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Articles

JACOBUS TENBROEK, PARTICIPATORY JUSTICE, AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

By: Michael Ashley Stein* & Janet E. Lord**

INTRODUCTION

Writing with prescience, Professor Jacobus tenBroek eloquently argued mid-century on behalf of participatory justice for individuals with disabilities.¹ Nothing “could be more essential to personality, social existence, [and] economic opportunity” he determined, “than the physical capacity, the public approval, and the legal right to be abroad in the land.”² Some fifty years later, Professor tenBroek’s “right to live in the world”—the ability of persons with disabilities to have equally meaningful contact with the population at large—became a central feature of the values underlying the United Nations Convention on the Rights of Persons with Disabilities (hereinafter CRPD, or Convention),³ the first human rights treaty of the twenty-first century.⁴ Accordingly,

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This Article is dedicated to the memory of Allan Macurdy, a dedicated disability rights advocate and scholar.

1. “Undergirding this notion is a prevailing normative assumption that in a just society everyone should have the ability to interact with and take part in general culture.” Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 102 (2007).

2. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 841 (1966). This article is considered seminal yet is but one example drawn from Professor tenBroek’s many writings. See generally FLOYD W. MATSON, *BLIND JUSTICE: JACOBUS TENBROEK AND THE VISION OF EQUALITY* (Government Printing Office 2005) (providing an overview of Professor tenBroek’s advocacy as witnessed by a close colleague and co-author) [hereinafter *BLIND JUSTICE*].

3. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, G.A. Res. 61/106 (2007) [hereinafter CRPD].

4. For our earlier and more detailed treatments of the CRPD, see Janet E. Lord & Michael

this Article explores the extent and manner that participatory justice animates the CRPD, first as a general matter and then specifically in reference to Article 30, the provision governing the obligations of States Parties to “[p]articipation in cultural life, recreation, leisure and sport.”⁵

Part I sets forth Professor tenBroek’s jurisprudence in regard to participatory justice. Next, Part II highlights aspects of the Convention that are especially notable for their substantive and procedural inclusion of persons with disabilities and reflective of a deeply participatory model of justice that is consistent with Professor tenBroek’s vision. Part III illustrates these assertions by focusing on CRPD Article 30 and its mandate for inclusive cultural life, recreation, leisure and sport, and explains that provision’s practical significance for the worldwide community of persons with disabilities. We conclude with a few reflections on the Convention’s future impact as a vehicle for social change.

I. JACOBUS TENBROEK AND PARTICIPATORY JUSTICE

Professor Jacobus tenBroek was a visionary academic and advocate.⁶ Notably, his calls for participatory justice preceded contemporary notions of diversity by more than a half-century⁷ and extended to racial and economic categories, as well as to individuals with disabilities.⁸ Professor tenBroek’s jurisprudence may therefore be characterized as the pursuit of social justice through equality and participation.⁹

Ashley Stein, *The Committee on the Rights of Persons with Disabilities*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* (Philip Alston & Frédéric Mégret eds., forthcoming 2008); Michael Ashley Stein & Janet E. Lord, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, in *THE UN CONVENTION ON THE RIGHTS OF PERSON WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* (Oddný Mjöll Arnardóttir & Gerard Quinn eds., forthcoming 2008); Michael Ashley Stein & Janet E. Lord, *The United Nations Convention on the Rights of Persons with Disabilities as a Vehicle for Social Transformation*, in *NATIONAL MONITORING MECHANISMS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES* (Comisión Nacional de los Derechos Humanos de México, Network of the Americas & Office of the United Nations High Commissioner for Human Rights eds., forthcoming 2008).

5. CRPD, *supra* note 3, at art. 30.

6. Parenthetically, aside from MATSON, *BLIND JUSTICE*, *supra* note 2, we are unaware of an in-depth biographical or jurisprudential treatment of Professor tenBroek, a striking lacunae for a scholar of his standing.

7. The literature is vast. See, e.g., CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2004) (extending the contact thesis to the workplace); David Wilkins & Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 498 (observing that most diversity advocates argue that the majority of business leaders are cognizant of the economic value of a diversified work force); David B. Wilkins, *From ‘Separate is Inherently Unequal’ to ‘Diversity is Good for Business’: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

8. See Michael E. Tigar, *In Memoriam*, 56 CAL. L. REV. 573 (1968) (noting that in addition to disability rights, Professor tenBroek “was for years Chairman of the State Board of Social Welfare, challenging arbitrary administration of public assistance” and had also “written on the origins of the Civil War Amendments—of their great . . . promise of freedom to black America.” *Id.* at 574).

9. See MATSON, *BLIND JUSTICE*, *supra* note 2, at 203 (“For tenBroek, however, equality was never just an abstraction, never less than a pragmatic end-in-view: a right to be claimed, a

A. *The Fourteenth Amendment and Race*

Professor tenBroek was one of the earliest scholars to examine and systemically apply the Equal Protection Clause of the Fourteenth Amendment of the Constitution¹⁰ to the area of social justice.¹¹ Despite Justice Holmes referring to that Clause as “the last resort of constitutional arguments”¹² (without intending irony),¹³ Professor tenBroek’s later studies of the Equal Protection Clause recast many subsequent constitutional arguments.¹⁴ For example, *The Equal Protection of the Laws*,¹⁵ which analyzes the over-inclusive and under-inclusive use of constitutional classification,¹⁶ remains one of the most influential pieces of Fourteenth Amendment scholarship.¹⁷

The more historically and racially specific publication by tenBroek, ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT,¹⁸ was noted by then-attorney Thurgood Marshall as providing many of the central arguments that the Legal Defense Fund relied upon in the landmark Supreme Court case of *Brown v. Board of Education*.¹⁹ His equally focused PREJUDICE, WAR, AND THE CONSTITUTION²⁰ exposed the inhumanity and challenged the constitutionality of interring Japanese-

struggle to be won, a constitutional mandate to be enforced.”)

10. U.S. CONST. amend. XIV, § 1, cl. 2.

11. Subsequent scholars to comment on social justice as applied to the Equal Protection Clause include RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1975); ROBERT J. HARRIS, *THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT* (1960).

12. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

13. Justice Holmes’s pronouncement on the role of the Fourteenth Amendment follows closely on his even more infamous ruling upholding the involuntary sterilization of Carrie Buck on the ground that “three generations of imbeciles are enough.” *Id.* at 205. One commentator notes that nearly “[e]verything about Holmes’s opinion in *Buck v. Bell* has been subjected to withering criticism.” Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 107 (2005). Nevertheless, the ruling and its reasoning had dire consequences. See Anita Silvers & Michael Ashley Stein, *Disability and the Social Contract*, 74 U. CHI. L. REV. 1615, 1649–50 and n.54 (2007).

