the harmful social processes, discriminatory policies, and disruptive environment that contributed to and fostered inequality, inaccessibility, and discrimination were left unaddressed.<sup>149</sup> Further, viewing disability through the lens of the medical model created an unnecessary rift in the disability community as it forced society to view differences in individual physiological traits among disabled people, rather than the universal societal barriers that unite the entire community of all persons with disabilities.<sup>150</sup>

Beginning in the 1970s, the social model of disability rights gained momentum and soon after became the dominant paradigm embraced and advanced by the disability rights movement.<sup>151</sup> With the passage of the ADA and other anti-discrimination legislation, the United States began to view the person with disabilities through a social model of disability.<sup>152</sup> The social model finds society's environment and attitudes as the locus of the disability, focusing on

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<sup>145</sup> *Id.*

<sup>146</sup> Areheart, *supra* note 141, at 192–93.

<sup>147</sup> LORD, *supra* note 55, at 35–36.

<sup>148</sup> PAULA KLUTH, SYRACUSE UNIV., CTR. ON HUMAN POLICY, TOWARD A SOCIAL MODEL OF DISABILITY (2006), available at <http://www.disabilitystudiesforteachers.org/files/TowardsaSocialModelofDisability.pdf>.

<sup>149</sup> Areheart, *supra* note 141, at 185–86. This critique in no fashion should be seen to diminish the important and necessary role of the medical community in promoting health for all and providing rehabilitation in the best interest of the individual, as well as to finding a cure or aiding the individual in overcoming the disability. LORD, *supra* note 55, at 36.

<sup>150</sup> Areheart, *supra* note 141, at 186–87.

<sup>151</sup> Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 88 (2007); Stein & Stein, *supra* note 8, at 1207. This model resulted from the mass scrutiny the medical model received from the disability community and was originally named by Mike Oliver with the help of concepts contained in the book *Fundamental Principles of Disability*, along with the work by activists in the Union of the Physically Impaired Against Segregation (UPIAS).

<sup>152</sup> Stein & Stein, *supra* note 8, at 1207.

societal norms that create the barriers that prevent equality, full participation, and lack of respect for differences.<sup>153</sup> “Being disabled depends upon deviation from society’s construction of corporeal normality,”<sup>154</sup> and unlike the medical model that sought to adjust the individual to fit society, the social model focused on adjusting social environments and underlying attitudes.<sup>155</sup> Further, in contrast to the medical model, the social model incorporated the experiences, views, and practices of people who were labeled “disabled.” Because the social model focused first on the person and then on the disability, this model viewed the person with the disability as the expert on living with and overcoming the disability, but did not see the disability as inherently negative or problematic.<sup>156</sup> The goal of the social model, rather than “fix” the disability, was to remedy environmental barriers, such as inaccessible buildings, unattainable education, and inadequate representation in the workforce, which prevented persons with disabilities from achieving equal access.

Although the social model greatly advanced the rights of persons with disabilities, especially through the implementation of the ADA,<sup>157</sup> greater efforts are needed to achieve equal access through inclusion and participation. With those twin aspirations in mind, the CRPD was drafted and implemented. The goal of the CRPD is to view persons with disabilities through the holistic lens of human rights, which builds on the social concept of the interaction between the inaccessible environment and the individual. In order to migrate from a purely societal driven desire to fix or accommodate the person with a disability and achieve the holistic approach envisioned by the CRPD, the CRPD drafters moved beyond mere questions of impediments to access in the physical environment to the broader issues of equality and elimination of legal and social barriers.<sup>158</sup> Through this enlightened approach, the CRPD promotes society’s responsibility to understand disabilities, not the disabled person’s individual responsibility to accomplish such an understanding. Thus, by moving from a medical or social model to a human rights model, the CRPD marks a paradigm shift in attitudes and approaches to persons with disabilities by providing universal recognition to the

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<sup>153</sup> *Id.* at 1208; Areheart, *supra* note 141, at 188.

<sup>154</sup> Areheart, *supra* note 141, at 188.

<sup>155</sup> Stein & Stein, *supra* note 8, at 1209.

<sup>156</sup> Kluth, *supra* note 148, at 1–2.

<sup>157</sup> See *supra* Part II.

<sup>158</sup> CRPD, *supra* note 1, at art. 4.

dignity of persons with disabilities.<sup>159</sup>

*C. Applying the Holistic Model Through the Lens of the CRPD*

By adopting the CRPD's human rights paradigm, persons with disabilities are no longer viewed as "objects" of charity needing medical treatment and social protection; but rather as "subjects" with human rights, who are capable of claiming those human rights, making decisions for their lives based on their free and informed consent, and being active members of society. In other words, persons with disabilities no longer need to be "fixed" through medical treatment, but rather are individuals with rights, who have choices as to how they want to live and what treatments, if any, they wish to use. Furthermore, persons with disabilities will no longer be viewed as objects of charity or social welfare or a burden on society, but rather will be viewed as active members of society with something to contribute in all areas of social, political, and cultural rights and who will have avenues to defend those rights, including complaint mechanisms and advocacy groups.

