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Books and People with Print Disabilities



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BOOKS AND PEOPLE WITH PRINT DISABILITIES

Public Value and the International Disability Human Rights Agenda

David Adair and Paul Harpur

Introduction

The World Blind Union calls blind and partially sighted people's lack of access to books and other printed materials in accessible formats a global "book famine." In the richest countries, less than 10 percent of published materials are accessible, while in developing countries, the figure is less than 1 percent.¹ Technology is helping, however legal barriers perpetuate the book famine.² Governments have framed the problem as a matter of how to manage rival rights claims by copyright holders and those seeking access. They respond to access requests by authorizing a limited number of institutions to make copies of copyrighted materials available to individuals with disabilities, who may then use adaptive technologies to gain access to titles covered by the exception. This ad hoc "exceptions paradigm" is inconsistent, costly, inefficient and slow to respond to demand from people with print disabilities.³

The exceptions paradigm is rejected by contemporary disability activists, who perceive it as a mutable governmental strategy of dispute management, not a neutral and rational recognition of limits set by technology, economics or even impairment.⁴ Rejecting individualistic definitions of disability, they urge governments to act in the public interest and intervene in the structural maintenance of policy-induced disablement, to ensure that the rights and interests of those without adequate access to educational and other cultural resources are prioritized in public policy formulation and decision-making. To date, the most promising results of this advocacy are innovations in the international copyright regime, notably the World Intellectual Property Organization's (WIPO) Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the Marrakesh Treaty).⁵ The treaty entered into force on September 30, 2016, after attracting the required 20 signatories. The number rose to 70 after the European Union signed it in October 2018, to take effect on January 1, 2019.⁶ The Marrakesh Treaty promises to shift the balance struck between competing rights claims, in favor of people who are unable to read print media without audio technologies.

Public and non-profit organizations are the main facilitators of access to useable content by vision-impaired people. Their activities in pursuit of this mission give programmatic form to the principles embodied in the changing governmental paradigm. This chapter therefore acknowledges changes in how cultural leadership by the public and non-profit sectors is theorized and

practiced: developments that are concurrent with the new accommodations of the governmental responses to the book famine and the rise of the more assertive disability politics. Leadership in the sector increasingly derives its legitimacy and support from stakeholders, while its authority is exercised through trust and consensus-building. These sectoral changes have been developed internationally, in response to local and global conditions, but are perhaps most coherently theorized in the United States, in strategic management studies, under the rubric “public value.”⁷

A public value analysis would see public and non-profit organizations being effective in addressing the problem of the book famine to the extent that they can coordinate the values of their authorizers (strategic partners of varying kinds, including public agencies that resource and authorize their value-producing activities), and the expectations of those who derive direct and indirect benefits from these activities (ranging from vision-impaired individuals and groups who benefit directly from access, to communities and the broader society, who benefit more or less indirectly).⁸ These diverse benefits constitute the organizations’ public value. From this perspective, the recent innovations in the international copyright regime are significant changes in the organizations’ authorizing environments. In order to maximize their use as resources for increasing sociocultural participation, the organizations and their client-citizens must be able to demonstrate that the benefits created are not unambiguous and mutually excluding “private” and “public” goods, but exist in an interlinked value chain that stretches out from the individual to the whole society, from the intrinsic pleasures of reading, to the instrumental social and economic impacts that flow from reading becoming accessible to all.⁹ Making this case to authorizers involves affirming the principle that public and non-profit agencies exist in order to “make a positive difference in the individual and collective lives of citizens.”¹⁰ It also requires the rights-based definition of citizenship to be augmented with one that accommodates the social values of cultural participation and resourcing.