14. See, e.g., Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 101 n.8 (2007) (referencing the tenBroek & Tussman article as a “pioneering exposition of the Equal Protection Clause”); Ian F. Haney López, “*A Nation of Minorities*”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1016 n.130 (2007) (referring to the tenBroek & Tussman article as the “germinal article on the modern Equal Protection Clause”).

15. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

16. See generally Michael Ashley Stein, *Generalizing Disability: Profiles, Probabilities, and Stereotypes*, 102 MICH. L. REV. 1373 (2004).

17. See Fred R. Shapiro, *The Most Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1996) (ranking the Tussman & tenBroek article as the fourteenth most cited law review article of all time).

18. JACOBUS TENBROEK, EDWARD NORTON BARNHART & FLOYD W. MATSON, *ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

19. 347 U.S. 483 (1954). See also MATSON, *BLIND JUSTICE*, *supra* note 2, at 117–118. Marshall wrote to Professor tenBroek that the Legal Defense Fund had “taken full advantage of your book,” that “many of our research people have been using it,” and requested an appointment to talk through the Constitutional arguments. That meeting never came about, but one wonders at what the result would have been.

20. JACOBUS TENBROEK, *PREJUDICE, WAR, AND THE CONSTITUTION* (1954).

Americans during World War II well before it became academically acceptable to do so.²¹ Indeed, the publication of work focused on the rights of those ethnic minorities seen as threatening national security²²—not to mention openly resisting loyalty oaths²³ and advocating for free speech²⁴—was uncommonly brave during Cold War-era America.²⁵

B. *Disability and Rights of Inclusion*

Within the disability rights realm, Professor tenBroek made an early and significant contribution to the development of the social model of disability,²⁶ a civil rights paradigm from which most disability rights advocates, both domestically and internationally, draw their arguments.²⁷ The framework maintains that it is the physically engineered environment, and the attitudes that are reflected in its construction, that play a central role in creating the condition termed “disability.”²⁸ According to the social model, many factors that are exogenous to a disabled person’s own limitations are really what determine the extent to which that individual will be able to function in a given society.²⁹ Professor tenBroek argued that disabled people’s own physical limitations had far less to do with their ability to participate in society than did “a variety of considerations related to public attitudes,” most of which were “quite erroneous and misconceived.”³⁰

21. See, e.g., ERIC L. MULLER, *AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II* (2007); Aya Gruber, *Raising the Red Flag: The Continued Relevance of The Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307 (2006).

22. For example, concerns that Thurgood Marshall was a threat to national security prompted investigations in connection with his NAACP activities prior to his appointment as a federal court judge and Supreme Court justice. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

23. See MATSON, *BLIND JUSTICE*, *supra* note 2, at 181–86 (recounting the role that Professor tenBroek played in academic senate policy sessions).

24. See *id.* at 195–202.

25. Julie H. Margetta, *Taking Academic Freedom Back to the Future: Refining the Special Concern of the First Amendment*, 7 LOY. J. PUB. INT. L. 1, 30 (2005) (observing that during the Cold War, “professors suffered from exactly these kinds of chilling effects, and America suffered with them”).

26. See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 592–93 (2004).

27. See Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1206–12 (2007) (describing the central role played in disability rights advocacy by the social model). Cf. Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1252 (2007) (claiming that the social model “has no policy implications”).

28. In the view of one leading scholar, the social model is “nothing more fundamental than a switch away from focusing on the physical limitations of particular individuals to the way the physical and social environments impose limitations on certain groups or categories of people.” MICHAEL OLIVER & BOB SAPEY, *SOCIAL WORK WITH DISABLED PEOPLE* 23 (1983).

29. For detailed explanations, see Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN’S STUD. 97 (1994); Ron Amundson, *Disability, Handicap, and the Environment*, 23 J. SOC. PHIL. 105 (1992). For an application to the Americans with Disabilities Act, see Stein, *Same Struggle, Different Difference*, *supra* note 26.

30. tenBroek, *supra* note 2, at 852, 859 (“Architectural barriers . . . make it very difficult to project the physically handicapped into normal situations of education, recreation, and employment.”). See also Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of*

In making these assertions, Professor tenBroek articulated an initial and influential version of the social model of disability.³¹ However, his jurisprudence also went beyond the basic tenets of the social model in two significant and path breaking respects. First, Professor tenBroek analyzed the public choice sources of disability-based exclusion.³² Second, Professor tenBroek argued that the remedy for disability-based exclusion lay in participatory justice.³³

Influenced by Gunnar Myrdal's Nobel Prize winning study,³⁴ Professor tenBroek understood American policy makers as having the choice and ability to influence whether and to what extent groups of individuals interact with mainstream society.³⁵ In his view, policy makers historically considered people with disabilities as "mentally inferior and narrowly circumscribed in the range of their ability—and therefore inevitably doomed to vocational monotony, economic dependence, and social isolation."³⁶ Consequently, the social welfare schemes they developed limited persons with disabilities and their life choices under the rubric of providing well-intended³⁷ public-based

Welfare, 54 CAL. L. REV. 809, 814 (1966) ("A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician . . . a handicap is the cumulative result of the obstacles which disability interposes between the individual and his maximum functional level.").

31. Not surprisingly, Professor tenBroek's work is frequently cited by those writing in the disability field. See, e.g., Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479 (2001) (exploring the politics of risk valuation and regulation in the ADA); Mark C. Weber, *Disability and The Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889 (examining the law of welfare as it affects persons with disabilities and arguing for its reform); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy For People With Disabilities*, 40 UCLA L. REV. 1341 (1993) (criticizing the ADA as codifying the medical-social pathology model of disability, granting only limited rights of workplace access to persons with disabilities).

32. Professor tenBroek also identified the impact of broad stereotypical attitudes years before the classic treatment by Erving Goffman. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963). See, e.g., MATSON, *BLIND JUSTICE*, *supra* note 2, at 242 (averring that society believes "the blind are by virtue of their defect emotionally immature if not psychologically abnormal").

33. One could argue that in making this claim for participatory justice Professor tenBroek anticipated some of the questions raised by Samaha, *supra* note 27.

34. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944); see also MATSON, *BLIND JUSTICE*, *supra* note 2, at 119–20.

35. The thrust of this type of argument, as presented by Myrdal, is that there were a variety of obstacles keeping African Americans from participating fully in society, and that race-based oppression was at odds with the "American Creed" ideals of liberty, equality, justice, and fair treatment of all people. See generally MYRDAL, *supra* note 34.