In contributing to society and defending the rights to equal access, inclusion, and participation, the human rights approach focuses on the manner in which society limits persons with disabilities from exercising fundamental political, economic, and social human rights.<sup>160</sup> The human rights approach is premised upon enabling people with disabilities to receive fundamental needs "as a matter of rights to claim, rather than charity to receive."<sup>161</sup> This approach calls for simultaneously granting the first generation of civil and political rights, with second-generation social, cultural, and economic measures.<sup>162</sup> Approaching disabilities in this fashion provides equal opportunity, instead of simply equal treatment.<sup>163</sup> Unlike the social or medical models, the human rights model acknowledges that "failing to counteract the unequal position of people with disabilities perpetuates their social stigma and the attitudes that maintain

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<sup>159</sup> This shift is evident from the language of Article 1 of the Convention, which states that "[t]he purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity." *Id.* at art. 1. See also Arlene Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People under International Law*, 25 GA. ST. U. L. REV. 527, 549 n.102 (2009).

<sup>160</sup> Stein, *Disability Human Rights*, *supra* note 151, at 92.

<sup>161</sup> LORD, *supra* note 55, at 41.

<sup>162</sup> Stein & Stein, *supra* note 8, at 1205.

<sup>163</sup> *Id.* at 1206.

subordination.”<sup>164</sup> The human rights approach is predicated on the understanding that persons with disabilities are entitled to equality because of their status as human beings.<sup>165</sup> At its core, the CRPD mandates that society accept the individual’s value as “inherent human worth, rather than basing value on an individual’s measured functional ability to contribute to society.”<sup>166</sup> According to the CRPD, accessibility is only achieved when persons with disabilities can live independently and fully participate in all aspects of life.<sup>167</sup> While the approach of the social model, as codified and implemented by the ADA, allows for reasonable accommodations on a case-by-case basis as requested by persons with disabilities, a holistic approach ensures accessibility as a societal responsibility to understand and incorporate environmental changes, rather than an individual responsibility shouldered by the person with a disability.

With this understanding, the CRPD presents a major shift in the view of persons with disabilities. Under the CRPD, persons with disabilities become the key decision-maker in their own lives. Through the foundational principles of inclusion, participation, and accessibility, persons with disabilities become “rights holders” and “subjects of law” with full participation in formulating and implementing plans and policies that affect them.<sup>168</sup> The CRPD therefore moves beyond questions of simply providing access to the physical environment to broader issues of equality and elimination of legal and social barriers to health, education, employment, and social development. Thus, the CRPD promotes substantive equality through its mandate of promoting both positive and negative rights to address the disadvantages and marginalization faced by those with disabilities.<sup>169</sup>

In its preamble, the CRPD recognizes the importance of persons with disabilities to have “individual autonomy and independence, including the freedom to make their own choices . . . .”<sup>170</sup> The preamble further demonstrates the key shift in the focus of the disability paradigm is in making the disabled person the key decision-

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<sup>164</sup> *Id.* at 1209.

<sup>165</sup> *Id.* at 1212.

<sup>166</sup> Stein, *Disability Human Rights*, *supra* note 151, at 77.

<sup>167</sup> *See* CRPD, *supra* note 1, at art. 9.

<sup>168</sup> *See* LORD, *supra* note 55, at 20; *see also* Stein & Stein, *supra* note 8, at 1205.

<sup>169</sup> Kelley Loper, *Equality and Inclusion in Education for Persons with Disabilities: Article 24 of the Convention on the Rights of Persons with Disabilities and its Implementation in Hong Kong*, 40 H.K. L.J. 419, 433 (2010).

<sup>170</sup> CRPD, *supra* note 1, at pmbl.

maker in his or her own life.<sup>171</sup> To accomplish this shift, participation and inclusion are crucial elements in adopting rights-based approaches to development.

Participation and inclusion are not only ends in themselves, they are important to the process of decision-making as it concerns development or any other planning. Through participation and inclusion, the needs and concerns of persons with disabilities are defined by those affected most readily and constantly. Persons with disabilities have the opportunity to raise issues and hold decision-makers accountable. Through inclusion, persons with disabilities become more visible and persons without disabilities have the opportunity to learn and change from their interactions and experiences with persons with disabilities.

When applying the key foundational principles of inclusion, participation, non-discrimination, and accessibility to education, including postsecondary education, the CRPD reasserts the bedrock principles of dignity and self-worth with respect to the human rights of persons with disabilities.<sup>172</sup> Article 24 of the CRPD specifically identifies education as a human right that must be protected through inclusion without discrimination in all aspects of primary, secondary, and postsecondary education on the basis of equal opportunity.<sup>173</sup> In following these principles, nations are required to provide children with disabilities access to general education programs, make reasonable accommodations for children with disabilities, and provide “[e]ffective individualized support measures.”<sup>174</sup> Taking an extra step, the CRPD specifically calls for nations to “employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education.”<sup>175</sup> Through the application of these core precepts to primary, secondary, and postsecondary education, the CRPD would, in its pristine form, effectuate its goal of full inclusion of persons with disabilities.

