

GLOBAL DISABILITY: REALITY, THEORY, PRACTICE

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As long as we regard our disabilities as tragedies, we will be pitied.

As long as we feel ashamed of who we are, our lives will be regarded as useless.

As long as we remain silent, we will be told by others what to do.

-Adolf Ratzka 2005¹

I. INTRODUCTION

What is the relationship of global health to global disability? My initial intuition is that, while they share some similar characteristics, global disability is about more than global health and seeing both as similar forms of challenges is deeply problematic. By extension, treating both as issues to be resolved in one framework for global justice generates difficulties and even possible reversals. My concern is that when it comes to global health, we are in the process of globalizing a conception of justice that fails to adequately deal with disability.

Disability is frequently treated as a defined subset of health. The first sentence of an influential U.S. report states “Global health is the goal of improving health for all people in all nations by promoting wellness and eliminating avoidable disease, disability, and death.”² In this way, disability is already included when we speak about global health. We should also note that the global health discourse is permeated by a particular quantifiable notion of disability. Consider the popular metric of disability-adjusted life-years (DALYs)—which is a measure of a global burden of disease calculated by adding years lived with disability to years of life lost.³ Contemplating this metric quickly leads us to the question of

¹ <http://www.independentliving.org>, last accessed April 28, 2013.

² Committee on the U.S. Commitment to Global Health, *The U.S. Commitment to Global Health: Recommendations for the Public and Private Sectors* (Washington, D.C.: National Academy of Sciences, 2009), 1.

³ Christopher J. L. Murray and Alan D. Lopez, *The Global Burden of Disease : A Comprehensive Assessment of Mortality and Disability from Diseases, Injuries, and Risk Factors in 1990 and Projected*

whether disability *should* be understood as a subset of global health. Put differently, is a person who is blind and has cerebral palsy actually sick, or might it make more sense to think of their condition in a different intellectual frame? What does it mean for us to factor the years a person lives with disability into the same framework in which we factor a person's early death due to disease? For instance, when we give mental retardation caused by Meningitis a disability weight of 0.459 and blindness due to Onchocerciasis [River Blindness] a 0.594 we convert disability into a health and disease paradigm.⁴ We are, in effect, saying that having mental retardation due to Meningitis is 45.9 per cent as 'bad' as being dead; being blind due to Onchocerciasis is 59.4 per cent as 'bad' as being dead.

That is a remarkable thing to say.

The obvious issue I am trying to raise and get at here is that the way we define and value disability—on a continuum with death—has unintended pernicious affects on the way disabled persons are perceived and perceive themselves. This perception, in turn, is decisive for how and even whether the globally disabled are politically represented. The politics of recognition are crucial to any understanding of global disability.⁵

This inter-disciplinary paper is organized into three main sections, which can broadly be described as dealing with reality, theory, and practice on global disability. First (**I**) it offers a description of the state of global disability in the developing world. The next section (**II**) advances a global justice argument about the rights of disabled and impaired persons living in the developing world. The final substantive section (**III**) undertakes a survey of the international legal instruments and protections afforded to disabled persons. The danger inherent to inter-disciplinary work is that it may fail to convince a subject matter expert of any one of the areas it amateurishly touches on. Bearing that in mind, this paper only represents a broad sketch of what contours a more sustained intellectual engagement (perhaps a law review article) with the issue of global disability could take. It also represents some early work at developing a legal tool-set for disability advocacy.

The central argument also proceeds in three stages. *Reality*: We know more than we ever have of the fate of the globally disabled; a review of this statistical knowledge drives home that much of global disability, just like global health, could easily be ameliorated. In this sense, reality is a moral outrage. Disabling conditions that could be managed, mitigated, or even prevented, at very little cost afflict our global population. *Theory*: the intellectual problematique of global disability looks the way it does today because of its widespread absence and particular occasional treatment in the history of political thought; drawing on the legal history of the U.S. Civil Rights struggle provides fresh cognitive tools for thinking about global disability. *Practice*: a variety of legal mechanisms and international networks are available to assist in enshrining and protecting the rights of the global disabled. Yet there is a great gulf between legal protections available on the books, and what a society can and does actually offer to its disabled population. The uncomfortable truth to confront is that global disability today is to a large extent constituted—much like global health, poverty,⁶ and even famine⁷—not by an inherent and natural state of being, lack of resources, or formal laws, but much rather by social and political relations of entitlement. These relations, in turn, are constitutive and help to engender much of the second-order disability we see today.

to 2020, Global Burden of Disease and Injury Series (Cambridge, MA: Published by the Harvard School of Public Health on behalf of the World Health Organization and the World Bank ; Distributed by Harvard University Press, 1996).

⁴ See WHO, "Global Burden of Disease 2004 Update: Disability Weights for Diseases and Conditions", 3. Available at http://www.who.int/healthinfo/global_burden_disease/GBD2004_DisabilityWeights.pdf, last accessed April 29, 2013.

⁵ "Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being." Charles Taylor, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition*, ed. Charles Taylor, Amy Gutmann, and Charles Taylor (Princeton, N.J.: Princeton University Press, 1994), 25.