36. *The Cross of Blindness*, Keynote Address at the National Federation of the Blind Convention (1957), quoted in MATSON, *BLIND JUSTICE*, *supra* note 2, at 242, and considered a watermark in disability advocacy. The following statement from Justice Oliver Wendell Holmes, Jr. in *Buck v. Bell* is the paradigmatic expression of this prevalent view:

We have seen more than once that the public welfare may call upon the best citizens for their lives. 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 . . . Three generations of imbeciles are enough.

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

37. See generally RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS* (2d ed. 2001)

assistance.³⁸ These programs were especially reprehensible, he noted, for establishing sheltered workshops that exploited workers with disabilities through the guise of providing meaningful work.³⁹ Professor tenBroek supported his averments in several detailed studies, including *HOPE DEFERRED: PUBLIC WELFARE AND THE BLIND*⁴⁰ and *THE LAW OF THE POOR*.⁴¹

Perhaps most significantly, Professor tenBroek's analyses went beyond identifying the sources of disability-based social exclusion to argue that the appropriate remedy for this historical phenomenon⁴² was participatory justice.⁴³ This is because "individuals cannot flourish without their joining with other humans in some sort of collective activities,"⁴⁴ and are greatly harmed by their isolation.⁴⁵ Thus, the right to live in the world entails not only physical access to areas of public accommodation,⁴⁶ but even more appreciably "a basic right indispensable to participation in the community, a substantive right to which all are

(assessing the motivations impelling United States disability-related programs and policies).

38. DEBORAH A. STONE, *THE DISABLED STATE* (1984), provides a detailed account of social welfare policies and the way these have erected an edifice between the disabled and non-disabled population. Among her more significant points is that "[t]he very act of defining a disability category determines what is expected of the nondisabled—what injuries, diseases, incapacities, and problems they will be expected to tolerate in their normal working lives." *Id.* at 4.

39. See Jacobus tenBroek, *Sheltered Workshops for the Physically Disabled*, 44 J. URB. L. 39 (1967).

40. See JACOBUS TENBROEK & FLOYD W. MATSON, *HOPE DEFERRED: PUBLIC WELFARE AND THE BLIND* (1959) [hereinafter *HOPE DEFERRED*]; tenBroek & Matson, *supra* note 30.

41. See JACOBUS TENBROEK, *THE LAW OF THE POOR* (1966); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status II*, 16 STAN. L. REV. 900 (1964); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status III*, 17 STAN. L. REV. 614 (1965). These studies were reprinted in a more accessible format in *FAMILY LIFE AND THE POOR: ESSAYS BY JACOBUS TENBROEK* (Joel F. Handler ed. 1968) [hereinafter *FAMILY LIFE AND THE POOR*].

42. "People with disabilities were often virtually invisible citizens of many societies, [and] . . . have been marginalized in nearly all cultures throughout history." GERARD QUINN & THERESIA DEGENER, *HUMAN RIGHTS AND DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY 2* (2002), available at <http://www.nhri.net/pdf/disability.pdf>. See also Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1027 (2004) ("[D]eviating from [social norms] as with a discredited condition like a disability often leads to isolation, impaired status and social condemnation.").

43. "Participatory justice parallels the social model's assertions that but for the existence of artificial barriers, people with disabilities would play an equal part in society. It also supercedes that model by asserting that a just society not only removes unneeded obstacles, but also makes participation a moral imperative." Stein, *Disability Human Rights*, *supra* note 1, at 102.

44. Anita Silvers, *People with Disabilities*, in *OXFORD HANDBOOK OF PRACTICAL ETHICS* 300, 318 (Hugh LaFollette ed. 2004). See also tenBroek, *supra* note 2, at 841 ("[N]othing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community—than the physical capacity, the public approval, and the legal right to be abroad in the land.").

45. See *FAMILY LIFE AND THE POOR*, *supra* note 41, at 213 (characterizing dependency as invoking "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"); tenBroek & Matson, *supra* note 30, at 814 ("The psychological and socio-economic handicap suffered by disabled persons far outweighs the actual physical restrictions from their impairment.").

46. See tenBroek, *supra* note 2, at 848 ("If the disabled have the right to live in the world, they must have the right to make their way into it and therefore must be entitled to use the indispensable means of access, and to use them on terms that will make the original right effective.").

fully and equally entitled.”⁴⁷

To achieve participatory justice, Professor tenBroek explained, American policy makers must commit to “integrationism”—system wide policies “entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so”⁴⁸—to the same degree as the nondisabled population.⁴⁹ Such an approach was necessary for the “basic moral, social, and political tenets of our system”⁵⁰ as well as “for the dignity of independence, the pride of self-reliance, and the sense of personal achievement”⁵¹ of the targeted population of persons with disabilities.⁵² Nor should the costs incurred by these programs be deemed problematic, for resistance steeped in financial terms ignores “the incalculable social cost, of maintaining the blind in idleness”⁵³ and of denying “the disabled the right to a free exercise of their talents, and a fair opportunity to test them,” as well as depriving “society of the contribution such members are capable of making to its work and progress.”⁵⁴

Finally, Professor tenBroek cautioned that achieving participatory justice requires moving away from a paternalistic approach in which nondisabled persons set the course of public policies affecting individuals with disabilities⁵⁵ and towards a system in which persons with disabilities actively participate in designing their own social programming.⁵⁶ Particularly notable was the connection that he drew between the social model of disability, integrationism and the realization of the rights of persons with disabilities long before the articulation of a

47. *Id.* at 858. *See also id.* at 918 (“The blind, the deaf, the lame, and the otherwise physically disabled, have the same right to privacy that others do; not only the right to rent a home or an apartment, public or private housing, but the right to live in it; the right to select their mates, raise their families and receive due protection in the safe and secure exercise of these rights.”).

48. *Id.* at 843.

49. *Id.* at 847 (“This policy has been expressed by Congress and by the state legislatures, not once, but many times, and not merely with respect to a single, narrow area of human endeavor, but with respect to the whole broad range of social, economic, and educational activity.”).

50. TENBROEK & MATSON, HOPE DEFERRED, *supra* note 40, at 106 (noting the systemic values of “individualism,” “self-reliance,” “initiative,” “dignity and worth of the human person,” as well as “full rights of participation in the normal activities of the community”).

51. tenBroek & Matson, *supra* note 30, at 835 (asseverating that attaining feelings “is as genuine and almost as vital as the need of physical survival”).