Article 24 requires State Parties to approach education as an inclusive endeavor by mainstreaming persons with disabilities with students who are not disabled in order to achieve substantive equality.<sup>176</sup> Inclusive education is based on the principle that all

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at art. 24.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> CRPD, *supra* note 1, at art. 24.

children should learn together, whenever possible, to “maximize academic and social development.”<sup>177</sup> In order to accomplish the goal of providing educational opportunities, the CRPD advocates inclusive education in order to provide the best learning environment and to break down barriers and challenge stereotypes.<sup>178</sup> The CRPD covers many aspects of education, including attendance at schools of all levels and educational needs of a large number of adults with disabilities, who are uneducated or undereducated due to lack of opportunity or access.<sup>179</sup>

According to the Special Rapporteur on the Right to Education, “[i]nclusive education, by taking into account the diversity among learners, seeks to combat discriminatory attitudes, create welcoming communities, achieve education for all as well as improve the quality and effectiveness of education of mainstream learners.”<sup>180</sup> Viewed through this perspective, persons with disabilities are not educational problems that must be institutionally fixed or accommodated, but rather, approached as individuals with differences that present opportunities to enrich learning for all. In order to accomplish this holistic approach to institutional learning, cultural shifts in both education and the community at large must take place.

To achieve this shift, inclusive aspects are mandated by the

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<sup>177</sup> *Id.* at art. 24(2)(e).

<sup>178</sup> *Id.* at art. 24. Some argue that Article 24, in some contexts, in fact does not mandate inclusion through mainstreaming, as greater benefits for children with disabilities may be achieved through education in separate settings. See Malhotra & Hansen, *supra* note 36, at 92; see also CRPD, *supra* note 1, at art. 24(3)(c) (specifically stating that under certain circumstances education of children who are deaf and/or blind may occur in separate settings). However, some State Parties have not read Article 24 in this fashion, viewing it as mandating integration of students with disabilities, and as a result have crafted reservations to the CRPD to accommodate separate educational facilities under specific circumstances. See House of Lords and House of Commons Joint Committee on Human Rights, *UN Convention on the Rights of Persons with Disabilities: Reservations and Interpretative Declarations*, TWELFTH REPORT OF SESSION 2008–09 (April 17, 2009), available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/9/9.pdf>.

<sup>179</sup> *Id.*

<sup>180</sup> Vernor Muñoz, *Report of the Special Rapporteur on the Right to Education, delivered to the Human Rights Council and the General Assembly*, U.N. Doc. A/HRC/4/29, at 6 (Feb. 19, 2007) (citing United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Salamanca Statement and Framework For Action On Special Needs Education*, ED-94/WS/18 (June 1994)). Ninety-two governments and twenty-five international organizations attended the conference in Salamanca, Spain, to affirm their commitment to providing education for children, youth, and adults with special educational needs within the regular education system. While aspirational in 1994, the principles of inclusive education set forth in the Salamanca Statement have finally found fruition in the international human rights approach of the CRPD and the equitable notions of universal design in learning and instruction.

CRPD, which include “[f]acilitating the learning of Braille, alternative script, augmentative and alternative modes, [and] means and formats of communication and orientation and mobility skills,” “[f]acilitating the learning of sign language and the promotion of the linguistic identity of deaf community,” and “employ[ing] teachers, including teachers with disabilities, who are qualified in sign language and/or Braille.”<sup>181</sup> Fully protecting persons with disabilities in postsecondary education at this level of specificity would represent a dramatic shift in the protection of persons with disabilities under U.S. law. The focus would move away from disability—an approach typical of the medical and social models discussed above—and towards the individual education needs of *all* children and young adults, with or without disabilities. With this understanding of disability, accessibility becomes a condition and not a final aim of inclusion. Thus, the resulting central pedagogical approach is an education based on the best interests of the students with disabilities and their relations with other students and faculty.

However, challenges presented to this holistic approach to inclusive education will include negative attitudes towards persons with disabilities and inadequate skills and training among educators and administrators, who often determine that persons with physical disabilities likewise have some kind of learning or intellectual disability.<sup>182</sup> Additionally, the concept of the right to education will encounter animosity from those who traditionally have viewed education, especially higher education, as an economic privilege purchased by those who can afford it, rather than a right provided under international human rights law.<sup>183</sup> Inclusion will also require more than simply accommodating those with disabilities. “[S]imple integration into mainstream schools without accompanying structural changes (for instance, organization, curriculum and teaching and learning strategies) have been shown, and will continue for a variety of reasons, to fail to meet the education rights of persons with disabilities.”<sup>184</sup> Advocates of a holistic approach thus posit that educators must re-think their approach to students who are disabled. Institutions of higher education must train educators and staff on “disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication,

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<sup>181</sup> CRPD, *supra* note 1, at art. 24.

<sup>182</sup> Malhotra & Hansen, *supra* note 36, at 82; *see also* Samuel R. Bagenstos, *Subordination, Stigma and Disability*, 86 VA. L. REV. 397, 423–24 (2000).

<sup>183</sup> Loper, *supra* note 169, at 423.

<sup>184</sup> Muñoz, *supra* note 180, at 7.

educational techniques and materials to support persons with disabilities,”<sup>185</sup> an approach markedly similar to that advocated by proponents of universal design in learning and education.

#### IV. MOVING TOWARDS A UNIVERSAL DESIGN APPROACH TO EDUCATION

The premise behind universal design is to develop processes that allow maximum participation for every person—those who are disabled and those who are non-disabled.<sup>186</sup> In other words, universal design seeks solutions by proactively designing features that “benefit all, not merely accommodate the few.”<sup>187</sup> Thus, the goal of universal design is to provide products and environments that are “usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.”<sup>188</sup> For instance, the universal design feature of curb cuts intended for wheelchair users also benefits parents who are wheeling baby strollers, consumers who have loaded shopping carts, and children who are avid skateboarders.

