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Comparative Disability Policy in Employment

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COMPARATIVE DISABILITY POLICY IN EMPLOYMENT

ABSTRACT

For individuals living with disabilities, the ability to obtain employment can be challenging. But often it is not the disability itself that causes the challenge, but employers and society's prejudices. While national legislation both in the United States and abroad have attempted to dispel this prejudice through anti-discrimination programs, novel (or reimagined) solutions are needed to proliferate employment for disabled individuals.

This Comment explores the history of disability employment across the Atlantic by focusing on how the United States, Germany, and the United Kingdom have responded to proliferating employment for disabled individuals. Additionally, this Comment explores both what steps these countries have taken and could take in supporting disabled employees. The Comment concludes by proposing the implementation of a quota system for hiring disabled employees and explores why such a program is rational and legal.

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INTRODUCTION

Becky Dann wanted to be a photographer. She studied the discipline at the University for the Creative Arts in the United Kingdom.¹ She knew it would be a challenge to pursue her career, especially starting out, because she used a

¹ Abby Young-Powell, *'Sent Out in the Dark': Why Disabled Graduates Struggle to Find Work*, GUARDIAN (Aug. 1, 2019), <https://www.theguardian.com/education/2019/aug/01/sent-out-in-the-dark-why-disabled-graduates-struggle-to-find-work>.

wheelchair.² What she did not expect was the stigma associated with her disability and the prejudice she would face.³ Applying for a job as an entry-level staff member at a local art gallery, she was told “the job would be too challenging for [her]” even though “they didn’t know [her]” so they could not reasonably make that judgment based on her wheelchair alone.⁴ But they did.⁵ The United Kingdom has prohibited disability discrimination in employment for almost thirty years, but discrimination still occurs.⁶ This Comment presents a novel, or perhaps reimagined, policy approach to proliferating disability employment, which goes beyond anti-discrimination and toward affirmative action.

The modern world has focused on employment as one of the primary ways people value themselves in society. Because of the value placed on work, there have been strong correlations between employment, positive health outcomes, and quality of life.⁷ Without employment, especially for those who want to work, the ability to fully participate in society is limited. For disabled⁸ people, the ability to obtain employment is often challenging because of perceived or actual limitations.⁹ Proliferating employment among this community presents both a challenge and an opportunity, which if accomplished would result in a social and economic benefit. Additionally, because most governments provide some form of welfare to people with disabilities,¹⁰ increasing disability employment has the benefit of moving disabled individuals from welfare to employment, reducing government expenditures.¹¹

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*; Disability Discrimination Act, (1995) (UK).

⁷ Danielle Bunt et al., *Quotas, and Anti-Discrimination Policies Relating to Autism in the EU: Scoping Review and Policy Mapping in Germany, France, Netherlands, United Kingdom, Slovakia, Poland, and Romania*, 13 *AUTISM RES.* 1397–99 (2020), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/aur.2315>.

⁸ As the definition of a disability varies across countries, this Comment avoids providing a specific definition of disability. Instead, disability will be generally defined as a physical, mental, or psychological impairment. See Samuel R. Bagenstos, *Comparative Disability Employment Law from an American Perspective*, 24 *COMP. LAB. L. & POL’Y J.* 649, 656 (2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=655486 (presenting the medical and social models for defining disabilities in statutory language).

⁹ Ann Belser, *For Those with Disabilities, Finding Jobs Can Be Especially Difficult*, *PITTSBURGH POST-GAZETTE* (Sept. 10, 2010), <https://www.post-gazette.com/business/businessnews/2010/09/19/For-those-with-disabilities-finding-jobs-can-be-especially-difficult/stories/201009190286>.

¹⁰ Anne Penketh et al., *Which Are the Best Countries in the World to Live In If You Are Unemployed or Disabled?* *GUARDIAN* (Apr. 15, 2016), <https://www.theguardian.com/politics/2015/apr/15/which-best-countries-live-unemployed-disabled-benefits>.

¹¹ Bunt et al., *supra* note 7.

Germany, the United Kingdom, and the United States have all used anti-discrimination legislation to address inequality and proliferate opportunities associated with disability employment.¹² While the United States was the first to introduce this type of legislation through the passage of the Rehabilitation Acts of 1973 and 1974,¹³ the United States has failed to clearly establish the limits of disability-employment affirmative action programs. This failure potentially allows these programs to fall prey to Equal Protection violations. In examining the more-defined limits of disability-employment affirmative action programs in the United Kingdom and Germany, this Comment attempts to provide the legal limits for U.S. disability-employment affirmative action policy. Part of these legal limits includes defining these programs as rational. While rationality is a nebulous concept, this Comment makes the case both through economics and psychology for why disability-employment affirmative action programs—and in particular, quotas—are rational, and more importantly, necessary.

I. BACKGROUND

People with disabilities both historically and currently suffer from high percentages of poverty, which is caused by lack of access to services, education, and employment opportunities.¹⁴ For centuries, disabled people have needed to rely on the charity of religious and social institutions, with many disabled people still relying on these organizations today.¹⁵

As the modern world has defined employment as a necessity, the employment of people with disabilities should be a necessity as well.¹⁶ However, because of both real and imagined limitations in certain types of employment, governments have needed to provide income, which substitutes or supplements employment-generated wages, as a way of responding to the limitations disabilities present.¹⁷ This model, known as welfare, is represented

¹² Disability Discrimination Act, (1995) (UK); Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.; Allgemeines Gleichbehandlungsgesetz [AGG] (2006) [The General Act on Equal Treatment] (Ger.).

¹³ 29 U.S.C. §§ 701–794.

¹⁴ Alexander Wohl, *Poverty, Employment, and Disability: The Next Great Civil Rights Battle*, 40 HUM. RTS. MAG. (2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/poverty_employment_disability.

¹⁵ See DORIS FLEISCHER & FREIDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 10 (2d ed. 2011).

¹⁶ See Kimmie Jones, *How Employment Can Change the Life of Someone with a Disability (and Everyone Involved)*, TENN. WORKS, <https://www.tennesseeeconomy.org/how-employment-can-change-the-life-of-someone-with-a-disability-and-everyone-involved> (last visited Feb. 1, 2021).

¹⁷ See Bagenstos, *supra* note 8, at 649 (citation omitted).

in countries across the world, with examples ranging from the Personal Independence Payment scheme in the United Kingdom to the Social Security Disability Insurance program in the United States.¹⁸

A. Background on European Disability Employment

In Europe, the history of disability employment dates back to the beginning of the twentieth century as a response to the devastation of Europe post World War I.¹⁹ Specifically, wounded service members returning home and in need of employment were given certain preferential hiring benefits, either in the form of social pressure or government-mandated employment quotas.²⁰ Over the next three decades, and through World War II, these disability-employment regimes, originally designed for wounded soldiers, opened up to all people with a qualifying disability.²¹ This trend spread across Europe, Asia, and the world, creating the quota system that is still in effect in a majority of countries.²²

A quota operates when a government sets a ceiling or floor on an activity; in this case, mandating that employers hire a certain number of employees with disabilities.²³ The government does not need to set a fine or other coercive action to enforce its quota, but using coercive actions would make it easier to enforce. The simplest quota to administer is one without any coercive force, relying solely on the collective responsibility of employers to promote employment to underrepresented communities as a social welfare benefit.²⁴ While some countries were initially successful with a coercion-free quota, other countries found that businesses were not complying with the coercion-free quota.²⁵ In

¹⁸ See The Social Security (Personal Independence Payment) Regulations 2013, SI 2013/377 (UK); 20 C.F.R. § 404.

¹⁹ See Elisa Fiala, *A Brave New World of Work Through the Lens of Disability*, 8 SOC'YS 3 (2018), https://res.mdpi.com/d_attachment/societies/societies-08-00027/article_deploy/societies-08-00027.pdf (citation omitted) (discussing the history of disability employment in Germany); Lisa Waddington, *The Relationship Between Disability Non-Discrimination Law and Quota Schemes: A Comparison Between Common Law and Civil Law Jurisdictions in Europe*, in ANTI-DISCRIMINATION LAW IN CIVIL JURISDICTIONS 95 (Barbara Havelková & Mathias Möschel eds., 2019).

²⁰ Fiala, *supra* note 19; Waddington, *supra* note 19, at 95.

²¹ Sunwoo Lee & Sookyung Lee, *Comparing Employment Quota Systems for Disabled People Between Korea and Japan*, 10 ASIAN J. HUM. SERVS. 83, 84 (2016), https://www.researchgate.net/publication/301746199_Comparing_Employment_Quota_Systems_for_Disabled_People_Between_Korea_and_Japan. This Comment does not examine the definition of a qualifying disability, which varies from country to country.

²² *Id.*

²³ See Juan Liao, *The Quota System for Employment of People with Disabilities in China: Policy, Practice, Barriers, and Ways Forward*, 36 DISABILITY & SOC'Y 326, 326 (2020).