⁶ "It is not resources that are lacking; it is the will to harness them. Indeed, the world has never been richer, and the future promises even more." Ismail Serageldin, "World Poverty and Hunger--the Challenge for Science," *Science* 296(2002): 54.

⁷ Amartya Sen, *Poverty and Famines : An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press, 1981).

This leads me to conclude that the problem of global disability is first and foremost a political one, a fact that tends to be obscured by a medicalized global health framework.⁸

II. REALITY: SNAPSHOT OF GLOBAL DISABILITY

What are we talking about when we talk about global disability? Recent WHO statistics tell us that over a billion people (more than three times the population of the United States) have some form of disability.⁹ 39 million persons (about the population of Kenya) are blind and 246 million (about the population of Indonesia) have low vision. Crucially, “90% of visually impaired people liv[e] in developing countries” and “80% of all visual impairment can be prevented or cured.”¹⁰ 360 million people (more than the population of the United States) worldwide have a disabling hearing loss. Half of global hearing loss is preventable and “current production of hearing aids meets less than 10% of global need.”¹¹ In regard to child development, which can lead to a whole host of impairments later in life, “every year more than 200 million children under five years old fail to reach their full cognitive and social potential.”¹² The majority of these children also live in the developing world. It is estimated that about 65 million people need wheelchairs worldwide, and 20 million do not have one.¹³ [See Figure 1 in Appendix]

Read in this way, the basic demographics of the globally disabled illustrate that they are not a minor deviation from some widespread—‘normal’—human baseline. Instead, as a class of individuals 1 billion strong (circa 15 per cent of the human population), they constitute a massive and significant part of our unequal but shared humanity. Recalling that there are 1.2 billion Catholics in the world helps to put the global number of disabled persons into perspective.

But what is disability? In this paper, I commit myself to a social view of disability¹⁴ and treat it as the result and expression of patterns of interaction between a person and their social, political, and physical environments. On this account disability is always the product of an individual and a system; it is about power and relations, scientific knowledge and social perception, capitalism and ideology. For this paper, I treat our planetary institutional arrangements as the system that interacts with individuals to generate states of disability. My claim is that disability is produced, both locally and globally.

For instance, when 20 million people in the world do not have a wheelchair, but need one, then their resultant mobility problems can hardly be seen as solely due to their difficulty walking. Much rather,

⁸ Precisely on this point of a medical view on disability, Pogge asks: “Can we not affirm that certain persons, irrespective of any social factors, that make them needy and dependent and yet deny that their lives are any less worthwhile than ours?” Thomas Winfried Menko Pogge, “Justice for People with Disabilities: The Semiconsequentialist Approach,” in *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions*, ed. Leslie Pickering Francis and Anita Silvers (2000), 48. My answer to this question is “yes”, but this commitment in no way requires us to persist with a medicalized model of disability. It is possible, even desirable, to recognize that people have a variety of needs and forms of interdependence without regarding this interdependence as a medical problem. For a combination of the medical and social model—the “bio-psycho-social model” see World Health Organization. and World Bank., *World Report on Disability* (Malta: WHO Press, 2011), 4.

⁹ WHO. “Disability and health” Fact Sheet No 352 (2012). <http://www.who.int/mediacentre/factsheets/fs352/en/index.html> last accessed May 1, 2013.

¹⁰ WHO. “Visual Impairment and blindness” Fact Sheet No 282 (2012). <http://www.who.int/mediacentre/factsheets/fs282/en/> last accessed May 1, 2013.

¹¹ WHO. “Deafness and hearing loss” Fact Sheet No 300 (2013). <http://www.who.int/mediacentre/factsheets/fs300/en/> last accessed May 1, 2013.

¹² WHO. “Early child development” Fact Sheet No 332 (2009). <http://www.who.int/mediacentre/factsheets/fs332/en/index.html> last accessed May 1, 2013.

¹³ WHO. “Guidelines on the Provision of Manual Wheelchairs in less resourced settings” (2008). [http://www.who.int/disabilities/publications/technology/English%20Wheelchair%20Guidelines%20\(EN%20for%20the%20web\).pdf](http://www.who.int/disabilities/publications/technology/English%20Wheelchair%20Guidelines%20(EN%20for%20the%20web).pdf) last accessed May 1, 2013. p. 21.

¹⁴ For early literature on this see Claire H. Liachowitz, *Disability as a Social Construct : Legislative Roots* (Philadelphia: University of Pennsylvania Press, 1988). This is the approach that has been taken up by the *Americans with Disabilities Act* (ADA) and the *UN Convention on the Rights of Persons with Disabilities* (CRPD).

their lack of mobility has to be understood as a product of a set of global institutional arrangements and the radically uneven distribution of claims to goods and resources. When 360 million people could use some form of hearing aid or cochlear implant, but only circa 10 per cent receive any, then the majority of global hearing loss is not just caused by some medical condition (the *but-for* cause), but by the social and institutional arrangements that prevent these persons from receiving the equipment they need. It would be short-sighted to only focus on the medical cause—polio, cerebral palsy, river blindness, etc.—and miss out on the fact that much of dis-ability is constituted through not having appropriate equipment or an institutional arrangement that can integrate and mitigate disability. In its strongest variant I am arguing that global disability is engendered by a lack of resources and salient political claims on entitlements. To understand global disability, therefore, it is necessary to consider these profoundly political aspects.