Universal design focuses upon seven principles:

- (1) Equitable Use—The design is useful and marketable to people with diverse abilities.
- (2) Flexibility in Use—The design accommodates a wide range of individual preferences and abilities.
- (3) Simple and Intuitive Use—Use of the design is easy to understand, regardless of the user’s experience, knowledge, language skills, or current concentration level.
- (4) Perceptible Information—The design communicates necessary information effectively to the user, regardless of ambient conditions or the user’s sensory abilities.
- (5) Tolerance for Error—The design minimizes hazards and the adverse consequences of accidental or unintended actions.
- (6) Low Physical Effort—The design can be used efficiently and comfortably and with a minimum of fatigue.
- (7) Size and Space for Approach and Use—Appropriate size and space is provided for approach, reach, manipulation, and use regardless of user’s body size,

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<sup>185</sup> CRPD, *supra* note 1, at art. 24(4)

<sup>186</sup> RICHARD M. JACKSON, NAT’L CTR. ON ACCESSING THE GEN. CURRICULUM, CURRICULUM ACCESS FOR STUDENTS WITH LOW-INCIDENCE DISABILITIES: THE PROMISE OF UNIVERSAL DESIGN FOR LEARNING 2 (2011) [hereinafter “NCAC”], *available at* [http://www.aim.cast.org/sites/aim.cast.org/files/lowincidencereport\\_101305.pdf](http://www.aim.cast.org/sites/aim.cast.org/files/lowincidencereport_101305.pdf).

<sup>187</sup> *Id.*

<sup>188</sup> CONNELL, *supra* note 21.

posture, or mobility.<sup>189</sup>

By implementing these principles, new design standards in buildings were developed that allowed the greatest degree of access and usability for the widest possible range of individuals, including access to postsecondary institutions previously barred to persons with disabilities.<sup>190</sup> However, while physical access to classrooms and other education facilities is a necessary predicate for educational equality for persons with disabilities, without equal access to the general curriculum or comparable opportunity to derive benefit from what the school curriculum has to offer, it is a pyrrhic victory.<sup>191</sup> Full inclusion, equality, participation, and accessibility in the classroom environment and in the curriculum itself are also required.

To meet the goals of full inclusion and participation, the seven principles of universal design were used to lay the foundation for the U.S. Department of Education and the Center for Applied Special Technology (CAST) to create the three Universal Design in Learning (UDL) principles. These three principles are: (1) multiple means of representation, which give students a variety of methods for gathering information and knowledge; (2) multiple means of action and expression, which allow students alternative ways to demonstrate what they have learned; and (3) multiple means of engagement, which challenge students appropriately, focus on their interests, and motivate them to learn.<sup>192</sup>

These three principles of universal design in learning, with their prospective and forward thinking, holistic approach to disability issues, would avoid a case-by-case approach to disability by broadening the scope of the ADA's approach to education. Universal design as applied to higher education calls for "the preparation of curricula, materials, and environments so that they may be used, appropriately and with ease, by a wide variety of people."<sup>193</sup> The Higher Education Opportunity Act of 2008<sup>194</sup> defines universal design

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<sup>189</sup> BURGSTHALER, *supra* note 19, at 2–3.

<sup>190</sup> NCAC, *supra* note 186.

<sup>191</sup> *Id.*

<sup>192</sup> DAVID H. ROSE ET AL., NAT'L CTR. ON UDL, UNIVERSAL DESIGN FOR LEARNING IN POSTSECONDARY EDUCATION: REFLECTIONS ON PRINCIPLES AND THEIR APPLICATION 5 (2006), available at <http://www.udlcenter.org/sites/udlcenter.org/files/UDLinPostsecondary.pdf>; *About UDL*, CTR. FOR APPLIED SPECIAL TECH., *supra* note 22; Meredith George & Wendy Newby, *Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design*, 69 U. PITT. L. REV. 475, 494 (2008).

<sup>193</sup> FRANK G. BOWE, UNIVERSAL DESIGN IN EDUCATION: TEACHING NONTRADITIONAL STUDENTS 45 (2000).

<sup>194</sup> Higher Education Opportunity Act (HEOA) of 2008, Pub. L. No. 110-315 (codified at 20 U.S.C. § 1011 *et seq.*) (2008).

in learning as

a scientifically valid framework for guiding educational practice that provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and reduces barriers in instruction, provides appropriate accommodations, supports, and challenges and maintains high achievement expectations for all students, including students with disabilities and students who are limited English proficient.<sup>195</sup>

Universal design in learning is premised upon the belief that the various environments that persons, whether disabled or not, encounter are themselves disabling in application, an approach mirrored in the drafting of the CRPD.<sup>196</sup> Universal design therefore creates a remedy by redesigning these environments so that the barriers become usable by a majority, whether or not they have a disability, and no matter what the disability may be.<sup>197</sup> Universal design in learning shifts the focus from merely physical access and accommodation to all aspects of education, ranging from the physical environment to methodological approaches.<sup>198</sup> Educational curricula often lack flexibility in how information is presented to students, in how students are permitted to respond, and how students engage in the learning process.<sup>199</sup> Under a reasonable accommodation approach for persons with disabilities, time-consuming transformations and interpretations of textbooks and other curriculum materials must be undertaken so that the students' participation in classroom activities is often fragmented or delayed.<sup>200</sup>