²⁴ Yuko Mori & Norihito Sakamoto, *Economic Consequences of Employment Quota System for Disabled People: Evidence from a Regression Discontinuity Design in Japan*, 48 J. JAPANESE INT'L ECON. 1, 1 (2018).

²⁵ Germany and the United Kingdom are examples. Germany initially had a critical mass of support for

response to the employers who were not able to comply without a coercive mandate, many governments in Europe set up levy-grant quota systems.²⁶ In a levy-grant quota system, the government levies a fine against an employer if it does not meet a specified quota; if they meet or exceed that quota, employers are given a grant.²⁷ This type of system is meant to punish government-defined bad behavior and reward good behavior. The fines collected are primarily used to support services for people with disabilities.²⁸

1. Germany and the Quota System

Germany was one of the first countries in Europe to adopt a quota system for disabled employees.²⁹ This was intended to assist World War I veterans who returned from the War with physical disabilities and were thus unable to join the labor force without assistance.³⁰ The system was successful, resulting in a partnership between the private sector, public sector, and religious institutions.³¹ This system was quickly abandoned as the Nazis came to power.³² In the years after Nazi rule, the country grappled with how it would address the government's setback of disability rights and equality, leading to the reintroduction of the quota system.³³

The current German quota law is mandated on public and private employers with twenty employees or more.³⁴ If an employer meets this threshold, five percent of their staff must have a qualified disability, or the employer is subject to a fine.³⁵ In this regime, certain employees with "severe" disabilities are counted as double or triple under the employer mandate.³⁶

coercive-free disability quotas with private, public, and church partners working together for injured veterans. The United Kingdom's program failed to garner this support, and did not meet its threshold both with and without a mandated quota. Waddington, *supra* note 19, at 102.

²⁶ Yuko Mori & Norihito Sakamoto, *supra* note 25.

²⁷ *Id.*

²⁸ Waddington, *supra* note 19, at 102.

²⁹ Fiala, *supra* note 19, at 27, 29.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 2.

³³ *Id.*

³⁴ *Id.* at 11.

³⁵ *Employment Law Overview Germany 2019-2020*, L&E GLOBAL 15 (2019) [hereinafter L&E GLOBAL], https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal-Employment-Law-Overview_Germany_2019-2020.pdf.

³⁶ Waddington, *supra* note 19, at 106 (citations omitted).

The number of people employed through this regime in 2013 was approximately one million.³⁷ The corresponding fine with the quota raised €543 million in 2013, which funded vocational programs and grants for those businesses that hired employees in excess of the quota.³⁸ The quota, using the levy-grant model, financially rewards businesses who hire above the quota, and financially punishes those companies that do not meet the quota.³⁹ As a corollary, the German labor system uses a gender quota, which requires companies with twenty or more employees to be composed of at least thirty percent (as of 2016) female employees.⁴⁰

2. *The U.K. Quota System—Doomed to Fail*

Unlike the German system, the British government did not implement a disabled quota system following World War I.⁴¹ Instead, the British government increased military pension benefits for those veterans with disabilities.⁴² However, compared to the benefits provided to veterans in other European countries, including employment assistance, these benefits were subpar, with disabled veterans complaining they had no employment opportunities.⁴³ The government responded by creating the King's National Roll, which encouraged employers to sign up and hire disabled veterans, but this was not effective in increasing disabled veteran employment.⁴⁴

Not until World War II would this system change. The conscription of working-age men forced British companies to hire women and disabled veterans, creating a labor boom for these populations.⁴⁵ Following World War II, the British government witnessed service members returning with war-related disabilities and who wanted to work—the same scenario as after World War I.⁴⁶ The government responded by enacting the Disabled Persons Employment Act of 1944, which established a quota system for all disabled people, not just

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ L&E GLOBAL, *supra* note at 36.

⁴¹ *War and Impairment: The School Consequences of Disablement*, UK DISABILITY HIST. MONTH 3, 4 (2014) [hereinafter *War and Impairment*], <https://ukdhm.org/v2/wp-content/uploads/2014/09/UK-Disability-history-month-2014-Broadsheet.pdf>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 4. The policy encouraged employers to have a workforce with at least five percent disabled veterans. Waddington, *supra* note 19, at 102 (citations omitted). However, there was no enforcement mechanism in this government policy. *Id.*

⁴⁵ *War and Impairment*, *supra* note 42, at 5.

⁴⁶ *Id.* at 7.

veterans.⁴⁷ The Act mandated employers with twenty employees or more have a workforce with at least two percent disabled individuals—this quota was subsequently raised to three percent.⁴⁸ An employer was able to operate below the quota threshold, so long as when they needed to hire a new employee, the employer would hire a disabled worker from the disabled quota roll.⁴⁹

While the Act created penalties for failing to comply with its mandates, the Act also gave the Secretary of State in charge of the program the ability to exempt employers from the requirements of the Act.⁵⁰ As employers realized the Secretary of State could simply waive this government mandate, they petitioned the Secretary to grant exemptions. Successive Secretaries complied with and granted exemptions to large segments of the U.K. business community.⁵¹ Not only did businesses avoid the hiring mandate, few disabled employees registered for the program because they knew few businesses complied with it, dooming the program to fail.⁵²

B. Background on U.S. Disability Employment

The origins of the U.S. policy related to disability benefits date back to the Civil War, where injured soldiers would receive stipends based on their service-produced injuries which rendered them unable to work.⁵³ In the 1930s, the Social Security Act expanded the welfare regime to provide benefits and insurance for all people with disabilities, as well as the elderly and widows.⁵⁴ Subsequent to this program, U.S. policy toward disability employment shifted with the passage of the Rehabilitation Acts of 1973 and 1974 (Rehab Act), and most recently with the passage of the Americans with Disabilities Act of 1990 (ADA).⁵⁵ These

⁴⁷ *Id.*; Waddington, *supra* note 19, at 102 (citations omitted).

⁴⁸ *War and Impairment*, *supra* note 42, at 7; Waddington, *supra* note 19, at 102–03 (citations omitted).

⁴⁹ Waddington, *supra* note 19, at 102–03.

⁵⁰ *Id.*

⁵¹ *Id.* at 103.

⁵² *Id.*

⁵³ Bagenstos, *supra* note 8, at 649 (citation omitted).

⁵⁴ *Id.*; WILLIAM WHITTAKER, CONG. RSCH. SERV., RL30673, TREATMENT OF WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT 8 (2005); FLEISCHER & ZAMES, *supra* note 15, at 12.

⁵⁵ The origins of the Rehab Act date back to the 1920s when vocational rehabilitation programs were offered to help injured workers return to work. The Rehab Act provides funding for these vocational rehabilitation centers to assist people with disabilities in obtaining employment. This program is primarily run by the states (supported by federal and state contributions), which work with the disabled community directly. Section 503 sets up the anti-discrimination regime in federal contracting; the Rehab Act not only mandates anti-discrimination, but proscribes affirmative actions in hiring disabled applicants. SIDATH V. PANANGALA & CAROL O'SHAUGHNESSY, CONG. RSCH. SERV., RS22068, REHABILITATION ACT OF 1973: 109TH CONGRESS LEGISLATION AND FY2006 BUDGET REQUEST 1–2 (2005), https://www.everycrsreport.com/files/20050225_RS22068_3c007e85

legislative actions marked a significant change in U.S. disability-employment policy from a welfare-based system to an anti-discrimination system.⁵⁶ Unlike most of the world, the United States never imposed a quota for disability employment; instead, it has relied on these anti-discrimination statutes.⁵⁷

C. *The Paradigm Shift Caused by the Rehab Act and the ADA*

The Rehab Act, specifically Section 504, bars institutions receiving federal grants from discriminating against qualified individuals because of a disability.⁵⁸ The ADA extends this discrimination prohibition by an “employer, employment agency, labor organization, or joint labor-management team.”⁵⁹ These Acts did not just signal a structural change for U.S. disability policy, but for disability policy across the world.⁶⁰ Based on the United States’ emphasis on anti-discrimination, which sought to level the playing field for disabled people in their everyday lives, nations across the world began to adopt anti-discrimination policies modeled after the Rehab Act and the ADA.⁶¹ Due to the difficulty in administering anti-discrimination provisions, the Rehab Act, and subsequently the ADA, mandated employers only comply with the statutory requirements if the necessary accommodations are “reasonable.”⁶² This reasonable accommodations test is connected to whether the accommodation would “impose an undue hardship on the operation of the business.”⁶³ In essence, the potential hardship an accommodation would cause an employer determines if the employer’s actions are legally discriminatory.⁶⁴

Specific to the Rehab Act, Section 503 not only bars discrimination based on a disability for federal contractors, but requires they take affirmative steps to recruit and employ people with disabilities.⁶⁵ As administered through federal regulations, part of this affirmative duty includes “invit[ing] applicants to inform the contractor whether the applicant believes that he or she is an individual with

b9e18ffb01413cf8b7d23133a509e8ce.pdf; see also *The Rehabilitation Act of 1973 and 1974, and the American Disabilities Act of 1990*, TEAMSTER (Oct. 19, 2020, 10:28 PM), <https://teamster.org/rehabilitation-acts-1973-and-1974-and-american-disabilities-act-1990>; Bagenstos, *supra* note 8, at 649 (citation omitted).