A good, if rough, indication for the fact that disability is primarily a highly political issue is the variety of semantic upheavals that took place in the use of various signifiers associated with it: Consider the literary fate of the terms “disabled”, “impaired”, “retarded” and “handicapped”. [See Figure 2 in Appendix.] “Retarded” and “handicapped” used to have a higher incidence of use than “disabled” or “impaired” in published books. In the mid-70s “retarded” was the most frequently used term out of the four signifiers; in the early-80s it was “handicapped”; then in the late-80s—in the lead-up to the passage of the Americans with Disabilities Act (ADA) and similar international legislation—both “retarded” and “handicapped” radically plummeted in use and the frequency of “disabled” and “impaired” rose. Today, “disabled” is the most frequently used term, but there are already signs that its use is becoming problematic. These etymological dynamics were all the result of sustained efforts by disability advocates to affect the way in which disability was perceived.

In summary, the globally disabled are legion and global disability is complex. To properly understand disability we need to treat it as the result of interactions of individuals with institutional and social arrangements. This places the question of disability into the register of a global justice debate and into the area of social contract thought. As the next section will illustrate, however, our most sophisticated philosophical traditions have for a long time struggled with disability.

III. THEORY: GLOBAL JUSTICE AND DISABILITY

Difference is troubling for many of our philosophical theories. According to Martha Nussbaum three particular axes of difference—impairment and disability, nationality, and species membership—constitute the three unsolved problems of social contract theory.¹⁵ In the shaded overlap of two of these areas—impairment / disability and nationality—lies and sits the problem of *global disability*: the rights and justice claims for people with disabilities and impairments living in other countries. In this section I first seek to further explore why global disability constitutes a difficult area for our political theories before ending by drawing on the legal history of the U.S. Civil Rights struggle to make a number of claims about global disability.

A. Lacuna of Global Disability

Plato, Hobbes, Locke, Rousseau, Kant, and Rawls never spent much time focusing on the problems of disability. When they did refer to it, it was frequently in horrendous terms. Consider Plato’s suggestion in the *Republic*.

The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the

¹⁵ Martha Craven Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2006), 14-22. For a good intellectual and linguistic history of disability see Henri-Jacques Stiker, *A History of Disability*, Corporealities (Ann Arbor: University of Michigan Press, 1999). For a good literary study see Ato Quayson, *Aesthetic Nervousness : Disability and the Crisis of Representation* (New York: Columbia University Press, 2007). For a sociological approach see Michael Oliver, Colin Barnes, and Michael Oliver, *The New Politics of Disablement* (Houndmills, Basingstoke ; New York, NY: Palgrave Macmillan, 2012).

inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.¹⁶

Disability is present here only in the disappearance of the disabled. Plato conjures up a post-birth segregationist and eugenic order in which disabled children and those stemming from the lower castes are excluded and society is thereby purified. It turns out that Plato's utopia—the starting shot of Western philosophy—was a terrifying place. Whitehead obviously did not have disability in mind when he wrote that the “safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.”¹⁷ And yet it is astonishing how pronounced and persistent the lacuna of disability is in the history of our philosophical and political thought from Plato onwards.

As is well known, Hobbes, in his *Leviathan*, builds the entire intellectual framework on an originary equality and explicit denial of any political significance attaching to various levels of impairment or ability. “Of the NATURALL CONDITION of Mankind” he had the following to say.

Nature hath made men so equall, in the faculties of body, and mind; as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himselfe.

And as to the faculties of the mind ... I find yet a great equality amongst men, than that of strength.¹⁸

While laudable as a principle—and interesting because it inverts simple ideas that hierarchy and domination arise naturally out of the divergent capabilities of individuals—this is manifestly false. Remember that Hobbes is not advocating some abstract moral or legal equality, but much rather stating that all of (male, always male) humanity is sufficiently strong to harm all other, equally vulnerable, (male again) parts of it. This is a crucial intellectual move for his project; it bolsters the argument that investing in a sovereign to pacify the state of nature is in everybody's interests, even the strong and smart. There is, however, an abundance of conditions that severely impact human faculties to the point where to advocate a fundamental physical and mental equality is simply absurd. But not all of the greats of contract theory ignored physical and intellectual disability; sooner or later any philosophical framework that put such heavy emphasis on reason would have to account for intellectual disability.

Locke explicitly addressed what he called “idiots” in *An Essay Concerning Human Understanding*. In this text “idiots” are frequently mentioned in association with children: “even in children and idiots”; “not known to children, idiots, &c.”; “all children and idiots have not the least apprehension or thought of them”; “if therefore children and idiots have souls”; “the general maxims we are discoursing of are not known to children, idiots”—and so on.¹⁹ Locke mentions children with idiots because for him both are incapable of reason, and therefore both must be ruled. For idiots, however, the tutelage was perpetual. As Locke explained in his *Two Treatises* written at the same time as the *Essay Concerning Human Understanding*, “And so Lunaticks and Ideots are never set free from the Government of their Parents.”²⁰ Because the “idiot”, or mentally impaired person, does not possess reason for Locke—and in this case he does not maintain a continuum of reason, but rather a Manichean on/off switch—the idiot belongs to those things man has dominion over: children, savages, slaves, and animals. Difficulties are generated for this

¹⁶ Plato, *The Republic and Other Works*, trans. Benjamin Jowett, 1st Anchor Books ed. (New York: Anchor Books, 1973), 151.