A universal design in learning based curriculum, however, is proactively designed to accommodate the various needs of the majority of learners, both disabled and non-disabled, in order to

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<sup>195</sup> *Id.* The Act has many requirements related to the applicability of universal design in the classroom and has several requirements for participating states consisting of mandatory implementation of these principles in their public schools in order to receive funding. See *UDL and UD Provisions in the Higher Education Opportunity Act*, NAT'L CTR. ON UDL (July 12, 2010), <http://www.udlcenter.org/advocacy/referencestoUDL/HEOA> (listing relevant HEOA provisions regarding universal design in learning and universal design).

<sup>196</sup> See MO. STATE UNIV., UNIVERSAL DESIGN: A NEW PARADIGM FOR DESIGNING EQUITABLE AND INCLUSIVE LEARNING ENVIRONMENTS, *available at* [http://www.missouristate.edu/assets/fctl/FCTL\\_2final\\_presentation.pdf](http://www.missouristate.edu/assets/fctl/FCTL_2final_presentation.pdf).

<sup>197</sup> *Id.*

<sup>198</sup> CONNELL, *supra* note 21.

<sup>199</sup> NCAC, *supra* note 186.

<sup>200</sup> *Id.*

remove the need to accommodate the individual students with disabilities. Universal design in learning is intended to replace the social model “one size fits all” curriculum and accommodation that services the needs of the “average” learner.<sup>201</sup> With a universal design in learning approach, the designer—in the case of education, the academic institution and the individual professor—addresses the inaccessible, poorly designed environments. To remedy inaccessibility, the environment is designed to be usable, to the greatest extent possible, by all persons such that access is inclusive and sustainable.<sup>202</sup> As appropriately recognized by Dr. Megan Conway, instead of the bare minimum of reasonable accommodation, universal design focuses on the institutional atmosphere such that student success is enhanced.<sup>203</sup>

V. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES  
AS A NORMATIVE GAP-FILLER IN U.S. DISABILITY RIGHTS

Ratification of the CRPD by the United States, as written, could have represented a landmark step in the evolution of U.S. disability rights by recognizing and incorporating a holistic approach to accommodating persons with disabilities.<sup>204</sup> Arguably, the CRPD takes a U.S-centric approach to disability through its adoption of reasonable accommodation, and therefore, the global approach to persons with disabilities mirrors the U.S. approach under the ADA. Under this reading, the United States undertakes no new obligations or responsibilities through its ratification of the CRPD, which is the position staked out by the Senate Foreign Relations Committee in its

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<sup>201</sup> DAVID H. ROSE & JENNA GRAVEL, CURRICULAR OPPORTUNITIES IN THE DIGITAL AGE 1–6, 12 (2012) available at <http://www.studentsatthecenter.org/sites/scl.dl-dev.com/files/Curricular%20Opportunities%20Digital%20Age.pdf>.

<sup>202</sup> *Universal Design*, *supra* note 110.

<sup>203</sup> Stodden & Conway, *supra* note 29, at 27.

<sup>204</sup> The United States Foreign Relations Committee had voted to recommend Senate ratification after hearings on the CRPD’s provisions and effects. S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 2. This recommendation was based on the Committee’s interpretation of the CRPD’s provisions and the United States’s reservations and declarations to the CRPD. S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 14–17. The Senate Foreign Relations Committee in its Report recommending that the Senate give its advice and consent to ratification of the CRPD, stated that “the Convention will reaffirm and strengthen the global leadership role of the United States with regard to the rights of disabled persons[.]” S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 2.

recommendation to the full Senate for ratification.<sup>205</sup> If the United States was really inclined to read the provisions of the CRPD in this fashion, then ratification should be a simple matter. However, due to the reservations, understandings, and declarations<sup>206</sup> upon which the Senate has conditioned ratification of the CRPD,<sup>207</sup> this human rights treaty is transformed into an “internationalized ADA” that falls far short of the holistic approach advocated by its drafters.

While the United States has made great progress towards the goals of inclusion, equal opportunity, independent living, and economic self-sufficiency through the ADA, such achievement for persons with disabilities is reflected through the prism of reasonable accommodation. For instance, private educational institutions are subject to nondiscrimination mandates under a variety of federal laws, principle among them the ADA.<sup>208</sup> These goals result in persons with disabilities being treated similarly to those persons who are non-disabled, albeit through the provisions of reasonable accommodations, which the person with the disability must request and which the institution’s disabilities coordinator implements on a case-by-case basis after review and consultation.<sup>209</sup>

The provisions of Article 4 and 9 of the CRPD, which mandate inclusion, participation, and equal access with respect to social, political, and economic rights, rather than focusing on the ADA’s social model of accommodation, speak more to the notion of the holistic approach envisioned by universal design.<sup>210</sup> Regardless of

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<sup>205</sup> S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 2.