⁵⁶ PANANGALA & O’SHAUGHNESSY, *supra* note 56.

⁵⁷ Bagenstos, *supra* note 8, at 649 (citation omitted).

⁵⁸ 29 U.S.C. § 794.

⁵⁹ 42 U.S.C. § 12111(2) (defining covered entities). In general, covered employers must have fifteen or more employees. *Id.* § 12111(5).

⁶⁰ Waddington, *supra* note 19, at 94 (citations omitted).

⁶¹ *Id.*

⁶² See 42 U.S.C. § 12111(9) (defining “reasonable accommodation”).

⁶³ 42 U.S.C. § 12112(b)(5)(A).

⁶⁴ *Id.*

⁶⁵ 29 U.S.C. § 793.

a disability[.]”⁶⁶ Additionally, the contractor “shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards[.]” and the employer may not retaliate against an employee for filing a disability-related complaint against the contractor.⁶⁷ The goal of this section, through the U.S. Department of Labor’s implementation of this statute, is to “ensure equal employment opportunity” and “equality in every aspect of employment[.]”⁶⁸

D. European Council Directive 2000/78/EC: A Response to the Rehab Act and the ADA

The major European response to the Rehab Act and the ADA came in the form of a series of European Council Directives, which aimed to combat discrimination against defined protected classes.⁶⁹ Specifically, European Council Directive 2000/78/EC *Establishing a General Framework for Equal Treatment in Employment Occupation* (Council Directive 2000/78/EC), adopted in 2000, established broad policy positions, with the mandate that Member States promulgate legislation reflective of these policy positions in their labor statutes.⁷⁰ Under this broad framework, the United Kingdom implemented its Equality Act of 2010, and Germany implemented its General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz* (AGG)).⁷¹

The Council Directive 2000/78/EC set out to define equality in opposition to both direct discrimination and indirect discrimination⁷²: the former being the unequal treatment of a person based on a protected category and the latter being the unequal result that could occur on facially neutral provisions (disparate impact discrimination).⁷³ While banning the practice of direct discrimination, two exceptions are made: the first is for statutory provisions that are “objectively

⁶⁶ 41 C.F.R. § 60-741.42(a) (2021).

⁶⁷ 41 C.F.R. § 60-741.44 (2021).

⁶⁸ 41 C.F.R. § 60-741.40(a) (2021).

⁶⁹ Council Directive 2000/78, art. 1, 2000 O.J. (L 303) (EC).

⁷⁰ *Id.* The directive itself mandates Member States use this framework to implement their own legislation. The directive has the power of law, binding Member States through Article 288 of the Treaty on the Functioning of the European Union. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, May 9, 2008, 2008 O.J. (C 115).

⁷¹ See generally *21 Discrimination – Overview*, PENSIONS IN 30 PODCASTS (2017), https://gowlingwlg.com/getmedia/18949b01-4ee2-4bdb-a800-8e5f12bd2c1d/PI30P_21.pdf.xml (describing programs).

⁷² Council Directive 2000/78, art. 2(2), O.J. (L 303) (EC).

⁷³ *Id.* Disparate impact is defined as “policies, practices, rules or other systems that appear to be neutral result in a disproportionate impact on a protected group.” SOC’Y FOR HUMAN RES. MGMT., *What Are Disparate Impact and Disparate Treatment?* (Oct. 17, 2020, 11:48 PM), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disperateimpactdisparatetreatment.aspx>.

justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”; the second, applicable only to disabled people, allows an employer to take “appropriate measures” to “eliminate disadvantages entailed by such provision[s.]”⁷⁴ These two exceptions are implemented through affirmative action programs.⁷⁵

Both the EC Directive and Member State legislation based on that Directive protect against direct or indirect discrimination because of “religion or belief, disability, age or sexual orientation as regards employment and occupation[.]”⁷⁶ Race-based and gender discrimination are prohibited separately under Council Directives 2000/43/EC and 2006/54/EC, respectively.⁷⁷ The grouping of age and disability under Council Directive 2000/78/EC is similar to the grouping of these two categories under U.S. law. Specifically, age and disability-related discrimination are both addressed in legislation separate from the 1964 Civil Rights Act, and both are afforded rational basis scrutiny for Fifth and Fourteenth Amendment equal protection claims.⁷⁸

The EC Directive devotes a specific section to disabled people—Article 5—which provides for reasonable accommodations for people with disabilities. The directive states that “employers shall take appropriate measures . . . to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.”⁷⁹ This disparate burden principle is similar to the Rehab Act and the ADA’s reasonable accommodation provisions.⁸⁰

As European Union countries adopt the provisions of the EC Directive, it is important to note many of these countries have not eliminated their quota

⁷⁴ Council Directive 2000/78, art. 2(2)(i)–(ii), O.J. (L 303) (EC).

⁷⁵ *Id.*

⁷⁶ *Id.* art. 1.

⁷⁷ Council Directive 2000/43, O.J. (L 180) (EC); Council Directive 2006/54, O.J. (L 204) (EC).

⁷⁸ Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 276 (2010); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985).

⁷⁹ Council Directive 2000/78, art. 5, 2000 O.J. (L 303) (EC). This description is similar to language found in the Americans with Disabilities Act, as it relates to reasonable accommodation and undue burden. *See* 42 U.S.C. § 12111.

⁸⁰ 42 U.S.C. § 12112(5)(A); *see* § 12111(9) (defining of Reasonable Accommodation).

systems.⁸¹ Instead, they rely on both anti-discrimination and affirmative action to achieve their social and economic policy goals.⁸²

II. THE ECONOMIC AND PSYCHOLOGICAL CASE FOR DISABILITY-EMPLOYMENT AFFIRMATIVE ACTION PROGRAMS

The United Kingdom, Germany, and the United States, in various forms, have suggested that affirmative action programs must be reasonable. Here, this Comment explores whether affirmative action programs for disabled employees, in particular quotas, are economically reasonable.

Affirmative action programs are often criticized for equalizing outcomes instead of opportunities.⁸³ Additionally, these programs are criticized for promoting groups of allegedly less qualified people, and thus they perform inefficiently in roles they otherwise would not be qualified for.⁸⁴ This in turn could reinforce prejudices and stigmas.⁸⁵ The counterargument to this theory is that if a group has been systemically discriminated against at work or schools, then affirmative action could lead to the breaking of prejudices or stigmas by observing how that group performs, and the efficiencies they might create.⁸⁶ The assumption here is that imperfect information leads to a lack of opportunity, which causes inefficiencies.⁸⁷ Research suggests that for women, affirmative action programs in the workplace have “been more effective where discrimination may be more entrenched . . .” which might also be true for disability discrimination.⁸⁸ The ADA’s statutory language, which extends anti-discrimination protection not only to those with a disability, but those who are “regarded as” having a disability reflects the idea that disability discrimination is not only based on actuality, but on perception.⁸⁹ Fixing this fear can and should be addressed through increased government action.⁹⁰

⁸¹ Bagenstos, *supra* note 8, at 657. It has been suggested the type of disability program actually reflects the nature of the disability itself more than a government philosophy. In this regard, for a disability in which an employer is eliminating a barrier, anti-discrimination is most helpful, while a disability where an employer believes hiring will create a burden on the employer, quotas or incentives work best. Waddington, *supra* note 19, at 98–100 (citations omitted).

⁸² Bagenstos, *supra* note 8, at 657. Waddington, *supra* note 19, at 108 (citations omitted).

⁸³ Harry J. Holzer, *The Economic Impact of Affirmative Action in the US*, 14 SWEDISH ECON. POL’Y REV. 41, 48 (2007).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ Jonathan S. Leonard, *Women and Affirmative Action*, 3 J. ECON. PERSPS. 61, 64 (1983).

⁸⁹ 42 U.S.C. § 12102(1)(C).

⁹⁰ Bagenstos, *supra* note 8, at 658 (“that society’s accumulated myths and fears about disability and

To this aim, this section attempts to show 1) disability discrimination is based on prejudice; 2) this prejudice harms economic efficiency through undervaluing a labor force; 3) a novel approach in the United States must be enacted to rectify this; and 4) a defense of that approach.