This chapter sets out to identify potentially productive synergies between the changing international copyright regime, contemporary disability politics and the public and non-profit sectors that have been authorized and resourced to resolve the problem of the book famine. It begins by considering important shifts in how disability politics is theorized and practiced, before discussing participatory forms of citizenship and corresponding initiatives by public agencies to advocate and realize citizens’ cultural rights. The chapter acknowledges the Convention on the Rights of Persons with Disabilities (CRPD) as a significant development in the advancement of those rights, while also recognizing its limitations and noting how such obstacles have been theorized and notionally resolved in legal theory, if not in the “exceptions paradigm.” A more significant development discussed in the chapter is the Marrakesh Treaty. Australia signed the Marrakesh Treaty on June 23, 2014, to enter into force on September 30 2016.¹¹ We use the Australian context as an example of obstacles and possible solutions for integrating the revised copyright laws into a public policy domain where consensus comes through consultative cultural leadership. The chapter concludes by synthesizing the issues it has raised and identifying an existing field of theoretical and practical resources that could resolve them.

The Social Model of Disability Politics

The exceptions paradigm treats the market of uncapped copyright protections as the norm, and access by people with print disabilities as a relatively rare, and thus tolerable, exception that can be accommodated up until the point at which it destabilizes the market overall. Under this governmental regime, public and non-profit agencies are authorized to manage access using this market-prioritizing mechanism. Disability theorists and activists have long questioned attempts to use appeals to tolerance to advance the interests of people with disabilities. For example, Wendy Brown argues that the term “tolerance” identifies a situation where a divergence is morally

repugnant, but endured under sufferance for a greater good.¹² Brown observes that in most professional fields, “tolerance” refers to encounters with an undesirable element. In engineering or statistics, for instance, it is the point at which an impure factor creates a serious defect. In plant physiology, it is the point at which a substance becomes fatal to life. Tolerance, “involves managing the presence of the undesirable, the tasteless, the faulty—even the revolting, repugnant, or vile.”¹³ Disability theorists and activists consequently favor a social model of disability that sees little point in calling for tolerance, while leaving unaddressed the structural conditions that create and reproduce power imbalances and inequalities between people with different kinds and levels of ability.¹⁴

The social model of disability—or more properly, disablement—treats it in sociopolitical terms, not as being necessarily determined by technological limitations, the economic “bottom line” or individual impairment.¹⁵ From this perspective, universal design that gives full access is within reach,¹⁶ the technology is available to digitize existing works and it is even easier to ensure that all works sold now and in the future in electronic form are made accessible at relatively little cost. Consequently, the major access problems facing people with print disabilities are barriers created by active societal choices to prioritize the interests of copyright owners. The example of Amazon’s Kindle e-book reader illustrates this argument.

When Amazon released the Kindle 2 in 2009, it included text-to-speech output that made it potentially accessible for persons with low vision and blindness. This was a remarkable advance for persons with print disabilities.¹⁷ The American Author’s Guild responded to the possibility of accessibility by urging its members to sign contracts blocking this potential capability, on the basis of it being a copyright infringement for a book to be read aloud by a machine, even in private contexts, unless the copyright owner grants permission.¹⁸ After 2011, Amazon opted to remove the audio features from subsequent Kindle models.¹⁹ This decision resulted in persons who rely on screen readers being disabled and excluded from using this popular e-book reader. In this case, individuals were not print disabled because of their low vision or other impairment, or because of technological limitations, but due to a decision by Amazon: an action that was mandated and legitimized by the current regulatory regime. Gerard Goggin refers to Amazon’s action as “one of the most scandalous examples in the world of digital books.”²⁰

Despite the Amazon decision to curtail the capacity of persons with print disabilities to access e-books, it continued to market the Kindle to school districts and universities, which are major suppliers of e-book technologies to their students. Only after the National Federation of the Blind (NFB) led a campaign pointing to these organizations’ “obligation under federal law to purchase or deploy only accessible technology and content”²¹ did Amazon reverse its decision in 2016 and restore audio functionality via Bluetooth technology.²² In that year, the NFB announced that it had entered into an ongoing collaborative relationship with Amazon to resolve current access issues and avoid future ones. For its part, Amazon publicly reaffirmed the principle of equal access in digital learning resources used by educational institutions.²³

Since disablement is not adequately accounted for by impairment, economic or technological limitations, much of the failure to ensure adequate levels of access can be attributed to a systematic lack of political will and imagination to make structural changes to the regulatory regime that creates the problem. By casting the major barriers to accessibility in these sociopolitical terms, disability activists have been able to draw attention to the deliberative forums in which public policy is created, and from where public and non-profit agencies and regulatory initiatives derive their authority and resources: forums making up part of the responsible organizations’ authorizing environments. By recasting the problem from disability to disablement, the social model of disability politics challenges organizational participants in these forums, and those whom they represent, to reconsider how economic, social and cultural factors can maximize, rather than limit, citizens’ abilities and opportunities to access and use published reading materials.