¹⁷ Alfred North Whitehead, David Ray Griffin, and Donald W. Sherburne, eds., *Process and Reality: An Essay in Cosmology*, Corrected ed., Gifford Lectures (New York: Free Press, 1978), 39.

¹⁸ Thomas Hobbes and C. B. Macpherson, *Leviathan*, The Pelican Classics, Ac 2 (Harmondsworth,: Penguin, 1968), 183. Chapter XIII.

¹⁹ John Locke, *An Essay Concerning Human Understanding* (London: T. Tegg and Son, 1836), 254, 20, 9, 10. See also Barbara Arneil, “Disability, Self Image, and Modern Political Theory,” *Political Theory* 37, no. 2 (2009): 221-23.

²⁰ John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II: §60.

line of philosophy by the fact that reason is elevated to be the ontological essence of humankind; it is treated as the basis for a specific moral status. Plato's desired physical exclusion of the disabled and impaired is hereby recapitulated as a philosophical marginalization.

Moving very quickly now. Continuing its journey from explicit discrimination to philosophical exclusion disability then progressed on in the grand history of political thought to become an underexplored counterpoint to reason, which in turn was used to animate human personality and political order. For Rousseau reason was crucial and the defining element of personhood.²¹ In broad and general strokes the same could also easily be said of Kant, who built his ethical framework on the "autonomy of the will" of "every rational being" [vernünftiges Wesen].²²

Once we arrive in the 20th century, prominent political philosophies have been shaped by this tradition of neglect. Rawls—"the patron saint of Anglophone egalitarian liberalism"²³—explicitly excludes persons with disabilities from his original position of basic choice.

But for our purposes here I leave aside permanent physical disabilities or mental disorders so severe as to prevent persons from being normal and fully cooperating members of society in the usual sense.²⁴

Note that Rawls is not just excluding people who may fall short of a constructed standard of intellectual competence and reason, but also those with "permanent physical disabilities." Neither group of persons can be a contracting agent in his scenario. With this, to my mind unnecessary and egregious move, Rawls excludes anybody dependent on a wheelchair, or anybody who may be blind, or deaf—anybody whose disability prevents them "from being normal".²⁵ In fairness, Rawls knows that his theory of justice has difficulty dealing with disability and says as much.²⁶ But this does not change the fact that he has written disabled people out of his vision of a just order.

Prof. Pogge, too, draws attention to this problem of disability in some of his work: "the difficult question of who is to count as a person in the relevant sense: what about the severely mentally disabled...?"²⁷ In his classic *Realizing Rawls*, Pogge purposely does not extend the justice claims he is making for ameliorating global poverty and health to the globally disabled.

A plausible evaluation of the morally significant consequences of feasible institutional schemes must give a prominent place to the satisfaction of basic social and economic needs. Here it may be too much to require that an institutional scheme be so designed that even the special needs of its naturally handicapped participants are met. Perhaps such special needs raise issues of morality rather than justice.²⁸

As I have sought to indicate in the previous section, the category of "naturally handicapped participants" is troubling, indeed as troubling to me as a category of "naturally impoverished" would be. First off, the concept places a nearly impossible task of distinguishing between natural and not naturally handicapped

²¹ "While reason defines the citizen for Locke, it defines what it is to be human or a person for Rousseau." Arneil, "Disability, Self Image, and Modern Political Theory," 224.

²² Immanuel Kant, *Grundlegung Zur Metaphysik Der Sitten* (Essen: Phaidon Verlag), 93.

²³ Pogge, "Justice for People with Disabilities: The Semiconsequentialist Approach," 34.

²⁴ John Rawls, "Justice as Fairness: Political Not Metaphysical," *Philosophy and Public Affairs* 14, no. 3 (1985): 234. For an extensive argument on Rawls and disability see Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 96-154.

²⁵ At the most recent estimates this would amount to 430 million people who are excluded not due to mental competence, but a physical disability. See Figure 1 in Appendix.

²⁶ John Rawls, *Political Liberalism*, Expanded ed., Columbia Classics in Philosophy (New York: Columbia University Press, 2005), 21.

²⁷ Thomas Winfried Menko Pogge, *World Poverty and Human Rights : Cosmopolitan Responsibilities and Reforms* (Cambridge ; Malden, MA: Polity, 2002), 99. For more on Pogge and disability see *Realizing Rawls* (Ithaca: Cornell University Press, 1989), 45, 57, 71 115, 16, 65, 80, 275. But for a more sustained engagement with disability cf. "Justice for People with Disabilities: The Semiconsequentialist Approach."