A. Prejudices

Less than a century ago, the famed Justice Oliver Wendell Holmes wrote “[t]hree generations of imbeciles are enough” to support a forced sterilization program for people with intellectual disabilities.⁹¹ While society believes it has become less prejudiced, there are many who doubt that disabled people are equal to non-disabled people. Supporting the theory that the public views disabled employees as less capable, U.K. Chancellor of the Exchequer Philip Hammond stated in a Parliamentary Committee that “very high levels of engagement in the workforce, for example of disabled people—something we should be extremely proud of—may have had an impact on overall productivity measurements.”⁹² In this statement, Chancellor Hammond claimed increased disability employment decreased productivity, something the Chancellor’s own department later rejected.⁹³

While not directed at employment, disability-related discrimination exists among our highest levels of government regardless of country. For example, former U.S. President Donald Trump, when asked a question about the 2018 Paralympics Games, called them “a little tough to watch too much,” sparking renewed accusations of disability-related prejudice.⁹⁴

In a 2011 study, researchers in California interviewed human resource professionals and managers and found that the general reasons they did not, or had difficulty hiring disabled people, was because of cost concerns, legal liability concerns, and not knowing what necessary accommodations were needed.⁹⁵ Of note, during the course of the interviews, “a few [human resources professionals or managers] revealed disturbing attitudes reflecting personal

disease are as handicapping as are the physical limitations that flow from actual impairment.”).

⁹¹ Buck v. Bell, 274 U.S. 200, 207 (1927).

⁹² Nicola Slawson, *Philip Hammond Causes Storm with Remarks About Disabled Workers*, GUARDIAN (Dec. 6, 2017) (quoting Philip Hammond before the Treasury Select Committee).

⁹³ Jim Edwards, *Chancellor Philip Hammond Had no Evidence for his Statement that Disabled Workers Hurt the UK Economy, the Government Quietly Admits*, BUS. INSIDER (Jan. 14, 2018).

⁹⁴ Jamie Ducharme, *The Paralympics Fire Back After Trump Calls them ‘Tough to Watch’*, TIME (Apr. 28, 2018), <https://time.com/5258664/trump-paralympic-games-tough-watch>.

⁹⁵ H. Stephen Kaye et al., *Why Don’t Employers Hire and Retain Workers with Disabilities?*, 21 J. OCCUP. REHABIL. 526, 530 (2011).

prejudice and ignorance. One remarked . . . that ‘people with disabilities don’t think the same way as normal people.’”⁹⁶ What is important here is that these are the specific individuals tasked with the hiring and retention of potential employees, and *should* hold the least discriminatory views.

In a 2008 study from the U.S. Department of Labor 3797 companies ranging from small companies (five to fourteen employees) to large companies (more than 250 employees) were asked what challenges they faced in hiring disabled employees.⁹⁷ Approximately thirty percent of employers reported difficulty in hiring people with disabilities based on four categories—attitudes of customers, discomfort or unfamiliarity, attitudes of co-workers, and attitudes of supervisors.⁹⁸

Not hiring people with disabilities is not always intentional prejudice; it is often not knowing what additional steps need to be taken and wanting to avoid difficulty. But it still has the same effect—inefficiency.

B. Inefficiencies

As introduced into mainstream economics by Professor Gary Becker in his book *The Economics of Discrimination*, prejudices uncompetitively increase the cost of obtaining labor and decrease minority wages.⁹⁹ While Professor Becker believed the notion that an employer’s prejudice would cut into their profits, thus facilitating behavioral change, racial prejudice still plays a role in labor markets.¹⁰⁰

In addition to research on racial prejudice causing labor inefficiencies, extensive research has been conducted showing gender prejudice also causes labor inefficiencies.¹⁰¹ The research found trillions of dollars are lost annually because of these inefficiencies.¹⁰² Similar research conducted by the American

⁹⁶ *Id.* at 531.

⁹⁷ CESSI, SURVEY OF EMPLOYER PERSPECTIVES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES 3 (2008).

⁹⁸ *Id.*

⁹⁹ GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 103 (1957); see Kevin Murphy, *How Gary Becker Saw the Scourge of Discrimination*, CHI. BOOTH REV. (June 15, 2015).

¹⁰⁰ See generally Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and the Economics of Discrimination* 9, 25 (Nat’l Bureau Econ. Research, Working Paper No. 13661, 2007) (discussing role racial prejudice plays in the labor market and responding to Becker); Murphy, *supra* note 100.

¹⁰¹ Martina Bisello & Massimiliano Mascherini, *The Gender Employment Gap: Costs and Policy Responses*, 52 INTERECON. 1 (Jan.–Feb. 2017); Gaëlle Ferrant & Alexandre Kolev, *Does Gender Discrimination in Social Institutions Matter for Long Term Growth?: Cross-Country Evidence* 28 (OECD Dev. Ctr., Working Paper No. 330, 2016).

¹⁰² See Ferrant & Kolev, *supra* note 102.

Association of Retired People (AARP) found age-related discrimination resulted in \$850 billion lost annually in Gross Domestic Product (GDP).¹⁰³ In both groups, the perception of limitations and differences gave rise to exclusionary behavior, which produced inefficiencies.¹⁰⁴ These inefficiencies prohibited businesses and economies from maximizing their potential profits.¹⁰⁵ Similar to these categories, disability discrimination, while not benefiting from economic research, is affected by prejudice, which most likely prohibits economic growth.

Instituting a law or regulation to reduce an inefficiency might seem like an anomaly. The administration of laws and regulations is often the thing that causes the inefficiencies that reduce economic growth because of the costs businesses spend on compliance.¹⁰⁶ However, this is not always the case, as the exclusion of a pool of candidates from the workforce because of perceived limitations might hurt the economy more than the administration of laws and regulations.¹⁰⁷ For instance, the 1964 Civil Rights Act eliminated a number of employment barriers for African Americans that allowed them to enter into higher-skilled, higher-wage positions they otherwise would have been excluded from.¹⁰⁸ This law had a positive effect on the economy as it increased skilled labor opportunities.¹⁰⁹ Increasing labor, especially skilled labor, contributes to economic growth and increased GDP.¹¹⁰

C. A Novel Recommendation

Above, this Comment shows the existence of prejudice against disabled people and how it can hurt economic growth. Here, this Comment brings in a psychological phenomenon which would support the imperative of putting disabled employees into every workforce.

¹⁰³ AM. ASS'N OF RETIRED PEOPLE, THE ECONOMIC IMPACT OF AGE DISCRIMINATION 3, https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2020/impact-of-age-discrimination.doi.10.26419-2Fint.00042.003.pdf.

¹⁰⁴ See generally Bisello & Mascherini, *supra* note 102 (finding economic loss due to the existence of a gender employment gap in Europe amounted to more than €370 billion in 2013).

¹⁰⁵ See generally Ferrant & Kolev, *supra* note 102 (finding gender discrimination is “estimated to induce a loss of up to USD 12 trillion” annually).

¹⁰⁶ See Richard Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1321 (1989) (discussing economic inefficiencies in sex discrimination laws).

¹⁰⁷ See, e.g., Kilian Huber, *How Discrimination Harms the Economy and Business*, CHI. BOOTH REV. (2020) (arguing prejudice hurts economy).

¹⁰⁸ Gavin Wright, *The Regional Impact of the Civil Rights Act of 1964*, 95 B.U.L. REV. 759, 764–66 (2015); see also Kathleen O’Toole, *Economist Says Civil Rights Movement Was Economic Success*, STAN. U. NEWS SERV. (Jan. 26, 2000), <https://news.stanford.edu/pr/00/000126CivilRightsEcon.html>.

¹⁰⁹ *Id.*

¹¹⁰ See COUNCIL OF ECON. ADVISERS, RELATIONSHIP BETWEEN FEMALE LABOR FORCE PARTICIPATION RATES AND GDP (2019).

In psychology, the Intergroup Contact Theory holds that interactions between people who discriminate and people who are discriminated against can reduce prejudice by dispelling some of the preconceived notions and assumptions discriminators have.¹¹¹ A notable application of this model occurred in early twentieth century New York City when researchers invited Columbia University students to meet and interact with African American leaders in Harlem; the researchers reported that those students had more positive perceptions about the African American community after that encounter.¹¹² In a review of different methods for achieving workplace assimilation, Professor Tristin Green examined Professors Thomas F. Pettigrew and Linda R. Tropp's seminal paper on Intergroup Contract Theory, which had analyzed 515 previous studies, to conclude that "intergroup contact does reduce prejudice."¹¹³ The *degrees* to which prejudice was reduced was not analyzed.¹¹⁴

In this regard, the implementation of policies that encourage, or mandate, employers to take on disabled employees will help dispel preconceived notions about disabled employees' limits or abilities. Once employers and non-disabled employees observe the reality that there is often no difference in capacity or labor performed, disability prejudices will be reduced, both in the office and society. This would increase disability employment and, as stated in the above section, have a positive effect on the economy.