Culture and Citizenship

The multifaceted and mutable nature of citizenship was theorized in the mid-twentieth century by Thomas H. Marshall, who distinguished what he called its civil, political and social forms.²⁴ Marshall's initial identification of the typology was brief and his treatment of social citizenship has been criticized for focusing on rights, at the expense of a more active, socially dispersed and capacity-focused conception of citizenship,²⁵ but the typology remains a key contribution to efforts to critically interpret and reconfigure the nexus of culture and citizenship. Mitchell Cohen describes Marshall's account as embracing:

civil citizenship (particularly the ideas of equality before the law and individual rights), political citizenship (particularly universal suffrage), and social citizenship (the notion that all members of a polity ought to enjoy and to share at least a basic level of social-economic and cultural well-being).²⁶

As these understandings developed and spread, they elaborated and extended the institution of citizenship, in the process making it more active and thus rewarding and challenging, for governments and citizens alike. Current efforts to ensure that citizens with print disabilities have equality of access to published materials exemplify these ongoing attempts to build upon rights, so they are "practically enacted and realized through actual participation in the community."²⁷

Citizenship is not a finite resource diminished by extension and elaboration, but a dynamic institution over whose features citizens deliberate, in the process expressing, disputing and refining their common aspirations. As Marshall put it:

There is no universal principle which determines what [a citizen's] rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed. The urge forward along the path thus plotted is an urge towards a fuller measure of equality, an enrichment of the stuff of which the status is made and an increase in the number of those on whom the status is bestowed.²⁸

Equality of access to the means of participating in the cultural life of society is an enduring theme in public policy and has been articulated at different levels and in varied stages of the policy process.²⁹ American examples include the "Cultural Bill of Rights" written by Bill Ivey, former Chair of the US National Endowment for the Arts, in 2008. It proposes that, "citizens of a mature democracy possess a just claim to a cultural system that enables them to engage heritage and expand individual creative capacity."³⁰ In the Australian context, *Creative Australia*, a peak national cultural policy document that was developed after years of wide-ranging stakeholder consultations, likewise articulated this aspiration in the second of its five main goals: "Ensure that government support reflects the diversity of Australia and that all citizens, wherever they live, whatever their background or circumstances, have a right to shape our cultural identity and its expression."³¹ At the international level, Article 27(1) of the 1948 United Nations Universal Declaration of Human Rights states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."³² Continuing this theme, Article 2(7) of the 2005 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions states that, "Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging

mutual understanding.”³³ Since the mid-twentieth century, these and numerous other national and international initiatives have sought to build equality of access and opportunities for cultural participation into citizenship.

The CRPD

A significant moment in the history of citizenship came when the CRPD was adopted by the United Nations and rapidly ratified by a number of member states.³⁴ The CRPD is the declaration of ability equality for persons with disabilities and sweeps in a new disability human rights paradigm.³⁵ The CRPD begins by “[recognizing] the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.”³⁶ Importantly, it distinguishes itself from earlier initiatives by drawing on the social model of disability to frame the problem of lack of access³⁷ and by obliging state signatories to solve it by adopting proactive laws and policies.³⁸ Article 21 requires member states to:

Take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.³⁹

However, the provision’s impact is then somewhat diluted by requirements to only “[urge] private entities”⁴⁰ and “[encourage] the mass media”⁴¹ to make information and services available in accessible formats: qualifications that fall short of the more assertive agendas of the advocates of the social model of disability politics. If the CRPD baulks at compelling the private sector to act, the right to education in Article 24 nevertheless provides citizens with disabilities with a strong right to education, “to facilitate their full and equal participation in education and as members of the community,” while Article 27(1) entitles them to have the “opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.”⁴²