²⁸ *Realizing Rawls*, 275.

persons, even when their conditions are very similar. For instance, a person with cerebral palsy, who has cerebral palsy because they were a pre-term birth, might be seen as naturally handicapped. However, if a person had cerebral palsy due to medical negligence at birth, this person would not be seen as naturally handicapped. Such a distinction would generate a host of difficulties. For another example, consider the difference between a person with Polio because the vaccination failed or a person with Polio due to the fact that an insurgent movement has prevented the delivery of vaccines.

Secondly, the idea of a “naturally handicapped person” naturalizes and occludes the fact that disability is to a significant extent engendered, by a combination of public and private discrimination, unequal relations, and the proto-scientific categorizations of individuals. Disability is more than the original medical cause, genetic variance, or negligence that generated it. What else are our health institutions but arrangements to respond to the particular, socially constructed, needs of individuals? Once one has gone down the rabbit-hole of viewing disability as primarily a social phenomenon, it is impossible to countenance the exclusion of disabled persons from our global justice claims.

What I have sought to draw out, and attention to, in this very swift survey of some of the great political theorists in the Western tradition is that disability represents a bit of an embarrassment for them, either explicitly due to discriminatory attitudes or implicitly due to neglect. Building our justifications for central political authority on reason, and drawing universal lines around the human condition predicated on intellectual capacity has a number of effects. One of them is to engender a tradition of political thought that in its most universal impulses tragically denies a shared humanity to persons with disabilities (sometimes not even profound). By excluding the disabled from our contract scenarios we also obviously read down their political standing. Now, it is important to note that disabled persons are not the only group of people historically excluded from social contract’s thought experiments.²⁹ Women, members of other races, and foreigners were also usually omitted from these frameworks.

Social contract theory typically assumed societal isolation. The international, or, put differently, the figure of the non-national, has received much important attention in the work of Thomas Pogge³⁰ and Charles Beitz.³¹ For our purposes, it should suffice to draw from their interventions that strong global justice claims can be made which relate to the vast inequalities of wealth and health that pervade this planet—“our global institutional order is unjust ... we do wrong in simply collaborating in the perpetuation and imposition of this order”.³² It is precisely at this intersection of justice claims of the foreigner and the disabled—this doubly problematic space—that global disability resides. In the next section I seek to drive the point home that disability can be engendered by social practices and deserves its own justice claims.

B. Constructing Competence

In this section I draw on the history of civil rights in the United States³³ to develop an account of competence and disability that underlines the manner in which it is socially constructed and suspended in a web of political relations. The comparison is already apt simply for historical grounds. The disability rights movement, after all, came of age in the 1960’s, consciously following the example set by the African-American and women’s rights struggle by deploying sit-ins and similar techniques. ‘The Americans with Disability Act’ (1990) is closely modeled after the ‘Civil Rights Act’ (1964); and an Amendment (1982) to

²⁹ For an attempt to include disability in a social contract thought experiment see Silvers, *Disability, Discrimination*, Anita Silvers, David T. Wasserman, and Mary Briody Mahowald, *Disability, Difference, Discrimination : Perspectives on Justice in Bioethics and Public Policy*, Point/Counterpoint (Lanham, Md.: Rowman & Littlefield Publishers, 1998). For a critique testing the limits of Silver’s approach see Pogge, ADA. Pogge, "Justice for People with Disabilities: The Semiconsequentialist Approach."

³⁰ See especially *Realizing Rawls*, 211-73.

³¹ See Charles R. Beitz, *The Idea of Human Rights* (Oxford ; New York: Oxford University Press, 2009); *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1979). As far as I can tell, Beitz never mentions or addresses disability, impairment, or being handicapped in either of these famous books.

³² Pogge, *Realizing Rawls*, 278.

³³ I draw inspiration here from Bruce Ackerman, "We the People: The Civil Rights Revolution, Volume Iii," (Yale Law School, 2012).

the ‘Voting Rights Act’ (1965) explicitly provides for disability rights.³⁴ Moreover advocacy for school inclusion carries many obvious parallels to advocacy for school desegregation. But beyond that, disability and racial discrimination also share other important characteristics.

Competence and ability—and conversely inferiority, incompetence, and disability—are not merely labeling exercises, but rather socially constructed products of complex relations that create authentic material facts. This is how I argue we should speak about global disability. As a pertinent example, consider how years of discrimination against, and underfunding of, education resulted in African-Americans regularly underperforming on IQ tests administered by the U.S. Army.³⁵ While we could say that the segregation generated a feeling of inferiority in these individuals, this would miss out on the fact that the schooling policy *produced* discernable differences in measures of competence. Iterated institutional exclusion generated real inferiority. These measures of inferiority could then be reified and treated as natural and neutral scientific indices of African-American competence *per se*, which in turn could be used to justify the furtherance of a discriminatory educational policy. The infernal cycle is apparent.

A well-intentioned social reformer, armed with IQ tests and other statistics, could proclaim that there was not just a feeling of inferiority, but that there *was* manifest inferiority, documented by lower test scores, less representation in highly skilled jobs, and so on. The African-American was thus disabled by segregation and discrimination. To remove all possible misreading: My point here is obviously not that being black is inherently disabling, but rather that the way the society treated African-Americans did have the affect of *disabling* them as a class. There is nothing natural or neutral about African-Americans underperforming on U.S. Army intelligence tests. The political order and practice of exclusion engendered disabilities. The same could be said of the treatment of women in many contexts.