If this theory would hold true for other minority groups, why should we implement a quota only for disabled employees? Because in examining discrimination surveys and reports, even by leading Universities and Foundations, disability discrimination is left out—often simply forgotten.¹¹⁵ In the United States, over the past seventy years, women have made significant

¹¹¹ Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C.L. REV. 379, 401–02 (2008).

¹¹² *Id.*

¹¹³ *Id.* at 404–05 (2008) (citing Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751, 752 (2006)).

¹¹⁴ *See id.*

¹¹⁵ *See Discrimination in America*, ROBERT WOOD JOHNSON FOUND. (2017), <https://www.rwjf.org/en/library/research/2017/10/discrimination-in-america—experiences-and-views.html> (discussing discrimination against African Americans, Asian Americans, Latinos, LGBTQ, Native Americans, White Americans, and Women. Absent from this list are people with disabilities).

progress in reducing the gender gap in employment.¹¹⁶ For disabled employees, this gap is still wide open¹¹⁷—disability discrimination is still real and active.¹¹⁸

D. *Why a Quota?*

An employment quota is a powerful tool in changing both economic and social outcomes.¹¹⁹ The main argument quota advocates make is that a quota balances out the historically imbalanced scales to what they should be if there was no discrimination.¹²⁰ The main argument against quotas is that they replace qualified employees with unqualified employees.¹²¹ A natural question asked is why couldn't a less powerful tool be used, such as monetary incentives for businesses? In the United States, monetary incentives already exist for businesses to hire certain members of disadvantaged communities, such as people with disabilities. These monetary incentives include the Workforce Opportunity Tax Credit and the Disabled Access Credit.¹²² But a tax credit is only helpful for an employer who wants to take on a disabled employee in the first place; it does not incentivize someone who might have a prejudice, or even an aversion, to hire a disabled person and overcome that prejudice.

III. LEGAL AND CONSTITUTIONAL LIMITS OF DISABILITY-EMPLOYMENT AFFIRMATIVE ACTION

Having shown that disability-employment affirmative action, in particular quotas, is a reasonable policy option, here this Comment explores whether such programs would be legal. Additionally, this Comment highlights what might make one program legal in one country and illegal in another country.

¹¹⁶ A.W. Geiger & Kim Parker, *For Women's History Month, a Look at Gender Gains – and Gaps – in the U.S.*, PEW RES. CTR. (Mar. 15, 2018), <https://www.pewresearch.org/fact-tank/2018/03/15/for-womens-history-month-a-look-at-gender-gains-and-gaps-in-the-u-s>.

¹¹⁷ Ben Paynter, *People with Disabilities Face a Massive Employment Gap*, FAST CO. (Feb. 20, 2019), <https://www.fastcompany.com/90309504/people-with-disabilities-face-a-massive-employment-gap>.

¹¹⁸ Wendy Lu, *This Is How Employers Weed Out Disabled People from Their Hiring Pools*, HUFF POST (June 18, 2019) https://www.huffpost.com/entry/employers-disability-discrimination-job-listings_1_5d003523e4b011df123c640a.

¹¹⁹ Isobel Coleman, *Are Quotas for Women in Politics a Good Idea?* ATLANTIC (Jan. 11, 2012), <https://www.theatlantic.com/international/archive/2012/01/are-quotas-for-women-in-politics-a-good-idea/251237>.

¹²⁰ *Id.* (arguing “[q]uotas for women do not discriminate, but compensate for actual barriers . . .”).

¹²¹ Elizabeth DeMeo, *'Pink Quotas' Would Do More Harm than Good in Europe*, AM. ENTER. INST. BLOG POST (Oct. 26, 2012), <https://www.aei.org/uncategorized/pink-quotas-would-do-more-harm-than-good-in-europe>.

¹²² Office of Disability Emp't Policy, *Tax Incentives for Employers*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/odep/program-areas/employers/tax-incentives-for-employers> (last visited Sept. 24, 2021).

A. Germany

The Basic Law of the Federal Republic of Germany, the functional equivalent of the U.S. Constitution, contains an article dedicated to equality before the law. Article 3 requires that:

- (1) all persons shall be equal before the law.
- (2) men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability.¹²³

The interpretation of this Article, enacted in 1949, has been subject to scrutiny from the public and the courts as to the extent this Article allows governments or businesses to discriminate.¹²⁴ From the text of the constitutional language, the separation of “disability” in Section 3 from the other protected categories might indicate the constitutional drafters implicitly authorized or allowed for programs that favored people with disabilities. Otherwise, “disability” would not have its own sentence.

1. Statutes

In 2006, Germany passed the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz (AGG)). AGG is meant to codify certain provisions of the 2000 anti-discrimination European Council Directive into Member State law.¹²⁵ As part of this codification, the law prohibits “discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.”¹²⁶

While disability discrimination is included in this list, the statute dedicated to disability rights is the Severely Disabled Persons Act—SchwbG (2000),

¹²³ Grundgesetz [GG] [Basic Law] art. 3, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.).

¹²⁴ Michael Wrase, *Gender Quality in German Constitutional Law* 6–8 (WZB Berlin Soc. Sci. Ctr., Discussion Paper No. 2019-005, 2019), <https://bibliothek.wzb.eu/pdf/2019/p19-005.pdf>. While the discrimination ban applies to the government, as the rights implicated in discrimination claims are considered fundamental, courts have incorporated them to be applicable toward private sector actors. *Id.*

¹²⁵ *New Anti-Discrimination Law in Germany*, WILMERHALE (July 31, 2006), <https://www.wilmerhale.com/en/insights/publications/new-anti-discrimination-law-in-germany-july-31-2006>.

¹²⁶ Allgemeines Gleichbehandlungsgesetz [AGG] (2006) [The General Act on Equal Treatment] § 1 [Purpose] (Ger.).

which governs the German disabled employee quota system.¹²⁷ Thus, because a specific statute rooted in the Basic Law authorizes this practice, litigation over affirmative action in hiring or retaining disabled employees has been sparse.¹²⁸ Because of the lack of case law, we instead will look at age-related discrimination and affirmative action. The reason for looking at age-related discrimination is because in the United States (as will be shown in the *United States* subsection) both disability discrimination and age-related discrimination are analyzed through rational basis equal protection scrutiny. To make cross-country analysis more congruent, age-related discrimination jurisprudence will be used where disability discrimination jurisprudence is lacking, like it is here.

Under the AGG, differential treatment based on age is not discriminatory if it is “objectively and reasonably justified by a legitimate aim,” and the “means of achieving that aim [are] appropriate and necessary.”¹²⁹ The language used in German law is similar to rational basis scrutiny used by U.S. courts in equal protection claims against government actions. Specifically, under rational basis scrutiny, the government action must be “rationally connected” to a legitimate government interest.¹³⁰

Unlike the United States, the German age-related scrutiny is based in statute and not in case law. Additionally, the statute provides six examples of when an age-related employer policy is not discriminatory.¹³¹ For example, “the setting of special conditions for access to employment and vocational training, as well as particular employment and working conditions, including remuneration and dismissal conditions, to ensure the vocational integration of young people, older workers and persons with caring responsibilities and to ensure their protection” is not discriminatory under the AGG.¹³² Using this example as a template, employers are able to provide affirmative action to older and younger employees because of their unique circumstances.¹³³

¹²⁷ *Schwerbehindertengesetz (SchwbG)* (1986) [Law on Severely Disabled Persons Act] (Ger.).

¹²⁸ Waddington, *supra* note 19, at 116 (citations omitted).

¹²⁹ *Allgemeines Gleichbehandlungsgesetz (AGG)* (2006) [The General Act on Equal Treatment] § 10 [Permissible Difference of Treatment on Grounds of Age] (Ger.).

¹³⁰ *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012) (citations omitted).

¹³¹ *Allgemeines Gleichbehandlungsgesetz (AGG)* (2006) [The General Act on Equal Treatment] § 10 [Permissible Difference of Treatment on Grounds of Age] (Ger.).

¹³² *See id.* § 10(1).

¹³³ These circumstances might include the need for vocational training between the academic and professional environments, and for older employees it might include training on academic topics or skills not covered in the classroom when they were school-aged. *See Bundesarbeitsgerichts [BAGE] [Federal Labor Court]*, Oct. 21, 2014, 9 AZR 956/12 Rn. 15 (Ger.).