52. “Our historical conception of citizenship, our sense of community, and our sense that we are of value to the world all depend importantly on the work that we do for a living and how it is organized and understood by the larger society. In everyday language, we are what we do for a living.” Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1884 (2000). *See generally* Gregory S. Kavka, *Disability and the Right to Work*, 9 SOC. PHIL. & POL’Y 262 (1992).

53. *See* tenBroek, *supra* note 2, at 883 (“If all the blind people capable of doing so were moved into the streets and into employment, more than enough money would be saved to pad all the lampposts, erect gold-plated padded barricades before every hold in the city, with enough left over to pay for a small war or two.”).

54. TENBROEK & MATSON, HOPE DEFERRED, *supra* note 40, at 221.

55. *See* MATSON, BLIND JUSTICE, *supra* note 2, at 242 (“[T]hey must place their faith and trust, not in themselves and in their own organizations, but in the sighted public and most particularly in those who have appointed themselves the protectors and custodians of the blind.”), *quoting The Cross of Blindness*, *supra* note 36.

56. *See generally id.* at 149–69 (describing the formation by Professor tenBroek of blind activists into the National Federation of the Blind against the backdrop of federal laws and practices that prevented those individuals from collective action).

rights-based approach to disability that culminated in the adoption of international disability rights standards.⁵⁷

II. THE CRPD AND PARTICIPATORY JUSTICE

The substantive rights contained in the Convention, as well as the process of its negotiation and anticipated future implementation,⁵⁸ reflect notions of participatory justice that dovetail well with Professor tenBroek's jurisprudence on the right of persons with disabilities to live in the world.⁵⁹

A. CRPD Substantive Rights

As the first human rights treaty of the twenty-first century,⁶⁰ the Convention was modeled consciously after recent United Nations human rights treaties, most particularly the Convention on the Rights of the Child (CRC).⁶¹ Like the CRC, the Convention sets forth a full set of human rights obligations and applies them to the specific circumstances of a targeted group,⁶² in this case persons with disabilities.⁶³

Aside from a few significant exceptions, the CRPD's structure also tracks that of the CRC.⁶⁴ The Convention sets forth articles that are introductory,⁶⁵ of universal application,⁶⁶ spell out substantive rights,⁶⁷ and establish implementation and monitoring plans.⁶⁸ It further lays out rules that govern the Convention's operation⁶⁹ and, through its Optional Protocol, provides mechanisms for individual and group communications and an inquiry procedure.⁷⁰

The CRPD's preambulatory article establishes that the treaty was

57. See generally tenBroek, *supra* note 2.

58. We draw on the sources cited *supra* note 4.

59. Parenthetically, while it is fair to say disability rights advocates have been influenced by Professor tenBroek, one also wonders what might have resulted from his consideration of international law.

60. Another core convention was subsequently adopted but not yet entered into force: International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res., 20 December, 2007.

61. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 161, U.N. Doc. A/44/49 (1989).

62. See generally LAWRENCE J. LEBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS* (1995).

63. QUINN & DEGENER, *supra* note 42, deserve credit for marshalling very persuasive arguments in favor of a disability-specific convention.

64. For instance, a separate article that announces its purpose, see CRPD, *supra* note 3, at art. 1, and the absence of a formal explanation of the protected class in the definition article, see *id.* at art. 2.

65. See CRPD, *supra* note 3, at preamble, arts. 1–2.

66. See *id.* at arts. 3–9.

67. See *id.* at arts. 10–30.

68. See *id.* at arts. 31–40.

69. See *id.* at arts. 41–50.

70. See Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007).

motivated in large measure by the continuing exclusion of disabled persons,⁷¹ and recognition of the many benefits that participation by disabled persons contributes to their respective societies.⁷² The Convention also categorically affirms the social model of disability by describing it as a condition arising from “interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others” instead of inherent limitations.⁷³

Article 3 includes among the CRPD’s general principles “full and effective participation and inclusion in society,”⁷⁴ and “equality of opportunity.”⁷⁵ Article 5 requires States Parties ensure the equality of persons with disabilities in their societies while also prohibiting all types of discrimination “on the basis of disability.”⁷⁶ Separate articles directed at women⁷⁷ and at children⁷⁸ underscore these basic principles.⁷⁹

Article 8 targets the underlying attitudinal causes of disability-based discrimination by requiring States Parties to raise public awareness, and provides a list of illustrative measures. The awareness-raising provision reflects, albeit in greater elaboration, parallel provisions in human rights conventions combating gender and race discrimination.⁸⁰ Article 9 seeks to dismantle barriers erected because of discriminatory attitudes by promoting physical, technological, information, communication, economic and social accessibility⁸¹ in the public and private spheres.⁸²

Because the Convention is a comprehensive human rights treaty, its substantive articles run the gamut of life activities in clarifying, within a disability-specific context, human rights to which all persons are

71. See CRPD, *supra* note 3, at preamble (k) (expressing concern that in spite of soft laws “persons with disabilities continue to face barriers in their participation as equal members of society”).

72. See *id.* at preamble (m) (acknowledging that “full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty”).

73. See *id.* at art. 1; *id.* at preamble (e) (describing disability as a condition arising from “interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” instead of inherent limitations).

74. See *id.* at art. 3 (c).

75. See *id.* at art. 3 (e).

76. *Id.* at art. 5. For a discussion of the three main normative theories of equality (and by implication, non-discrimination) that are applied to the disability context, see QUINN & DEGENER, *supra* note 42, at 16–18. For different conceptions of disability-based equality within the context of the Americans with Disabilities Act, see generally DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY (Anita Silvers et al. eds., 1998).

77. See CRPD, *supra* note 3, at art. 6.

78. See *id.* at art. 7.

79. Other individuals with disabilities subject to multiple forms of discrimination are acknowledged, *id.* at preamble (p) (“[c]oncerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status” (emphasis in original)).

80. *Id.* at art. 8(1). For parallel provisions pertaining to awareness-raising in the racial discrimination context, see International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, Supp. No. 14, at 47, U.N. Doc. A/6014 (1966), art. 7.

81. See *id.* at art. 9.

82. See *id.* at art. 9(1).

entitled. Each of these guarantees is directed at ensuring that people with disabilities are able to participate in their communities. These elemental protections include fundamental freedoms such as the right to life,⁸³ freedom from torture,⁸⁴ the right to education,⁸⁵ employment,⁸⁶ political participation,⁸⁷ legal capacity,⁸⁸ access to justice,⁸⁹ freedom of expression and opinion,⁹⁰ privacy,⁹¹ participation in cultural life, sports and recreation⁹² (discussed in detail below),⁹³ respect for home and family,⁹⁴ personal integrity,⁹⁵ liberty of movement and nationality,⁹⁶ liberty and security of the person,⁹⁷ and adequate standard of living.⁹⁸

Although several articles might seem to embody newly created rights, in fact they were included in order to direct the means by which other Convention rights are realized and in fact connect to existing human rights.⁹⁹ For example, the articles on living independently,¹⁰⁰ personal mobility,¹⁰¹ and habilitation and rehabilitation¹⁰² are central if other more historically recognized human rights (like employment) are to be achieved.¹⁰³ In this sense, these provisions foster the full realization of the rights articulated in the Convention.