Most relevantly, in Article 30, the CRPD directly addresses rights to participate in culture, recreation and leisure. Article 30(1) entitles persons with disabilities to “take part on an equal basis with others in cultural life,” and requires that member states “shall take all appropriate measures to ensure that persons with disabilities ... [e]njoy access to cultural materials in accessible formats.”⁴³ Here “cultural material” can be interpreted widely to include literature, artefacts, radio, screen and television productions, performance and visual arts.⁴⁴ Article 30(3) goes further, directly addressing potential conflicts with copyright: “States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.” In this way, the CRPD affirms access to cultural materials as a human right in international law, as first codified in Article 15 of the International Covenant on Economic, Social and Cultural Rights, which entered into force in 1976.⁴⁵ Taken together, these provisions impose a strong positive obligation on member states to ensure persons with disabilities enjoy equal access to cultural goods and services, including to print material protected by copyright.⁴⁶ It should be noted, however, that this agenda remains seriously curtailed by the refusal of the government of the United States—the largest producer of published materials—to ratify the CRPD. This lack of political will demonstrates that while international human rights initiatives create legal norms, a rights discourse does not resonate equally or in the same ways in all national jurisdictions.

The American jurist, legal theorist and political philosopher Martha Albertson Fineman attributes the reluctance of the US government to curtail private interests to the pervasive influence of how the human subject is theorized in liberal philosophy: a subject with presumed attributes of autonomy, personal responsibility and self-reliance. Fineman writes that this has shaped “our [American] economic, legal, and political principles” and that it underpins a contractual vision of social organization that restrains the state from “interfering with the liberal subject’s entitlements to autonomy and liberty.”⁴⁷ As her alternative, Fineman theorizes a “vulnerable subject”—one existing in a “state of constant possibility of harm”—and uses this potential for vulnerability to advocate for a paradigmatic shift in conceptualizing the power of state institutions to empower those who are vulnerable: institutions “that are created and maintained under the legitimating authority of the state, since the ultimate objective of a vulnerability analysis is to argue that the state must be more responsive to, and responsible for, vulnerability.”⁴⁸ Fineman’s call for a paradigm shift resonates with the social model of disability/disablement, Marshall’s social form of citizenship and the distinctive mandate of public and non-profit organizations affirmed by public value theory and practice. Changes to the international copyright regime are inputs into this mix and its potential to address the problem of the book famine.

The Marrakesh Treaty

If the CRPD began the process of unsettling the exceptions paradigm, a more important development occurred in 2013, when the Marrakesh Treaty was opened for signing. It significantly increases obligations contained within international IP laws and reflects a new disability paradigm.⁴⁹ The impact of this paradigm shift can be illustrated by the fact that the WIPO,⁵⁰ an organization established and committed to restricting access, in the face of staunch opposition from copyright lobbyists, adopted the Marrakesh Treaty.⁵¹ By embedding disability rights within an international copyright law instrument under the auspices of WIPO, it constitutes a significant change in the authorizing environments of organizations with public mandates to resolve the problem of the book famine.

The paradigm shift is also being felt in domestic law reforms. The Marrakesh Treaty Implementation Act (USA) in October 2018 is one of the more significant domestic developments. It will open up the vast resources of the United States disability digital libraries to global sharing.⁵²

The following are particularly important features of the Marrakesh Treaty. Some conditions and obstacles vary between jurisdictions, while others are more common. Those presented here with comments on their applicability to the Australian context, are included to demonstrate how one signatory state brought its own regulatory regime into compliance with the Treaty.