2. Case Law

In testing the limits of the AGG, a shoemaker in Rhineland-Palatinate brought suit against his employer for providing two extra days of annual leave to employees older than fifty-seven.¹³⁴ The plaintiff, who was fifty-four at the time of judgment, argued the defendant's theory that an employee over fifty-seven needed more relaxation because of physical strain was a subjective policy, because there was no discernable difference between an employee under fifty-seven and an employee over fifty-seven.¹³⁵ In its discussion, the German Federal Labor Court found "there [was] direct unequal treatment because of age," however the court relied on the assumption that increased age correlates with the need for increased rest.¹³⁶ The court found the plaintiff's demand that the employer empirically justify an assumption that was justifiable from common knowledge would unreasonably burden the employer and their ability to provide voluntary benefits.¹³⁷ Thus, the affirmative action policy for employees over the age of fifty-seven was not discriminatory under the differential treatment carve-out in Section 10 of the AGG, as it was "aim[ed] to protect older employees mentioned in this provision, taking into account the defendant's freedom of design and discretion"¹³⁸

Four years later, in 2018, the German Federal Labor Court was again presented with a similar question over affirmative action for older employees in regards to additional leave or vacation.¹³⁹ The plaintiff, a nursing professor employed by the State of Hesse, brought suit alleging the State's civil service vacation ordinance and collective bargaining agreement discriminated against him based on age.¹⁴⁰ Specifically, the ordinance and agreement had a grandfather provision that allowed employees to retain their vacation entitlements if they were employed before the new ordinance and agreement.¹⁴¹ The previous ordinance and agreement gave employees over age fifty thirty-three days of vacation, which was more vacation days available than under the current ordinance and agreement that capped vacation days at thirty.¹⁴² The plaintiff, who was under age fifty when the ordinance and agreement were

¹³⁴ *Id.* at Rn. 2.

¹³⁵ *Id.* at Rn. 2–3.

¹³⁶ *Id.* at Rn. 14.

¹³⁷ *Id.* at Rn. 27.

¹³⁸ *Id.* at Rn. 15.

¹³⁹ BAGE, Dec. 11, 2018, 9 AZR 161/18 Rn. 1–2 (Ger.).

¹⁴⁰ *Id.* at Rn. 2.

¹⁴¹ *Id.* at Rn. 7.

¹⁴² *Id.* at Rn. 6.

transferred, applied for the more generous benefits upon reaching age fifty and was denied.¹⁴³

The Court's decision was based on the narrow ground that two employees who are both over age fifty but have different vacation allotments because one employee had turned fifty before the new ordinance and agreement went into effect, was discriminatory under the AGG.¹⁴⁴ However, the court provided future guidance for litigating age-related discrimination claims. Specifically, the Court stated that for an employer to claim a "legitimate aim[.]" the employer cannot simply state that the "regulation serves to protect older workers," but must give factual evidence.¹⁴⁵ Additionally, the court discussed that the "decrease in the physical resilience of employees who have reached the age of 50" is a general standard that does not hold true across the population and cannot alone be relied on.¹⁴⁶ Without specific evidence, "the defendant [would] not meet the burden of proof," and the action would not be justified, thus a discriminatory act under the AGG.¹⁴⁷ This is in opposition to the *Shoemaker* (2014) decision, which allowed inferences instead of evidence, meaning that going forward employers implementing age-related affirmative action programs will need to provide evidence to defend their programs.¹⁴⁸

As shown above, Germany is able to implement disability-employment-related affirmative action programs through statute. This is in line with the German constitutional language which does not bar *favorable* treatment for people with disabilities. If not already authorized under the statute, disability affirmative action programs, like age affirmative action, would need to meet the heightened evidentiary burden, as set by *Hesse* (2018), concerning the rational relationship for the program beyond inferences.

¹⁴³ *Id.* at Rn. 8; Heuking Kuhn Luer Wojtek, *Enhanced Vacation Entitlement on Grounds of Age Violates the Prohibition of Discrimination of the Germany General Act of Equal Treatment (AGG)*, HEUKING (July 30, 2019), <https://www.heuking.de/en/news-events/articles/enhanced-vacation-entitlement-on-grounds-of-age-violates-the-prohibition-of-discrimination-of-the-ge.html>.

¹⁴⁴ BAGE, Dec. 11, 2018, 9 AZR 161/18 Rn. 31–32 (Ger.).

¹⁴⁵ *Id.* at Rn. 37 (citing BAGE, Apr. 27, 2017, 6 AZR 119/16; BAGE, Nov. 15, 2016, 9 AZR 534/15 Rn. 20).

¹⁴⁶ *Id.* at Rn. 42.

¹⁴⁷ *Id.* at Rn. 41.

¹⁴⁸ BAGE, Oct. 21, 2014, 9 AZR 956/12 Rn. 27 (Ger.).

B. *United Kingdom*

1. *Introduction of Anti-Discrimination Legislation*

Under the direction of the Conservative Leadership in the House of Commons, the United Kingdom passed the Disability Discrimination Act of 1995 (DDA), which eliminated the quota system and replaced it with an anti-discrimination system, similar to the ADA.¹⁴⁹ Subsequently, in a major consolidation of the various anti-discrimination laws, the United Kingdom passed the Equality Act of 2010 (EqA). Section 14 of the EqA outlaws discrimination because of a “protected characteristic” which includes age, disability, gender reassignment, race, religion or belief, sex, or sexual orientation.¹⁵⁰ However, Section 159 allows for affirmative action for individuals with protected characteristics in employment if an employer “reasonably thinks that – (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or (b) participation in an activity by persons who share a protected characteristic is disproportionately low.”¹⁵¹ Thus, in order for an employer to implement an affirmative action program 1) the candidate with the qualifying protected characteristic must be as qualified as the other candidate being considered, 2) the employer must not have a policy “treating persons who share the protected characteristics more favorably” and 3) the affirmative action must be a “proportionate means of achieving the aim.”¹⁵²

For people with disabilities, a special statutory framework (EqA Section 15) defines discrimination as a) being treated unfairly because of a disability, and b) not “a proportionate means of achieving a legitimate aim.”¹⁵³ This legitimate aim requirement is similar to the ADA’s reasonable accommodation standard.¹⁵⁴ To counter the reasonable accommodation or undue burden elements that might adversely affect a disabled person, Section 13 of EqA creates an exception to the definition of discrimination that does not include treating a disabled person “more favorably” as discrimination.¹⁵⁵ This would seem to signal approval for

¹⁴⁹ ALWYN W. TURNER, *A CLASSLESS SOCIETY: BRITAIN IN THE 1990S* 97–98 (2013).

¹⁵⁰ Equality Act, (2010) c.15 § 14 (UK).

¹⁵¹ *Id.* § 159(2).

¹⁵² *Id.* § 159(4).

¹⁵³ *Id.* § 15.

¹⁵⁴ Matthew Purchase, *Practical Law Employment: Disability Discrimination*, THOMAS REUTERS PRAC. L., <https://uk.practicallaw.thomsonreuters.com/3-502-7601>; see 42 U.S.C. § 12111 (2009).

¹⁵⁵ Equality Act, (2010) c.15 § 13(3) (UK). “If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled person more favourably than A treats B.” *Id.*

employers to engage in affirmative action for disabled people, but a natural question exists as to what this upper bound would be.

In interpreting the EqA, labor tribunals are mandated to use the Employment Statutory Code of Practice (EHRC) in their adjudication.¹⁵⁶ Under the regulations of the EHRC, employers are able to establish affirmative action programs as long as they are “proportionate means of achieving the aim[.]”¹⁵⁷ In defining “proportionate,” labor tribunals must consider whether it would “be possible to achieve the aim as effectively by other actions that are less likely to result in less favorable treatment to others[.]”¹⁵⁸ For affirmative action programs with no time limit, there is an implication that these are not “proportionate.”¹⁵⁹

2. *Jurisprudence and Case Law*

Deciding a case under the DDA, which shares the EqA’s language that allows for employers to treat disabled employees *more favorably*, the U.K. Court of Appeal in *O’Hanlon v. HM Revenue & Customs* conflated more favorable treatment with examples of reasonable accommodations.¹⁶⁰ Specifically, the U.K. Court of Appeal acknowledged that an “employer may be obliged to take positive steps which involve treating the disabled employee more favourably” and pointed to Section 18B(3) of the DDA as “examples of the kinds of steps which may be appropriate.”¹⁶¹ The court here uses the examples of reasonable accommodations listed in the DDA to show what more favorable treatment might look like.¹⁶²

Similarly, in *Archibald v Fife Council*, the House of Lords considered an appeal brought under the DDA in which a disabled employee claimed her employer, the Fife Council, denied her reasonable accommodations and

¹⁵⁶ Prac. L. Emp., *Discrimination in Employment: Exceptions*, WESTLAW, https://uk.practicalaw.thomsonreuters.com/9-502-3493?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&comp=pluk#co_anchor_a337594.

¹⁵⁷ Equality Act, (2010) c.15 § 159(4) (UK), <https://www.legislation.gov.uk/ukpga/2010/15/contents>.

¹⁵⁸ EQUAL. AND HUM. RTS COMM’N, EMPLOYMENT STATUTORY CODE OF PRACTICE: EQUALITY ACT 2010 CODE OF PRACTICE § 12.28 (Sept. 4, 2015), <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>.

¹⁵⁹ *Id.* at § 12.30.