‘Real’ competence, our ‘normal’ healthy person—which must be the point of comparison for any disparagement of competence—is therefore already the result of policies as well as suspect technical expertise with faulty biases, rebuttable presumptions, and the like. As a corollary it is worth recalling that Homer Plessy, of Plessy v. Ferguson, was categorized as African-American because he was one eighth black, an ‘octoroon’ in the proto-scientific parlance of the time.³⁶ This ‘objective’ definition of blackness, bolstered by phrenology and similar forms of academic expertise, acted as a measure of competence in a racist society and itself already manifested a strong racial bias. It holds many similarities to the history of proto-scientific classifications of intellectual competence: apparently fine-grained distinctions between “morons”, “idiots”, etc.

Technical measures of competence and disability, just like of blackness, are made, not merely impugned or observed. Moving on, segregating a people through policies does not only take away their *sense* of dignity or their standing. It does not only insult them. Much rather, it denies them actual competence and thereby injures them, at times grievously. In this way, *de jure* humiliation can lay the foundation for a technocratic *de facto* discrimination, administered only through an ‘objective’ measure of competence.

This circular tension is apparent in Brown v. Board of Education’s³⁷ key paragraph.

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.³⁸

³⁴ Public Law 97-205, Sec. 208 “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of the employer or office or agent of the voter’s union.”

³⁵ Stephen Jay Gould, *The Mismeasure of Man*, 1st ed. (New York: Norton, 1981), 192-233.

³⁶ Plessy v. Ferguson was a famous Supreme Court case that permitted segregation in trains. “The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the state of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.” Plessy v. Ferguson, 163 U.S. 537, 541 (1896) *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954).

³⁷ Brown v. Board of Education was the famous Supreme Court case that ended segregation in public education in the United States.

³⁸ Brown v. Bd. of Ed., 347 U.S. 483, 494 (1954) *supplemented sub nom.* Brown v. Bd. of Ed. 349 U.S. 294 (1955).

On the one hand, the idea of qualification is used as an indicator that segregation is unjust: “separate them from others of similar age and *qualifications*.”³⁹ On the other hand, Brown unequivocally states that segregation “may affect their hearts and minds”⁴⁰—*minds*, which must form part of any basis of assessment of a person’s quality. The circular problem here is that our notion of ‘qualification’ depends on an assessment of minds already affected by our institutional arrangements. Warren is concerned about this when he quotes the Kansas District Court.

Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.⁴¹

I think that civil rights advocates, government lawyers, and justices of this time period were on to something when they used the language of disability to describe segregating practices. For a prominent example consider the government’s second brief in Bell v. Maryland, a famous case about a sit-in in a segregated Baltimore restaurant. In it the government offered an interpretation of constitutional amendments, which made them about *eradicating* imposed disabilities. “[T]he Thirteenth, Fourteenth and Fifteenth Amendments not only abolished human bondage but purported to eradicate the *imposed public disabilities* based upon the false thesis that the Negro is an inferior caste.”⁴² I am especially struck by this phrasing as it gestures towards political aspects of the social construction of disability. The argument I am seeking to make here is that our measures of competence and normalcy—the background that we use to analyze disability—are already socially constructed and that there are constitutional resources that address this. To adequately measure the inequalities engendered and exacerbated by our societal arrangements is an impossible task.

How is the statesman to decide whether the special sacrifices imposed on a citizen’s power by virtue of sex and physical handicap are greater than the sacrifices imposed on another by color and wealth?⁴³

But we nonetheless need to advance to an understanding that society is not innocent when it comes to disability and there is a tradition of grappling with this concern. One of the ways to do that is to realize that the civil rights struggle was, also, about the eradication of “imposed disabilities”, as justice and not merely moral claims.

IV. PRACTICE: LEGAL APPROACHES

The globally disabled have more legal protections today than at any point in their history; yet in many places they are excluded and discriminated against. The stated purpose of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) (2006), which entered into force on May 3, 2008, is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms

³⁹ Brown v. Bd. of Ed., 347 U.S. 483, 494 (1954).

⁴⁰ Brown v. Bd. of Ed., 347 U.S. 483, 494 (1954).

⁴¹ Brown v. Bd. of Ed., 347 U.S. 483, 494 (1954).

⁴² SUPPLEMENTAL BRIEF at 7. Emphasis mine. See also “Its only function is to preserve, despite the Thirteenth, Fourteenth, and Fifteenth Amendments, the essence of the earlier *disabilities* associated with slavery but extended more widely through the Nation.” SUPPLEMENTAL BRIEF at 12. See also SUPPLEMENTAL BRIEF at 13; 15; 16; 19.

⁴³ Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), 245.

by all persons with disabilities, and to promote respect for their inherent dignity.”⁴⁴ CRPD features a view of disability that is more open to the possibility of societal engenderment and construction.