The article on independent living is especially worth noting for acknowledging “the equal right of all persons with disabilities to live in the community” and to have “full inclusion and participation in the community.”¹⁰⁴ It ensures that disabled persons “have the opportunity to choose their place of residence,”¹⁰⁵ and have access to sufficient services “to support living and inclusion in the community, and to prevent isolation or segregation from the community.”¹⁰⁶ It also ensures that children with disabilities receive equal access “to participation in play, recreation and leisure and sporting activities, including those activities in

83. See CRPD, *supra* note 3, at art. 10.

84. See *id.* at art. 15.

85. See *id.* at art. 24.

86. See *id.* at art. 27.

87. See *id.* at art. 29.

88. See *id.* at art. 12.

89. See *id.* at art. 13.

90. See *id.* at art. 21.

91. See *id.* at art. 22.

92. See *id.* at art. 30.

93. See *infra* Part III.

94. See CRPD, *supra* note 3, at art. 23.

95. See *id.* at art. 17.

96. See *id.* at art. 18.

97. See *id.* at art. 14.

98. See *id.* at art. 28.

99. See United Nations Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities: Why a Convention?*, available at <http://www.un.org/disabilities/convention/questions.shtml#one>.

100. See CRPD, *supra* note 3, at art. 19.

101. See *id.* at art. 20.

102. See *id.* at art. 26.

103. See generally Stein & Stein, *supra* note 27.

104. CRPD, *supra* note 3, at art. 19.

105. *Id.* at art. 19(a).

106. *Id.* at art. 19(b).

the school system.”¹⁰⁷

B. *CRPD Procedural Rights*

Before setting forth the procedural rights of inclusion contained in the CRPD, it bears noting that the treaty negotiation process itself broke new and inclusive ground. Disabled peoples organizations (DPOs) were present and involved in the proceedings from the start, and played a key role in the working group that drafted a foundational text.¹⁰⁸ The inclusion of disability-related civil society organizations at this stage was unprecedented in the normal course of treaty development at the United Nations.¹⁰⁹ Indeed, the physical presence and substantive input of persons with disabilities in the treaty development process cannot be over-emphasized as having affected both the substantive outcomes described above, and the procedural guarantees that followed.¹¹⁰

Participation appears in the UN Disability Convention both as a value and a general principle capable of (and requiring) specific application in civil, political, economic, social and cultural life. Beginning with the preambular declaration “that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes,”¹¹¹ the CRPD actively mandates the inclusion of disabled persons and DPOs in the process of determining the direction of their lives.¹¹² In so doing, the Convention operationalizes the mandate by Professors Gerard Quinn and Theresia Degener that disabled persons be placed at the center of all decisions affecting their lives, and therefore be viewed as “subjects and not as objects.”¹¹³

In addition to the foundational rights of autonomy and independence,¹¹⁴ and legal capacity,¹¹⁵ two instances within the CRPD

107. *Id.* at art. 19(c).

108. Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities, Report of the Working Group to the Ad Hoc Committee, U.N. Doc. A/AC.265/2004/WG.1 ¶ 1 (Jan. 27, 2004). The working group included twelve DPOs. *See id.* at ¶ 2. For a consideration of NGO participation in the early negotiations of the CRPD, see Janet E. Lord, *Mirror, Mirror on the Wall: Voice Accountability and NGOs in Human Rights Standard Setting*, 5 SETON HALL J. DIPL. INT’L REL. 93 (Summer/Fall 2004).

109. Continuing DPO involvement can be interpreted as acquiescence to their assertion of the participatory claim expressed in the mantra: “nothing about us without us.”

110. Compare, for example, the two and a half year time period in which the CRPD went from draft text to adopted document, with the more than ten years required before the rights of indigenous persons—which was negotiated without input from the targeted population was adopted as a declaration rather than as a convention. *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Sept. 13, 2007).

111. CRPD, *supra* note 3, at preamble (o).

112. *See Lauding Disability Convention as ‘Dawn of a New Era,’ UN urges Speedy Ratification* (UN Press Release 13 Dec. 2006), available at <http://www.un.org/apps/news/story.asp?NewsID=20975&Cr=disab> (summarizing statements made on the adoption of the CRPD and heralding its significance for persons with disabilities and for the development of international human rights law).

113. QUINN & DEGENER, *supra* note 42, at 1.

114. *See, e.g.,* CRPD, *supra* note 3, at art. 3(a) (expressing a fundamental principle as “[r]espect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”).

are especially noteworthy for ensuring the participatory justice rights of persons with disabilities from a procedural perspective.¹¹⁶ First, the general obligations set forth in Article 4 require that DPOs be closely consulted and actively engaged in developing and implementing law and policies related to the CRPD.¹¹⁷ This requirement is underscored by Article 33 in relation to the development of national level implementation and monitoring.¹¹⁸ Second, and building on Article 4(3), States are encouraged to involve disability civil society when preparing their reports for the monitoring body.¹¹⁹ In turn, the treaty committee is permitted to confer with DPOs if so doing will facilitate the performance of its own mandate to effectively implement the CRPD.¹²⁰

III. MAKING CULTURAL LIFE, RECREATION, LEISURE AND SPORT INCLUSIVE

Participation as a value and general principle is firmly embedded in the CRPD text and gives rise to more particular applications across the full range of civil, political, economic, social and cultural realms.¹²¹ Among these is Article 30 which expresses rights of participation in cultural life as well as sport, recreation and leisure.¹²² This inclusive mandate thereby assumes a fundamental practical significance for the worldwide community of persons with disabilities and, more generally, society as a whole.¹²³ Notably, Professor tenBroek was among the first scholars to make explicit the connection between inclusion and the participation of persons with disabilities in sport and recreation, noting the power of such participation as a vehicle for inclusion and as social change conveyor.¹²⁴

115. See CRPD, *supra* note 3, at art. 12.

116. For a general treatment of how process affects substance in the context of deciding fundamental issues impacting persons with disabilities, see Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REFORM 933 (1985).

117. *Id.* at art. 4(3) (“In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.”).