¹⁶⁰ *O’Hanlon v. HM Revenue & Customs* [2007] EWCA (Civ) 283 [56], (appeal taken from EAT) (Hooper, LJ) (UK).

¹⁶¹ *Id.*

¹⁶² I believe the Court meant to cite Section 18B(2), as that contains the list referenced. This list includes “(a) making adjustments to premises; (b) allocating some of the disabled person’s duties to another person; (c) transferring him to fill an existing vacancy; (d) altering his hours of work or training[.]” Disability Discrimination Act, (1995) § 18B(2) (UK).

subsequently fired her.¹⁶³ In deciding the case, their Lordships noted that while Section 6(7) of the Act states: “Subject to the provisions of this section, nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others[,]” the other provisions of this section create a duty on the employer to reasonably accommodate a disabled employee.¹⁶⁴ The question remaining is what are the limits of *more favorable treatment*?

In comparing disability discrimination with age discrimination, the absence of the EqA’s Section 15 carve-out in the definition of discrimination changes the calculus for other forms of discrimination litigation. Age discrimination will be used as a corollary in the absence of ample case law concerning disability employment because of its more extensive jurisprudential analysis. For disparate treatment based on age in employment not to be discriminatory, employers must “reasonably [think] that — (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or (b) participation in an activity by persons who share a protected characteristic is disproportionately low.”¹⁶⁵ This affirmative action then must be “a proportionate means of achieving a legitimate aim.”¹⁶⁶

In *The Lord Chancellor and Secretary of State for Justice and another v. McCloud Secretary of State for the Home Department and others v. Sargeant and others*, the U.K. Court of Appeal held a new pension scheme that had grandfathered older judges and firefighters into a more lucrative pension program was an unlawful act of age discrimination.¹⁶⁷ While stating the government must be afforded some discretion in establishing policy, the U.K. Court of Appeal stressed that just because the government defines a social goal or policy, it does not automatically make the goal or policy legitimate.¹⁶⁸ Additionally, the U.K. Court of Appeal emphasized that evidence must be given to support the claim; the evidence proffered here was “that ‘it felt right’ so to protect older firefighters, and that the decision to do so ‘was a moral decision’ and so did not need to be evidentially substantiated”¹⁶⁹ The U.K. Court of Appeal found that the proffered evidence here was “not good enough[,]” to make

¹⁶³ Archibald v. Fife Council [2004] UKHL 32 [3], (appeal taken from Scot.) (UK).

¹⁶⁴ *Id.* at [19], [33], [52]. See Disability Discrimination Act, (1995) c. 50 § 6(7) (UK); see also § 6(1).

¹⁶⁵ Equality Act, (2010) c.15 § 159(1) (UK), <https://www.legislation.gov.uk/ukpga/2010/15/contents>.

¹⁶⁶ *Id.* § 159(4)(c).

¹⁶⁷ *The Lord Chancellor and Others v. V McCloud and Others; The Secretary of State for the Home Department and others v R Sargeant and Others* [2018] EWCA (Civ) 2844 [233] (appeal taken from EAT) (UK).

¹⁶⁸ *Id.* at [153]–[54].

¹⁶⁹ *Id.* at [157].

the program legitimate.¹⁷⁰ Concerning proportionate means, the U.K. Court of Appeal did not conclude whether the grandfathered program was proportionate, instead stating it was a fact-based decision.¹⁷¹ In its ruling, the U.K. Court of Appeal increased the evidentiary burden necessary to prove justification of discrimination, and separated what might have been seen as an automatic connection between governmental, social, or moral policy and a legitimate aim.

Ultimately, the EqA allows employers to give certain benefits to disabled employees that, if given to another class or category of people, would be seen as discriminatory. Implicit in the U.K. Court of Appeal opinions in *Archibald* and *O'Hanlon* is that carve-outs of the definition of disability are connected with the reasonable accommodations employers must make for this population. The question becomes whether *more favorable* treatment is limited to reasonable accommodations, or reasonable accommodations set a floor for *more favorable* treatment. The latter interpretation should be rejected under a redundancy argument because if *more favorable* and reasonable accommodations both stood for the same proposition, only one term would be necessary. In examining case law concerning age-related discrimination, the U.K. Court of Appeal in *McCloud* narrowed “legitimate aim” to what can be substantiated through evidence. Because affirmative action for discrimination and age are both limited by “a proportionate means of achieving a legitimate aim,” the *more favorable* policy would have to overcome an evidentiary burden.

Concerning the limits of a *more favorable* policy for disabled employees, it seems employers have flexibility in crafting affirmative action programs as long as programs are supported with evidence showing their legitimate aim.¹⁷² In defining legitimate aim, the government does not receive deference simply by enacting a statute with the same goal.¹⁷³ Additionally, proportionality is a decision for the trier of fact.¹⁷⁴ Thus, employers, whether the government or the private sector, when implementing an affirmative action program, must rely on evidence to prove the program is rational and proportionate to their aim.

While the scope of employer affirmative action is broad, it most likely excludes a quota system. This is because the DDA repealed portions of the Disabled Persons Employment Act of 1944, including the quota provision.¹⁷⁵

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at [99].

¹⁷² *Id.* at [157].

¹⁷³ *Id.* at [153]–[54].

¹⁷⁴ *Id.* at [99].

¹⁷⁵ HC Deb (24 Jan. 1995) (253) col. 147 (UK) (“The right covers all aspects of employment: when disabled people apply for work or take up employment and when people become disabled during their working

Under the canons of statutory interpretation, the repeal of the quota provision would most likely prohibit another quota system from being created through statutory or regulatory interpretation without a clear Parliamentary intention.¹⁷⁶

C. *United States*

1. *Statutes*

When Congress passed the 1964 and 1968 Civil Rights Acts, which outlawed discrimination by private entities toward protected classes, Congress left out disabled people from the list of protected classes.¹⁷⁷ Congress thereafter passed the 1973 and 1974 Rehabilitation Acts, and the 1990 Americans with Disabilities Act (ADA), which included anti-discrimination language for disabled people.¹⁷⁸ The specific language, however, is different between these two statutes. The Civil Rights Act makes “discriminat[ion] against any individual . . . because of such individual’s race, color, religion, sex, or national origin” unlawful, while the ADA makes “discriminat[ion] against a qualified individual on the basis of a disability” unlawful.¹⁷⁹ A qualified individual here would include an employee who is able to perform job functions with either a reasonable accommodation or without a reasonable accommodation.¹⁸⁰

The ADA eliminates the option for an individual without a disability to bring a claim of discrimination “because of the individual’s lack of disability.”¹⁸¹ Without a potential plaintiff having this standing, they lack the option to challenge their employer’s providing of reasonable accommodations to disabled employees.¹⁸² As the statutory language bars potential non-disabled employees from bringing a claim under the ADA, an employer would theoretically have no

lives. It will replace the outdated and unworkable quota scheme.”).

¹⁷⁶ LARRY M. EIG, CONG. RSCH. SERV., 9-5700, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 31 n.207 (2014).

¹⁷⁷ MARIA L. ONTIVEROS ET AL., EMPLOYMENT DISCRIMINATION LAW: CASE AND MATERIALS ON EQUALITY IN THE WORKPLACE 747 (2021).

¹⁷⁸ 42 U.S.C. § 2000e-2; CYNTHIA BROUGHER, CONG. RSCH. SERV., RL 98-921, THE AMERICANS WITH DISABILITIES ACT (ADA): STATUTORY LANGUAGE AND RECENT ISSUES 18 (2012), <https://www.everycrsreport.com/reports/98-921.html>.

¹⁷⁹ 42 U.S.C. §§ 2000e-2, 12112(a).

¹⁸⁰ 42 U.S.C. §§ 12111.

¹⁸¹ 42 U.S.C. § 12201(g).

¹⁸² Even without the explicit language, a non-disabled employee could not have standing under the ADA since reasonable accommodation is based upon whether the accommodation would unduly burden the *employer* alone. See 42 U.S.C. § 12111(10)(B) (2008) (“In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include . . .” [Undue Hardship, Factors to be considered]).

limit to the type of affirmative action program the employer could provide to its employees. Thus, under federal law, an employer could establish a quota system for disabled employees in their private business. This is less restrictive than in the United Kingdom where a question exists as to how extensive or beneficial *more favorable* treatment may be; and less restrictive than Germany, where a quota system exists, but is subject to specific rules.

While private employers and government contractors are required to comply with the ADA and the Rehab Act, respectively, government actions related to discrimination are governed by the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment.¹⁸³ The equal protection claims from the Fifth and the Fourteenth Amendments are reviewed by courts under the tiers of scrutiny.¹⁸⁴

2. Case Law

Claims of reverse discrimination brought by non-disabled employees lack standing under the ADA per Section 12201(g), and would therefore implicitly allow private employers to create affirmative action programs, including quotas. The question left for consideration is whether the government may commence similar actions. Under this scenario, the government would have to overcome the equal protection challenges of the Fifth and Fourteenth Amendments to the U.S. Constitution, as refined through case law.