<sup>206</sup> Reservations and declarations allow a state party to limit the scope of application of a treaty or make clear how a State interprets some aspect of the treaty. States will usually file reservations to a provision so that the specified provision will not apply to the State and cannot be enforced against it. If the reservation contravenes the “object and purpose” of the convention, the reservation will be invalid and the provision will still apply to the party. Declarations, on the other hand, do not exempt a State party from the application of the provision of the convention; rather, they provide States an opportunity to clarify how they believe a particular provision should be interpreted or applied.

<sup>207</sup> S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 12–14.

<sup>208</sup> See 28 C.F.R. § 36.203 (2010).

<sup>209</sup> See *supra* Section II.

<sup>210</sup> CRPD, *supra* note 1, arts. 4, 9. Such an understanding is even implicit in the President Barack Obama’s letter of transmittal of the CRPD to the Senate in which he states “anchored in the principles of equality of opportunity, nondiscrimination, respect for dignity and individual autonomy, and inclusions of persons with disabilities, the commission seeks to promote, protect, and ensure the full and equal treatment of all human rights of persons with disabilities.” Remarks by President Barack Obama, *supra* note 116, at III.

whether the CRPD is ultimately ratified, a holistic approach to higher education, as properly envisioned by its drafters, has already taken root in the United States. This holistic approach is evidenced through the application of universal design in learning by several institutions of higher learning.<sup>211</sup> As noted, universal design focuses on the disenfranchising effect of the environment in which the individual finds him or herself, regardless of whether the person is disabled or non-disabled.<sup>212</sup> Due to this singular precept that remedies the wrongs perpetrated on persons with disabilities in a manner that reasonable accommodation under the ADA cannot, the universal design model should be utilized to implement the human rights guaranteed by the CRPD.

Universal design is a more efficient and effective methodology for achieving political, economic, and social rights, such as postsecondary education, than mere reasonable accommodation for persons with disabilities for several reasons. Under a reasonable accommodation approach, the burden rests firmly with the person with a disability to request the accommodation, which may or may not be granted by the institution, thereby actually limiting active and inclusive participation in the institution. Under the principles of universal design in education and learning, all students, both those that are disabled and those that are non-disabled, would participate equally, have equal access, be inclusive, and have equal fundamental educational services. Universal design in education might be implemented through a classroom that is designed with aisles that are wheelchair accessible and with audio and visual enhancement, such as multiple screens for various sight lines and closed captioning for those who are deaf or hard of hearing. Such a design would promote inclusion, participation, and access for both those with disabilities

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<sup>211</sup> For instance, Gallaudet University has implemented a universal design approach with regard to its newly constructed residential hall. With the input of students who are deaf, the university has created what is termed “DeafSpace.” Sign-language conversation is not impeded as stairs are few and walkways are extra-wide. Additionally doors all open electronically so that students do not have to stop their conversation to open a door. *Gallaudet University’s New Dorm Designed With Deaf Students in Mind*, WASH. POST, October 16, 2012, available at [http://www.washingtonpost.com/local/education/gallaudet-universitys-new-dorm-designed-with-deaf-students-in-mind/2012/09/29/c94e3674-03fb-11e2-91e7-2962c74e7738\\_story.html](http://www.washingtonpost.com/local/education/gallaudet-universitys-new-dorm-designed-with-deaf-students-in-mind/2012/09/29/c94e3674-03fb-11e2-91e7-2962c74e7738_story.html). See also UNIVERSAL DESIGN EDUCATION, <http://www.udeducation.org/about.html> (last visited Mar. 13, 2013) (providing online interactive support for educators regarding the teaching and study of universal design jointly coordinated by Center for Universal Design at North Carolina State University, the IDEA Center at the University of Buffalo, and Global Universal Design Educator’s Network).

<sup>212</sup> See *supra* notes 181–84 and accompanying text.

and those who are not disabled—goals that are mandated by the CRPD and which might be denied based on institutional perceptions of what qualifies as “disabled” or how reasonable an accommodation may or may not be.

Second, since universal design anticipates needs in higher education, the classroom and curricula design are proactive, rather than reactive. Costs are borne by the institution up-front and can be rationally apportioned to prevent undue burdens on the institutions or its students. Further, unlike the ADA, in which litigation is often the result of disputes over the type of disability or scope of the accommodation, universal design in learning prevents costly litigation over the scope and nature of the disability and accommodation.<sup>213</sup>

Finally, regardless of ratification, states may recognize a fundamental right to education through the application of the principles of the CRPD and universal design. While international human rights law has not acquired a significant position in U.S. jurisprudence with respect to equality and justice, state courts have frequently considered international human rights in recognizing a broad spectrum of economic, social, and cultural rights.<sup>214</sup> While treaty implementation is principally the responsibility of the federal government, states traditionally regulate in the substantive areas of criminal, family, and social law.<sup>215</sup> Understandings to international human rights treaties included by the United States upon ratification of human rights instruments, such as the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, are abundantly clear that states may implement human rights law in these substantive areas.<sup>216</sup>

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<sup>213</sup> The Association of American Publishers and the University of Georgia have proactively taken inclusive steps “for blind, dyslexic, and otherwise impaired college students to get specialized textbooks” through a centralized database by which electronic versions of textbooks are requested by colleges and supplied by publishers. Steve Klowich, *Textbooks for the Disabled*, INSIDE HIGHER ED. (Aug. 28, 2009), <http://www.insidehighered.com/news/2009/08/28/access>. This access will permit students with disabilities “to get their textbooks more efficiently, help colleges save money and avoid lawsuits, and protect publishers’ copy rights.” *Id.*

<sup>214</sup> THE OPPORTUNITY AGENDA, *Human Rights in State Courts*, 45 J. POVERTY L. AND POL’Y 233, 233–34 (2011).