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.⁴⁵

Thinking back to the previous section, it is worth wondering why such a view of disability can be the global norm in 2006, but is absent from classic social contract theory. The treaty appears to be comprehensive (but has no enforcement mechanism), requiring signatory states to pass measures and act in accordance with the “respect for inherent dignity”, “non-discrimination”, “participation and inclusion in society”, “respect for difference”, “equality of opportunity”, “accessibility”, “equality between men and women”, and “respect for the evolving capacities of children with disabilities.”⁴⁶ There are 155 signatories to the convention, and out of these 130 are formal parties. The United States has not ratified the treaty.⁴⁷ On the 4th of December 2012 the measure fell five votes short for the Senate majority required to pass the treaty.

It is crucial to note, however, that legal protections offered to the globally disabled are vulnerable to acts of interpretation and political systems in which there is little to no rule of law. That is to say, this global convention only actually enshrines protections for the globally disabled if all state parties have the will and capacity to implement it and forms of legal interpretation are also policed for their discriminatory affects. Let us begin with the issue of interpretation.

Now, it is a significant research challenge to find a country today with laws that explicitly discriminate against disabled persons. Yet there are many underlying forms of legal history, interpretation, statutes, and practices that clearly do discriminate. Consider the famous U.S. Supreme Court justice Holmes’s opinion in Buck v. Bell (1927), which upheld the involuntary sterilization laws as constitutionally valid *and has still not been overruled*.⁴⁸

Bell was the Superintendent of State Colony Epileptics and Feeble Minded; Carrie Buck was “a feeble-minded white woman who was committed to the State Colony”.⁴⁹ Bell had been ordered by the Circuit Court of Amherst County to sterilize Carrie Buck through a salpingectomy. The case ended up before the Supreme Court because of a claim that her involuntary sterilization was a violation of her 14th Amendment due process and equal protection rights—the same Amendment which the government’s brief in Bell v. Maryland claimed had been passed to overcome disabilities imposed on African-Americans. For the Holmes there was nothing wrong with sterilizing this woman against her will.

It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory

⁴⁴ UN. Convention on the Rights of Persons with Disabilities, Art. 1. Cf. Beth Ribet, “Emergent Disability and the Limits of Equality: A Critical Reading of the Un Convention on the Rights of Persons with Disabilities,” *Yale Human Rights & Development Law Journal* 14(2011).

⁴⁵ UN. Convention on the Rights of Persons with Disabilities (2006). Preamble (e).

⁴⁶ UN. Convention on the Rights of Persons with Disabilities, Art. 3.

⁴⁷ As well as Andorra, Antigua and Barbuda, Bhutan, Brunei Darussalam, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Fiji, Finland, Georgia, Grenada, Guyana, Iceland, Ireland, Japan, Kazakhstan, Lebanon, Libya, Madagascar, Micronesia, Norway, Palau, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, St. Lucia, Suriname, Tonga, Trinidad and Tobago, Uzbekistan, Vietnam. See United Nations. Treaty Collection. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec last accessed May 1, 2013.

⁴⁸ Buck v. Bell, 274 U.S. 200 (1927). Some argue that Skinner v. Oklahoma, 316 U.S. 535 rejected Buck v. Bell, but it is important to note that this was never made explicit by the court. Cf. David Pfeiffer, “Eugenics and Disability Discrimination,” *Disability & Society* 9, no. 4 (1994).

⁴⁹ Buck v. Bell, 274 U.S. 200, 205 (1927).

vaccination is broad enough to cover cutting the Fallopian tubes. ... Three generations of imbeciles are enough.⁵⁰

Here, again, disability is medicalized. Not only does Holmes construct a justification for sterilization through reference to the practice of vaccination, but he also treats imbecility itself as a disease that has to be eradicated. I draw out this example to first underline my previous point about disability being socially constructed and over-determined by the medical knowledge of the time. Secondly, what I wish to show here is that this type of constitutional interpretation is a good historical example of the justification for legal discrimination against persons with disabilities. *Buck v. Bell* is an act of constitutional interpretation that has discriminatory affects; it is not a clearly discriminatory law. Note that Holmes's opinion does not explicitly advocate discrimination for its own sake, but that it frames sterilization of persons with disabilities in terms of a kind of civic duty and sacrifice.

In many cases however, discrimination today is not an issue of statutory or constitutional interpretation, but much rather of a total neglect of the law permitting abhorrent abuses. Consider the case of "spirit children" in the north of Ghana. Ghana passed the Persons with Disabilities bill in 2006, which granted identical rights to the disabled as to the rest of the Ghanaian citizenry, and it ratified the CRPD in 2012. The legal protections for persons with disability are therefore of a high standard in the country. Yet, as Anas Aremeyaw Anas, a well-known Ghanaian investigative reporter, discovered.

Every year an unknown number of children—most of them disabled in some way—are murdered in northern Ghana because of the belief that they are in some way possessed by evil spirits set on bringing ill fortune to those around them.⁵¹

While this practice is horrific, the truly devastating finding for our analysis of the legal instruments available to persons with disabilities is that *no person had ever been arrested for these practices* until Anas shot a documentary about them. In the documentary *Anas*, designs a sting operation in which he brings the police to a location in which he has set up cameras and caught a person willing to kill a "spirit child". It was only in this case, that the police acted and imprisoned the accused parties.