First, the Marrakesh Treaty requires signatories to adopt copyright exceptions for the non-profit creation and distribution of accessible versions of works for the benefit of people with print disabilities.⁵³ This provision requires all signatories to bring their copyright legislation into line with the standard already attained in developed countries. The Marrakesh Treaty is one of the rare international instruments that mandate, rather than merely permit, exceptions to copyright holders’ exclusive rights. It thus imposes a ceiling on the strength of copyright interests relative to others.⁵⁴ The Australian *Copyright Amendment (Disability Access and Other Measures) Bill 2017* (Cth) was passed on Thursday June 15, 2017.⁵⁵ The amended Act⁵⁶ made Australian copyright law more compliant with this requirement by introducing a single fair dealing exception to replace the more complex statutory licence system.⁵⁷

Second, the Marrakesh Treaty requires signatories to allow organizations assisting people with print disabilities to either make copies available to similar organizations in other signatory countries, or distribute the copies directly to disabled individuals in those countries.⁵⁸ WIPO is also required to establish information-sharing procedures to enhance cooperation between member

states, by establishing a voluntary register of institutions assisting people with print disabilities.⁵⁹ These provisions reduce the gross inefficiency of the system that requires institutions in each country to digitize their own accessible copies of each work. The provisions allow economies of scale, by enabling institutions in some countries to provide works directly to beneficiaries in other countries. Importantly, comparatively well-funded organizations in some countries are allowed to assist people, particularly in developing countries, who do not have strong institutional support.⁶⁰ While the Copyright Amendment (Disability Access And Other Measures) Act 2017 (Cth) Schedule 1 introduced a new fair-dealing exemption for the purpose of access by persons with a disability, as well as new powers for organizations that help this group, the new sections 113E and 113F of the Copyright Act 1968 (Cth) do not facilitate the international exchange of accessible works. Similarly, the Schedule 1 exemptions, which facilitate access for the print disabled to sound recordings and cinematograph film, found in the amended section 248A(1) paragraphs (d) and (e), do not enable the international exchange of works made accessible to the print disabled. Accordingly, a further change to Australian copyright law will be required to enable institutions assisting people with print disabilities to import and export accessibly formatted copies.

Finally, the Marrakesh Treaty requires states to introduce exceptions to their anti-circumvention schemes (where applicable) to ensure that those schemes “[do] not prevent beneficiary persons from enjoying the limitations and exceptions”⁶¹ provided by the Treaty. This is particularly important for enabling people with disabilities (or their representatives) to circumvent digital rights management systems (digital locks on copyrighted materials) placed on e-books and other works, so they can utilize adaptive technologies to gain access. The Australian Copyright Act 1968 (Cth) s 116AN(9) enables certain technical measures to be circumvented, including where it benefits the print disabled.⁶² Arguably more robust exemptions are required to empower third parties to support persons with disabilities to circumvent digital rights measures, where such measures are used in ways that prevent persons with print disabilities from consuming copyright material to which they have lawful access rights.

The Marrakesh Treaty thus makes important contributions to improving access for people with print disabilities worldwide. Effectively, it requires developing countries to adopt the limited exceptions paradigm currently used by developed countries, enabling ad hoc digitization and other measures to provide access to people with print disabilities. For people in the developing world, where the book famine is most acute, this is an important advance. For Australia and other states where access is somewhat better, the measures needed to comply with most of the Marrakesh Treaty’s terms are not onerous, but neither are they complete in the absence of a consensus for change at all levels of public policy.

Upon ratification by the United States, the Marrakesh Treaty will enable access to several hundred thousand English and Spanish language books. As of 2018, 670,000 titles had been digitized by volunteers and held by the non-profit e-library Bookshare.org,⁶³ as well as similar collections by other, smaller institutions. In addition, there is the collection of the HathiTrust, a non-profit strategic partnership of university research libraries. In return for access to millions of hard copy books from the partner libraries, Google has made the results of its mass digitization project available to the HathiTrust.⁶⁴ Using primarily the Google Books digitization project, the HathiTrust e-library held, in late 2018 just under 17 million total volumes and over 8 million book titles.⁶⁵ As the Google Books digitization process is slowing down, due to the legal difficulties discussed below, the flow of new titles to this universal library is likely to diminish. Nevertheless, following Google’s successful defence of the right to continue its book digitization project, under US Fair Use law,⁶⁶ and the US Supreme Court’s decision to decline hearing a challenge from the Authors Guild,⁶⁷ the legal standing of digital libraries is more secure. Conceivably then, the Marrakesh Treaty and the affirmation of US Fair Use law may eventually

constitute a significant expansion of what Marshall called the “stuff” of citizenship. They are not, by themselves, sufficient to solve the problem of the book famine, but are an important component and driver of that process.