118. See *id.* at art. 33(3) (“Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.”).

119. See *id.* at art. 35(4) (“States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.”).

120. See *id.* at art. 38(b) (permitting the treaty body to “consult, as appropriate, other relevant bodies instituted by international human rights treaties”).

121. See *id.* at art. 3 (c).

122. See *id.* at art. 30(b).

123. For a collection of work on this topic, see SPORT IN THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (Eli Wolff et al. eds. 2007) [hereinafter UN SPORT], available at <http://www.sportanddev.org/data/document/document/336.pdf>.

124. See tenBroek, *supra* note 2 at 851–52

A. *Defining Social Rights of Participation in Cultural Life and Sport*

CRPD Article 30 on cultural life, recreation, leisure and sport makes participation manifest in a largely ignored realm of life. Long relegated to the margins of international human rights instruments, and then as an adjunct to provisions on employment,¹²⁵ the right to participate in the cultural life of one's community or the right to participate in sport is something of a second class right. Indeed, when reflected in various human rights instruments, including the Universal Declaration of Human Rights,¹²⁶ and the International Covenant on Economic, Social and Cultural Rights,¹²⁷ these rights are not as well developed as other human rights and are often forgotten. Thus, the recognized right in the CRPD of persons with disabilities to participate in a wide array of cultural, recreational, sporting, and leisure activities as central to their full social inclusion, breaks with previous practice.¹²⁸

Article 30 of the CRPD recognizes a number of specific measures designed to enhance participation in various realms of social as well as cultural life. These include the duty of States to take measures to support access to places where cultural performances or services are held, such as theatres, museums, cinemas, libraries and tourism services.¹²⁹ It also includes, as far as possible, access to monuments and sites of national cultural importance.¹³⁰ Confronting the passivity that paternalistic and non-participatory models of disability typically evoke, the CRPD affirms the right of people with disabilities to develop their creative, artistic, and intellectual potential for both individual and societal benefit.¹³¹

In so doing, the Convention recognizes that people with disabilities are full participants in the cultural life of their communities as are artists, musicians, scholars and actors. Further facilitating entry points into cultural life for persons with disabilities, Article 30 expresses the duty of States to ensure that laws protecting intellectual property rights do not present unreasonable or discriminatory barriers in access to cultural materials by persons with disabilities.¹³² This includes translating books and other material into Braille, providing audio-cassettes or providing sign language or forms of accessible technology for artistic

125. See, e.g., *International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR]*, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), at art. 7, 7(d) ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular . . . Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.").

126. See Universal Declaration of Human Rights, Dec. 10, 1948, art. 24, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) ("Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.").

127. *ICESCR*, *supra* note 125.

128. See generally UN SPORT, *supra* note 123.

129. CRPD, *supra* note 3, at art. 30(1)(c).

130. See *id.*

131. See *id.* at art. 30(2).

132. See *id.* at art. 30(3).

performances.¹³³

The right of persons with disabilities to equal recognition and support of their cultural and linguistic identity is likewise a fundamental cultural right expressed in Article 30,¹³⁴ and serves to further facilitate participation in society on one's own terms.¹³⁵ This includes, for example, the right to use sign language as well as the recognition and support of Deaf culture.¹³⁶ The CRPD therefore recognizes that people who are part of Deaf culture use sign language as their primary language and claim their identity as members of a cultural or language minority and not necessarily as persons with disabilities.¹³⁷

Finally, in its fullest expression in a human rights convention, the CRPD articulates the scope of the right of persons with disabilities to participate in sport, recreation and leisure, as well as the right of disabled children to play.¹³⁸ States must encourage and promote the inclusion of persons with disabilities in mainstream sporting activities, an approach that favors inclusive programming.¹³⁹ Applying the general principles of the CRPD to this provision, people with disabilities are to enjoy equal access to sport and recreational facilities (such as swimming pools and playgrounds) and have opportunities for participation in both disability-specific sport and recreation (e.g., wheelchair basketball) and mainstream sport programming.¹⁴⁰ It further affirms the rights of persons with disabilities to organize, develop, and participate in sport and recreation with other persons with disabilities, including activities organized specifically for persons with disabilities in both mainstream as

133. Note that the CRPD defines "communication" in art. 2 as including "languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology." See also *id.* at art. 2, ¶ 1.

134. See *id.* at art. 30(4) ("Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.").

135. LENNARD J. DAVIS, *MY SENSE OF SILENCE: MEMOIRS OF A CHILDHOOD WITH DEAFNESS* (2000).

136. See CRPD, *supra* note 3, at art. 30(4).

137. See generally Carol A. Padden, *From the Cultural to the Bicultural: The Modern Deaf Community*, in *CULTURAL AND LANGUAGE DIVERSITY AND THE DEAF EXPERIENCE* (I. Parasnis ed., 1996); Edward Dolnick, *Deafness as Culture*, 37 *ATLANTIC* (Sept. 1993); HARLAN LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY* (1992); Australian Association of the Deaf, *Policy Statement: Deaf People—A Linguistic and Cultural Minority Community or A Disability Group? White Paper* (1992); Bernard Mottez, *Deaf Identity*, 68 *SIGN LANG. STUD.* 195 (1990); Carol A. Padden, & Tom L. Humphries, *DEAF IN AMERICA: VOICES FROM A CULTURE* (1988); Timothy Reagan, *The Deaf as a Linguistic Minority: Educational Considerations*, 55 *HARV. ED. REV.* 265–277 (1985); Carol A. Padden, *The Deaf Community and the Culture of Deaf People in SIGN LANGUAGE AND THE DEAF COMMUNITY* (C. Baker & R. Battison eds., 1980).

138. See *id.* at art. 30(5).

139. "Inclusion" in this context has been defined as "the final stage of integration of people with disabilities in sport competition or organization, in which they are involved, accepted and respected at all levels of the competition or organization." Howard L. Nixon II, *Constructing Diverse Sports Opportunities for People with Disabilities*, 31 *J. SPORT & SOCIAL ISSUES* 417, 419 (2007).