While this is an extreme case, as is the Holmes's decision in *Buck v. Bell*, they both serve to underline inherent problems international conventions and formal laws will have difficulty overcoming: when disability is treated as a natural burden the individual inflicts on society, and not vice versa, great violations can occur. In systems where there is little judicial enforcement and the rule of law is weak—precisely the countries in which the globally disabled are most vulnerable—an international convention such as the CRPD is of little more than symbolic value.

What I have sought to advance in this paper is an understanding of global disability that runs in the opposite direction of the notion that a person's disability is a natural burden on society. Disability can only be grasped as the result of something imposed and co-constituted by society.

V. CONCLUSION

This paper has grappled with law, philosophy, and statistics on global disability. Through all of this it has sought to advance one main argument. Global disability needs to be considered in a global justice framework, but global disability is not the same as global health and treating it this way places it in danger of being medicalized up to a point where this may occlude the social and political aspects of disability. These are tricky issues and while the history of political thought and social contract theories are embarrassing in their neglect and treatment of disability, the history of the U.S. Civil Rights struggle offers some interesting intellectual resources—especially when it is treated as an attempt to overcome "imposed disabilities." Moreover, while modern conventions—such as the CRPD—are advanced in their promotion

⁵⁰ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

⁵¹ Anas, Aremeyaw Anas "Spirit Child" AlJazeera
<http://www.aljazeera.com/programmes/peopleandpower/2013/01/201319121124284358.html> last
 accessed May 2, 2013.

of a social model of disability, these legal instruments will have the least real impact in the places where they are needed the most—societies with weak rule of law provision.

APPENDIX

Images and Statistics

Figure 1: Descriptive Statistics on Global Disability⁵²

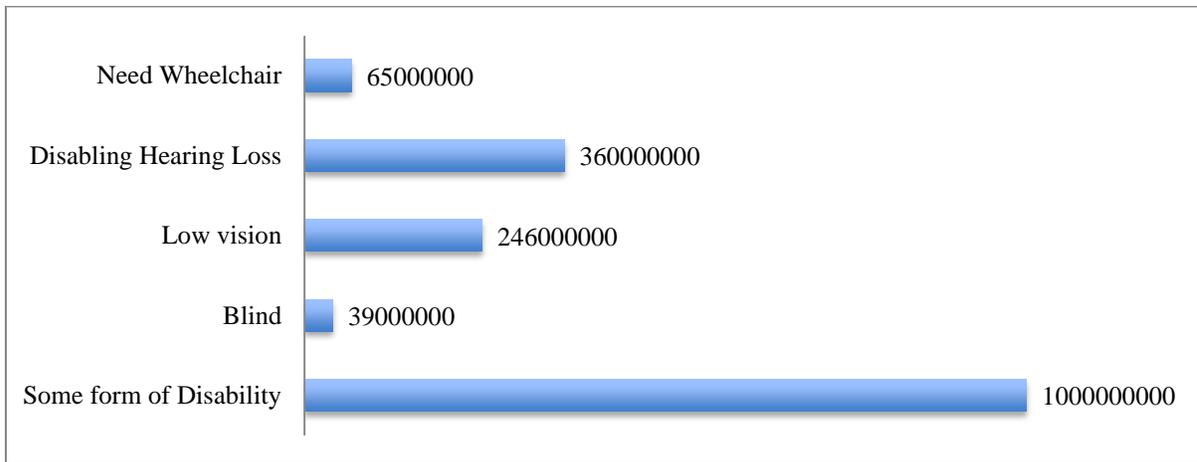
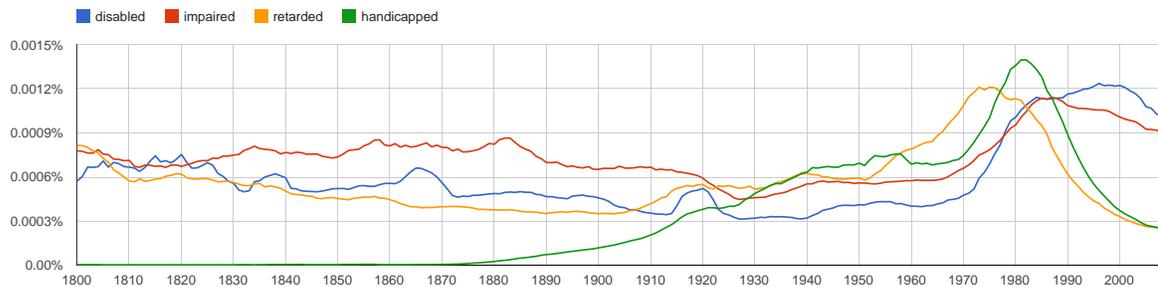


Figure 2: Incidence of “disabled”, “impaired”, “retarded” and “handicapped” in Google Ngrams



⁵² Data drawn from WHO Fact Sheets No 352, 282, 300; WHO “Guidelines on the Provision of Manual Wheelchairs in less resourced settings”, 21.

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