The major short-term challenges to expanding equality of access to print materials are to begin the global process of digitizing existing materials and ensure that new works are made accessible from the outset. The Marrakesh Treaty does not require signatories to undertake these activities through centrally planned regulation of supply by the public sector. Neither is a market-led response viable, considering that digitizing existing works on the global scale necessary will not be financially cost-effective and that Google’s successful Fair Use defence of its book digitalization project was won on the grounds that it creates significant public good benefits, not on commercial grounds.⁶⁸ The Marrakesh Treaty does, however, assist by providing a legal framework for making new methods of support as efficient as possible, through removing national barriers to the movement of accessible print materials. More importantly, it is a resounding victory for disability advocates and people with print disabilities and sends a strong international signal that the authority until now granted to the limited exceptions paradigm by the legislative and other representatives of citizens, is in the process of being renegotiated.

Conclusion

Non-profit organizations public mandated to address the problem of the book famine have already entered into mutually beneficial strategic partnerships with one another, as well as with private sector entities willing to contribute to that public mission. The NFB/Amazon partnership and the partnership between the HathiTrust consortium of university research libraries and Google are but two examples of how to “make a positive difference in the individual and collective lives of citizens.”⁶⁹ In order to expand their reach and become more effective and sustainable, these and other similarly mandated organizations must build trust and consensus in their authorizing and task environments, around initiatives to realize community-held principles of equity and fairness.⁷⁰

The term “public value” has two meanings; it refers to what citizens value, but also to what adds value to the public domain in which citizens’ capacities and attributes—including their rights—are acquired and exercised.⁷¹ For a public or non-profit organization to maximize value-production, it needs trusting relationships with its authorizing environment, as they are conditions for it being politically mandated and resourced to champion citizen rights and engage individuals and communities in designing and delivering appropriate capacity-building activities.⁷² The authorizing environments of those organizations that are seeking to solve the problem of the book famine have begun to change in ways deserving recognition and support, but if advocates for the new international disability human rights agenda are to take advantage of these developments and build on them, there must be greater public recognition that the beneficiaries of non-profit value-production are not only individuals, but the communities and wider society in which they live.⁷³ This necessitates advancing the new disability human rights agenda on multiple fronts, including changing the governmental rationale for increasing access to useable reading materials, from one that tolerates inconvenience and conceives of efforts to end the book famine as costs to be borne by society for the benefit of individuals, to one that sets out to create value chains that link individual, community and society-wide benefits—and affirms this paradigm change as an expression of citizens’ collective aspirations that is worthy of support. The theory and practice of public value strategic management were designed for such purposes. They have been operating in numerous public and non-profit contexts for two decades now, thus offering best practice cases and benchmarking opportunities for the task of making inroads into solving the problem of the book famine.⁷⁴

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- 44 “Cultural material” is broadly defined in a range of international agreements. For example: *Convention for the Safeguarding of Intangible Cultural Heritage*, signed October 17, 2003, MISC/2003/CLT/CH/14 (entered into force April 20, 2006); *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, signed December 31, 1954, 249 UNTS i-3511 (entered into force August 7, 1956).
- 45 *International Covenant on Economic, Social and Cultural Rights*, opened for signature December 16, 1966, 993 UNTS 3 (entered into force January 3, 1976); see further Janet E. Lord and Michael Ashley Stein, “Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play,” *Boston University International Law Journal* 27 (2009): 249–281. The Convention responds to traditional models, situates disability within a social model framework and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities. Such an understanding of disability rights sharply contrasts with earlier human rights instruments, which were neither disability rights based nor social model oriented.
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