140. CRPD, *supra* note 3, at art. 30(5)(a) (calling on States "[t]o encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels").

well as disability-specific sport.¹⁴¹

In addition to ensuring their right to access and to use sporting, recreational and tourism facilities such as sport arenas, community pools, museums, cinemas, and hotels, states must also take measures to ensure that persons with disabilities are included as recipients of services and programming by organizers.¹⁴² Finally, Article 30 recognizes the right of children with disabilities to play and to participate in recreation, leisure and sporting activities in the school system.¹⁴³ This also includes access to playgrounds in the community and adaptive physical education in schools.¹⁴⁴

B. Participation in Sport and Cultural Life as a Connector and Conveyor to Living in Community with Others

A primary goal of the disability rights movement, and indeed of other civil rights movements, has been the systematic removal of discriminatory and isolating barriers in social life and the equalization of opportunities in support of full participation in society.¹⁴⁵ An important dimension of this work therefore has included a push for the realization of participatory justice in sport and cultural life.¹⁴⁶ The potential for sport and cultural activities to serve as relational vehicles supporting a broad array of human rights ideas and rights-based interventions is increasingly understood.¹⁴⁷ It is likewise expressed in an expansion of programming at community, national and international levels in which sport and cultural activities serve as cohesion tools and conveyors of social issue messaging.¹⁴⁸ The role of sport in fostering peacebuilding

141. See *id.* at art. 30(5)(b) (requiring States to take measures “[t]o ensure that persons with disabilities have an opportunity to organize, develop, and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources”).

142. See *id.* at art. 30(5)(e) (requiring States “[t]o ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities”); art. 30(5)(c) (requiring States to take measures “[t]o ensure that persons with disabilities have access to sporting, recreational and tourism venues”).

143. See *id.* at art. 30(5)(d) (calling on States “[t]o ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system”).

144. On adapted physical activity for children with disabilities generally, see ADAPTED PHYSICAL ACTIVITY (Robert Daniel Steadward, et al eds. 2003). For a plan of action on implementing the right to play and inclusive of children with disabilities, see City Council of Southampton, *Southampton Play—A Play Strategy for the Children and Young People of Southampton*, March 7, 2005, [http://www.southampton.gov.uk/Images/Southampton%20Play%20Strategy%207%20March%202005%20\(3\)_tcm46-175264.pdf](http://www.southampton.gov.uk/Images/Southampton%20Play%20Strategy%207%20March%202005%20(3)_tcm46-175264.pdf).

145. See, e.g., Scotch, *supra* note 37 *passim*.

146. Eli Wolff, T. Fay & M.A. Hums, *Raising the Bar: Inclusion of People with Disabilities in Sport*, 2004 Disability in Sport Symposium (2004) (on file with authors).

147. See, e.g., UNICEF, IMPLEMENTATION HANDBOOK ON THE RIGHTS OF THE CHILD 468 (2d ed., 2002).

148. See Charlotte McClain, *Sport for Inclusive Development!* in UN SPORT, *supra* note 123, at 20, 21.

and social mobilization is also increasingly recognized.¹⁴⁹ Disability sport, for example, has been effectively utilized as a tool for continued national reconciliation in Cambodia.¹⁵⁰

For members of the disability community, participation in cultural life and sporting activities serves as a vital channel of engagement with society when such participation is embraced by the community. Much has been written about the role that participation in sport and recreation can have on increasing the self-reliance and empowerment of persons with disabilities, and in providing tools to facilitate fuller community engagement in all realms, including education and employment.¹⁵¹ Conversely, the consequences of being denied meaningful opportunities in sport and cultural life can be devastating. Isolation from culturally enriching activities can reinforce internalized oppression and disconnection from community and the exclusion of children with disabilities from play and more structured forms of recreation can stifle both mental and physical well-being.¹⁵² One of the fundamental human rights infringements documented by DPOs reporting on abuses in institutions such as mental health facilities or orphanages for children with disabilities is the lack of stimulation offered by engagement in sport, recreational and cultural activities.¹⁵³ In its most extreme and abusive form, children with disabilities are tied to furniture or literally caged and rendered immobile all day, often on the basis of a bogus strategy of protection by institution staff.¹⁵⁴ Failures in this context clearly contribute to other human rights violations, such as the right to the highest attainable standard of health, and thereby underscore the interrelatedness of rights.¹⁵⁵

149. See United Nations Inter-Agency Task Force on Sport for Development and Peace, *Sport for Development and Peace: Towards Achieving the Millennium Goals* (2003), <http://www.un.org/themes/sport/reportE.pdf>.

150. See Sport for Development and Peace Working Group, *Sport League Drives Reintegration of Disability Community in Cambodia*, (on file with authors) (detailing the success story of the National Standing Cambodian Volleyball League). For more on the team, see the League website, <http://www.standupcambodia.org>.

151. See, e.g., Goli Hashemi and Penny Parnes, *Sport as a Means to Foster Inclusion, Health and Well-Being of People with Disabilities*, (2008), available at <http://iwg.sportanddev.org>; see also Reuben McCarthy, *Sport and Children with Disabilities* in UN SPORT, *supra* note 123 at 14, 15.

152. See, e.g., D. HUTCHINSON & C. TENNYSON, *TRANSITION TO ADULTHOOD* (1986) (discussing disability oppression in the context of childhood).

153. This point is made, with great emphasis, in each of the following reports by the international non-governmental organization, Mental Disability Rights International: *RUINED LIVES: SEGREGATION FROM SOCIETY IN ARGENTINA'S PSYCHIATRIC ASYLUMS* (2007); *HIDDEN SUFFERING: ROMANIA'S SEGREGATION AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES* (2006); *BEHIND CLOSED DOORS: HUMAN RIGHTS ABUSES IN THE PSYCHIATRIC FACILITIES, ORPHANAGES AND REHABILITATION CENTERS OF TURKEY* (2005); *HUMAN RIGHTS AND MENTAL HEALTH IN PERU* (2004); *NOT ON THE AGENDA: HUMAN RIGHTS OF PEOPLE WITH MENTAL DISABILITIES IN KOSOVO* (2002); *HUMAN RIGHTS & MENTAL HEALTH: MEXICO* (2000); *CHILDREN IN RUSSIA'S INSTITUTIONS: HUMAN RIGHTS AND OPPORTUNITIES FOR REFORM* (1999); *HUMAN RIGHTS & MENTAL HEALTH: HUNGARY* (1997); *HUMAN RIGHTS & MENTAL HEALTH: URUGUAY* (1995). Each of these reports is available at <http://www.mdri.org/publications/index.htm>.

154. For documentation of caged bedding abuses, see *MENTAL DISABILITY ADVOCACY CENTER, CAGED BEDS: INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT IN FOUR EUROPEAN COUNTRIES* (2003), available at http://www.mdac.info/documents/118_MDAC_Cage_Bed_Report.pdf.