<sup>215</sup> *Id.* at 234.

<sup>216</sup> Senate ratification of these instruments has included the following language: “That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction

The Senate added a similar reservation to the CRPD recognizing this principle of federalism and adding that “the Federal Government [may take] measures appropriate to the Federal system, which may include enforcement action against state and local actions that are inconsistent with the Constitution, the Americans with Disabilities Act, or other Federal law, with the ultimate objective of fully implementing the Convention.”<sup>217</sup> Through this reservation, limitations are placed on litigants in federal court who seek to expand fundamental human rights.

While the reservations to the CRPD are quite cogent with respect to federal application of its provision to litigation under existing U.S. law,<sup>218</sup> such language does not prevent state courts from utilizing international agreements under state law.<sup>219</sup> While states can accept

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over the matters covered therein, and otherwise by the state and local governmental to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal System to the end that the competent authorities of the state or local government take appropriate measures for the fulfillment of the Covenant.” 138 CONG. REC. 8068, 8071 (1992) (International Covenant on Civil and Political Rights); 140 CONG. REC. 14326, 14326 (1994) (International Convention on Elimination of All Forms of Racial Discrimination); 136 CONG. REC. S17486, S17486 (1990) (Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).

<sup>217</sup> See S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 15.

<sup>218</sup> “The Constitution and laws of the United States of America establish extensive protections against discrimination reaching all forms of governmental activity as well as significant areas of non-governmental activity. . . . The United States of America does not accept any obligation under the Convention to enact legislation or take other measures with respect to private conduct except as mandated by the Constitution and laws of the United States of America.” See S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 15.

<sup>219</sup> Even when human rights treaties are either non-self-executing or not ratified, such that individuals cannot sue for violations of rights recognized under the treaty, states can still enforce concrete obligations. See, e.g., *State v. Romano*, 155 P.3d 1102, 1115 (Haw. 2007) (relying on the Convention on the Elimination of All Forms of Discrimination against Women to find that the state constitutional right to privacy did not prevent the criminalization of prostitution); *Grimes v. Kennedy Krieger Institute*, 782 A.2d 807, 835 (Md. 2001) (utilizing the Nuremburg Code to find a duty toward persons who are subjects of research programs); *Sterling v. Cupp*, 625 P.2d 123, 132 (Or. 1981) (interpreting the state constitution’s provision on the treatment of prisoners by looking at the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and The European Convention); *Pauley v. Kelly*, 255 S.E.2d 895 (W. Va. 1979) (invoking the Universal Declaration of Human Rights to proclaim a fundamental right to education in the context of public school financing). See also THE OPPORTUNITY AGENDA, LEGAL AND POLICY ANALYSIS: HUMAN RIGHTS IN STATE COURTS 2011 (2011), available at [http://opportunityagenda.org/files/field\\_file/2011.08.25%20Human%20Rights%20in%20State%20Courts%202011%20FINAL.pdf](http://opportunityagenda.org/files/field_file/2011.08.25%20Human%20Rights%20in%20State%20Courts%202011%20FINAL.pdf) (reporting on forty-one states

the United States's reservations to human rights treaties or simply refuse to adjudicate human rights defenses, a possible developing expanse for international human rights is through civil litigation.<sup>220</sup> Thus, while the U.S. Supreme Court has ruled that education is not a fundamental right requiring heightened judicial scrutiny,<sup>221</sup> the Texas Supreme Court in *Edgewood v. Kirby* held that the Texas funding scheme violated the right to education protected in the Texas Constitution.<sup>222</sup>

Likewise, international human rights principles, as set forth in treaty obligations, can be used as interpretive guides by state courts.<sup>223</sup> The New York Surrogate's Court has specifically referenced the CRPD in its review of an appointment of a guardian for a disabled and autistic child of an individual, after the individual died and the son was institutionalized.<sup>224</sup> The court in its discussion of the CRPD, determined that, as a matter of international human rights, state guardianships must have periodic reviews to prevent abuses that may occur as a result of the state's grant of power over a person with disabilities.<sup>225</sup> In reaching this conclusion, the court stated "if and when the Disability Convention is ratified, international adoption of protection of the rights of persons with intellectual and other disabilities, including the right to periodic review of burdens on individual liberty, is entitled to 'persuasive weight' in interpreting our own laws and constitutional protections."<sup>226</sup>

Similarly, regardless of whether or not the CRPD is ultimately ratified, state courts can look to Article 24 of the CRPD as the

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and their court decisions that have discussed principles set forth in international human rights treaties).

<sup>220</sup> THE OPPORTUNITY AGENDA, *supra* note 214, at 236.

<sup>221</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

<sup>222</sup> 777 S.W.2d 391, 398 (Tex. 1989). Similarly, the California Supreme Court decision in *In re Marriage Cases*, relied upon the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to support its holding that marriage is a basic civil right. 183 P.3d 384, 426 n.41 (Cal. 2008).