155. World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and

A rights-based approach to the idea of participation as applied to sport and cultural life seeks to understand how persons with disabilities can be included in ways that promote individual as well as community empowerment and development. Inclusion under the model envisioned by the Convention also requires participation in the selection of appropriate sporting and cultural activities and roles within sport (as spectator, as competitor) in line with the particular, individualized motivations, interest and talents and, clearly, consultation with people with disabilities themselves and their representative organizations.¹⁵⁶ Special Olympics exemplifies the notion of providing modified sport and recreational activities in individualized and structured frameworks to facilitate successful achievement.¹⁵⁷ The organization's premise is that people with intellectual disabilities can, with instruction and encouragement, derive numerous benefits from participation in individual and team sports designed in accordance with the age and ability level of each athlete and that the community at large benefits from participation and observation in events.¹⁵⁸ As one commentator has argued persuasively in the context of supporting fairness and participation in sport, through developing inclusive models opening sport options for disabled athletes opens options for all including "able-bodied people who find the existing sports opportunity structure inaccessible or unappealing."¹⁵⁹

The role that media plays in and around sporting, recreational and cultural life opportunities is also an important factor in combating—or all too frequently, reinforcing—disability discrimination and stereotyping.¹⁶⁰ Public media serves to shape popular conceptions about disability and ideas about the capacity of people with disabilities to be competent in various types of sporting and cultural activities.¹⁶¹ Scholars working in

Programme of Action, U.N. Doc A/CONF. 157/24, ¶ 5 (July 12, 1993), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En).

156. It should be underscored that designating participation as a general principle in Article 3 and consultation with persons with disabilities and their representative organization a general obligation in Article 4(3), requires application to Article 30. CRPD, *supra* note 3, at arts. 3(c), 4(3).

157. Special Olympics offers 30 Olympic-type individual and team sports that provide meaningful training and competition opportunities for persons with intellectual disabilities, including age-appropriate activities and activities for lower ability athletes. For persons who may not yet possess the physical and/or behavioral skills necessary to participate in these sports, Special Olympics offers the Motor Activities Training Program which provides the means for people to participate in appropriate recreation activities geared to their ability levels. See generally Special Olympics, available at <http://www.specialolympics.org>.

158. See *id.*

159. Nixon, *supra* note 139, at 430.

160. For critical assessments of the media coverage of disability sport, see generally M. Hardin & B. Hardin, *Performance or Participation . . . Pluralism or Hegemony? Images of Disability & Gender in Sports 'n Spokes Magazine*, 25 DISABILITY STUD. QTR. (2005); M. Hardin, S. Lynn, & K. Walsdorf, *Challenge and Conformity on 'Contested Terrain': Images of Women in Four Women's Sport/Fitness Magazines*, 53 SEX ROLES 105 (2005); K.W. Maas & C.A. Hasbrook, *Media Promotion of the Paradigm Citizen/Golfer: An Analysis of Golf Magazines' Representations of Disability, Gender, and Age*, 18 SOC. SPORT J. 21 (2001); B. Hardin, et al., *Missing in Action? Images of Disability in Sports Illustrated for Kids*, 21 DISABILITY STUD. QTR. (2001).

161. Karen Depauw, for example, has argued that the association of disability and sport compels a redefinition of athleticism and notions of the body according to which sport is socially constructed as an exclusive activity of the able-bodied participant. See Karen P. Depauw, *The (In)visibility of Disability: Cultural Context and "Sporting Bodies,"* QUEST 416-430 (1997); see also

the area of disability sport have argued that the visibility of an increasing number of successful athletes with disabilities in the mainstream could help to transform negative stereotypes about disability, persons with disabilities and the sporting body.¹⁶² This idea is certainly expressed in the common advocacy tool of celebrating December 3rd as the International Day of Persons with Disabilities¹⁶³ in which community sporting events hosted by DPOs and disabled participants seek to raise the image and voice of people with disabilities in their societies.¹⁶⁴ Similarly, the visibility of people with disabilities in the performing arts can likewise have a positive impact on cultural norms about disability.¹⁶⁵

In sum, Article 30 of the CRPD seeks to ensure participatory justice for persons with disabilities by mandating organizing principles and structural characteristics in a way that makes access to and participation in those activities equal and rewarding. Like the other articles of the Convention, the sports, recreation and cultural life provisions are harmonious with the theories put forward by Professor tenBroek's scholarship.

CONCLUSION

Keeping with Professor Jacobus tenBroek's notion of participatory justice, Article 30 of the Convention serves as a trigger for understanding participation as independence, autonomy, and individual flourishing in community with others. A relational notion of participatory justice moves well beyond purely instrumentalist understandings of participation as expressed in more traditional Fourteenth Amendment scholarship¹⁶⁶ as a means for attaining a particular outcome and

KAREN P. DEPAUW & SUSAN J. GAVRON, *DISABILITY SPORT* (2005); Karen P. Depauw, *Girls and Women with Disabilities in Sport*, 70 J. PHYS. ED. REC. & DANCE (1999).

162. See, e.g., D. Promis et. al, *Reconceptualizing Inclusion: The Politics of University Sports and Recreation Programs for Students with Mobility Impairments*, 18 SOC. SPORT J. 37 (2001) (arguing that people with disabilities need to be seen as athletes regardless of their impairment which requires a reconceptualization of the sporting body).

163. For more on International Day of Persons with Disabilities, see United Nations Enable, International Day of Persons with Disabilities—December 3, <http://www.un.org/disabilities/default.asp?navid=22&pid=109>.

164. In 1997, the theme for December 3 was Arts, Sports and Disabilities and the UN focused its celebration efforts that year on the achievements and contributions of artists and athletes with disabilities. The UN stated in connection with the events that:

Arts and sports play a vital role in preparing people with disabilities for learning and career success. Participation nurtures the independence and self-worth of persons with disabilities and contributes to the cultural and economic life of their communities. This, in turn, can help bring about positive changes in public attitudes.

United Nations Disabled Persons Bulletin No. 3 of 1997, Secretary General's Message, <http://www.un.org/esa/socdev/enable/disb973b.htm>.

165. This is one of the premises of *Art and Soul*, an international celebration of arts, disability and culture, the purpose of which is to hold visual and performing arts workshops, exhibits, and artist development sessions to provide emerging artists with disabilities opportunities to explore abilities, expand careers and heighten artistic exposure. See Ability Arts, Programs, Art & Soul, <http://www.abilityarts.org/programs.htm>.

166. For more on the limitations of due process scholarship focusing on process outcomes

disconnected from notions of dignity, broad notions of fairness and the like. It is this fuller dimension of participatory justice that the CRPD drafters, as well as Professor tenBroek, had foremost in mind in realizing the right of persons with disabilities to live in the world.

to the exclusion of examining with care the process itself, see JERRY MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 161–162 (1985).