<sup>223</sup> State courts can and should look to customary international law in addressing issues that arise under state constitutions, statutes, and common law. *See, e.g.*, Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. OF COMP. L. 455 (2010); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PENN. L. REV. 245 (2001).

<sup>224</sup> *In re Mark C.H.*, 28 Misc.3d 765, 783 (N.Y. Sur. Ct. 2010).

<sup>225</sup> *Id.* at 784.

<sup>226</sup> *Id.* at 786. While recognizing that the CRPD has not yet been ratified by the United States, the court stated that as a signatory to the CRPD, according to the principles set forth in Article 18 of the Vienna Convention on the Law of Treaties, which the United States has ratified, it must "refrain from acts which would defeat [the Disability Convention's] object and purpose." *Id.* at 785 (alteration in original).

measuring rod to further the legitimate principles and goals of accessibility and inclusion in disability cases regarding education. In this regard, state court decisions can establish “minimum core obligations” that will fulfill educational rights for persons with disabilities.<sup>227</sup> As aptly stated by Justice Louis Brandeis, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>228</sup> Thus, treaties, such as the CRPD, whether they are ratified or not, can serve as non-binding, persuasive authority to implement holistic social, economic, and political human rights.<sup>229</sup>

Both the holistic approach of the CRPD and the theory of universal design in learning recognize the imperative of proactively creating classroom environments that foster appropriate formats of communication.<sup>230</sup> Article 24(2) of the CRPD requires a “goal of full inclusion” in the education system for persons with disabilities.<sup>231</sup> Article 24(3)(a) and (3)(b) obligate States, *inter alia*, to facilitate the learning of Braille, modes and formats of communication, orientation and mobility skills, and the learning of sign language.<sup>232</sup> The United States’s position on these provisions is that the ADA meets the CRPD’s objectives through current federal law and the availability of schools such as Gallaudet University and programs that

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<sup>227</sup> Jeanne M. Woods, *Emerging Paradigms of Protection for “Second-Generation” Human Rights*, 6 LOYOLA J. PUB. INT. L. 103, 128 (2005) (“[E]xpanding recourse to the judicial forum opens another front in the ongoing struggle of the world’s impoverished millions to realize fully the dream of human dignity.”)

<sup>228</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice William Brennan has also indicated that state courts should “step into the breach” that has resulted from the U.S. Supreme Court’s narrow protection of individual rights. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

<sup>229</sup> See Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after Medellin*, 115 PENN ST. L. REV. 1051 (2011). By incorporating international human rights treaties into the legal analysis of state constitutional issues, these decisions establish norms that become persuasive authority to other courts at the state and federal level. *Id.* at 1065.

<sup>230</sup> The principles of universal design were recognized and incorporated in California Standardized Testing and high school exit exams. *Coachella Valley Sch. Dist. v. State*, 176 Cal.App.4th 93 (Cal. Ct. App. 2009). The court, citing to an internal ETS report, found that most tests currently are designed “in ways that limit the means of recognition, expression and engagement available to students.” *Id.* The tenets of universal design asserted that “the means available to a student within a learning environment should be available within an assessment environment.” With regard to test development, universal design tenets would encourage elimination of unnecessary linguistic complexity. *Id.*

<sup>231</sup> CRPD, *supra* note 1, at art. 24(2).

<sup>232</sup> *Id.* at arts. 24(3)(a), (3)(b).

promote the linguistic identity of the deaf community. This finding is simply incorrect. For instance, in *Eltigani v. N. Shore Community College*, a hearing-impaired student commenced an action against North Shore Community College raising claims under the Americans with Disabilities Act.<sup>233</sup> The court determined that the college fulfilled its reasonable accommodation duties by providing Eltigani with a qualified note taker and a monitor on June 4, 2007, and June 6, 2007, in lieu of Eltigani's absent communication access real-time translation (CART) reporter.<sup>234</sup> This decision flies in the face of the purpose and object of the CRPD, as it completely discounts its inclusive approach to education by preventing Eltigani from actively participating in his own education.

By narrowing the comprehensive holistic provisions of the CRPD, the disability community is limited in its efforts to achieve full equality and participation. The CRPD, as currently interpreted by the United States, and reasonable accommodation, as implemented under the ADA, fails to promote an individualistic, human rights approach as educational institutions will not have any obligation to proactively create classroom environments that foster appropriate formats of communication.

#### VI. CONCLUSION

Human rights treaties traditionally are not favored by the United States and, to date, the CRPD is no exception. Even if the Senate ultimately ratifies the treaty, the scope, object, and purpose have been so weakened by the United States's reservations, understandings, and declarations that it has, in essence, become an internationalized ADA. While such effect has significant potential for promoting human rights for persons with disabilities abroad, it does little to further the disabilities agenda in the United States.

To truly achieve equality and inclusion for persons with disabilities, the United States must move from the social model of disability that still focuses on accommodating the individual to a holistic, human rights approach that will address inaccessible environments and attitudinal barriers. Such an approach is not unrealistic, as the United States has already accepted universal design as a framework in architecture, as well as promoting its development in educational settings. The paradigm of universal design can be broadened to encompass disability rights in employment and higher

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<sup>233</sup> 967 N.E.2d 650 (Mass. App. Ct. 2012).

<sup>234</sup> *Id.*

education, and as such, truly meet the high ideals of the drafters of the Americans with Disabilities Act and the CRPD.