When evaluating equal protection claims, it is necessary to determine whether the group implicated by the provisions of a policy is a suspect class. If so, an evaluating court is required to review the policy with heightened scrutiny.¹⁸⁵ Concerning the question of the protected-class status of disabled people and the appropriate scrutiny to apply, the U.S. Supreme Court has evaluated whether disabled people are a suspect class and found they are not.¹⁸⁶ Without this protected status, a policy directed at this class would be reviewed under rational basis scrutiny.¹⁸⁷

Specifically, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court partially overturned the Appeals Court, which held that disabled people were a quasi-suspect class and that an intermediate level of scrutiny should apply.¹⁸⁸

¹⁸³ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 848–50 (6th ed. 2019).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 848.

¹⁸⁶ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985).

¹⁸⁷ CHEMERINSKY, *supra* note 183, at 587.

¹⁸⁸ 726 F.2d 191 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432, 450 (1985).

The Supreme Court did not find disabled people were a suspect or quasi-suspect class, particularly because of the fear that making disabled people even a quasi-suspect class would require “the legislature to justify its efforts in these terms [which] may lead it to refrain from acting at all.”¹⁸⁹ The Court intentionally avoided applying an equal protection categorization to disabled people because it wanted the government to provide beneficial services for disabled people that are not necessarily “equal in all respects[.]”¹⁹⁰

In the absence of specific guidance from the federal courts concerning the upper bounds of disability accommodations or benefits under equal protection, this Comment will analyze equal protection and age discrimination because age-related discrimination is also reviewed under rational basis scrutiny.¹⁹¹

Through two major cases, the U.S. Supreme Court shows how difficult it is to strike a government action under an equal protection claim with rational basis review.

In *Massachusetts Board of Retirement v. Murgia*, a state police officer who was forced to retire at fifty under state law brought a claim against the state alleging unconstitutional discrimination. In a *per curiam* opinion, the Court reversed the lower court decision which had found the mandatory retirement age lacked a rational basis.¹⁹² In reversing the decision, the Court noted “actions by a legislature [are] presumed to be valid” under rational basis review.¹⁹³ While the Court stated mandatory retirement after age fifty might be “imperfect,” the state had identified an objective—to make sure officers are physically prepared for the job—and a rationale that the older an officer, the less physically-able they are.¹⁹⁴

In *Gregory v. Ashcroft*, state judges in Missouri brought suit against the state, arguing that Missouri’s Constitutional provision, which mandates judges retire at seventy, violated the federal Constitution. The Court found the provision did not violate the Equal Protection Clause. In her majority opinion, Justice O’Connor quoted *Vance v. Bradley*, which stated “courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the

¹⁸⁹ *City of Cleburne*, 473 U.S. at 444.

¹⁹⁰ *Id.*

¹⁹¹ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 310 (1976).

¹⁹² *Id.* The district court did not employ rational basis review, determining the provision was unconstitutional before arriving at a tiers of scrutiny analysis. *Id.*

¹⁹³ *Id.* at 314.

¹⁹⁴ *Id.* at 314–15.

laws.”¹⁹⁵ As the constitutional provision had been passed by the Legislature and approved by voters, the Court found it *super-legitimate*, reflecting both the representative and direct opinions of the people of Missouri.¹⁹⁶ In hypothesizing a potential explanation for mandatory retirement, the Court found a rational explanation easy to deduce and thus affirmed the lower court.¹⁹⁷

These two cases show the difficulty in finding that a government action violates equal protection when it impacts a non-suspect class, such as those with a disability or of a certain age. When the legislature passes the statute in question, and more so when the voters approve, a government action is presumed to serve a legitimate government interest.¹⁹⁸ Additionally, as the Court in *Ashcroft* allowed hypotheticals for a rational connection between the government action and policy, the possibility of the government failing the test is low.¹⁹⁹ Therefore, the Court’s precedent seems to allow government-enacted disability quotas. But it also presents a challenge; where a legislator or business can propose proactive measures, they also can move in the opposite direction.

This stands in contrast to the United Kingdom, where using government action as the standard to establish legitimate aims and interests is not allowed. As seen through *McCloud*, government action is not given deference in establishing whether an affirmative action program has a legitimate aim.²⁰⁰

3. *Limited Purpose Government-Mandated Quotas*

The United States has less experience in introducing quotas, but has at times authorized the use of quotas as a remedial measure in responding to discrimination. Specifically, in the context of racial discrimination, the U.S. Supreme Court allowed a quota in *United States v. Paradise*.²⁰¹ In a plurality decision, the Court affirmed a district court order which had imposed a hiring quota on the Alabama Department of Public Safety.²⁰² The United States challenged the district court’s order on constitutional grounds, arguing the order violated the Fourteenth Amendment’s Equal Protection Clause.²⁰³ In Justice

¹⁹⁵ Gregory v. Ashcroft, 501 U.S. 452, 471 (1991) (quoting Vance v. Bradley, 440 U.S. 97, 99 (1978)).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 472–73.

¹⁹⁸ *Id.* at 471.

¹⁹⁹ *Id.* at 472–73; *see also* Grutter v. Bollinger, 539 U.S. 306, 308 (2003).

²⁰⁰ The Lord Chancellor and others v. V McCloud and Others; The Secretary of State for the Home Department and Others v. R Sargeant and Others [2018] EWCA (Civ) 2844, ¶¶ 153–54 (UK).

²⁰¹ 480 U.S. 149, 185–86 (1987).

²⁰² United States v. Paradise, 480 U.S. 149, 185–86 (1987).

²⁰³ *Id.* at 150.

Brennan's opinion, joined by three Justices, he stressed that the imposition of a quota as a remedial measure to address discrimination was constitutional even under a strict scrutiny analysis.²⁰⁴ Justice Brennan cited the district court judge who had stated the order is a "necessary remedy for an intolerable wrong[]" specifically because after being confronted with the issue, the Alabama Department of Public Safety continued to discriminate against African American state trooper applicants.²⁰⁵

While *United States v. Paradise* concerned the use of a quota as an affirmative action tool to respond to racial prejudice, it is illuminating to see the United States using such an affirmative action program, and for a quota to potentially withstand strict scrutiny analysis. Disability affirmative action is held to a rational basis standard, but *Paradise* is worth mentioning as it is a situation in which the United States actively established a quota system to respond to ongoing discrimination.

CONCLUSION

As shown above, case law regarding disability affirmative action programs is scarce, whether it is in Germany, the United Kingdom, or the United States. All three countries give great deference for disability affirmative action, but the amount of deference is based on whether the program is rational. In this respect, Germany and the United Kingdom both limit disability affirmative action programs to those that would pass a loose version of the United States' rational basis scrutiny. Specifically, under U.S. rational basis scrutiny, disability affirmative action programs must be rationally connected to a legitimate government interest.

Given the lack of case law related to disability affirmative action, the definitions of key terms such as "rational" or "legitimate" are, or must be, interpreted by other cases or statutes. This Comment used age-related affirmative action as a proxy where disability case law is lacking. Keeping the same categories across countries allows for more accurate cross-references and conclusions.

While Germany currently employs a disabled quota system and the United Kingdom recently eliminated its quota system, it is America that seems to have the most flexibility for what is defined as rational. This is due to U.S. case law

²⁰⁴ *Id.* at 167.

²⁰⁵ *Id.* at 58–59 (quoting *Paradise v. Shoemaker*, 470 F.Supp. 439, 442 (M.D. Ala. 1979), *aff'd*, 767 F.2d 1514 (11th Cir. 1985)).

providing legislatures and voters wide latitude on what constitutes rationality. But it is also this flexibility that might be the country's weakness. As Germany and the United Kingdom set limits for what legal and non-legal affirmative action programs looks like, the United States does not provide such a framework. Instead, the United States leaves the work up to legislatures and voters, who can either advance or stymie these programs.

In conclusion, all three countries require affirmative action programs to be rational and connected to a government interest. This Comment demonstrates there is an economic and psychological case for the government to engage in this type of affirmative action program. The prejudicial effects of disability discrimination have caused not only the underemployment of people with disabilities on a micro-economic level, but have also blocked maximizing GDP on a macro-economic level. Taken together, the reduction of discrimination caused by prejudice, the proliferation of employment among a historically marginalized community, and the increase in GDP are all rational and legitimate interests for government intervention.

With longstanding discrimination, the disabled community is a group that not only could benefit from government intervention, but requires government intervention of this kind.

As illustrated in the introductory story, Becky Dann wanted to be employed and was as qualified as anyone else graduating from her program. But she was presumed different because of her external appearance—her disability. Knowing someone with a disability, and interacting with them professionally, is a major step any employer or employee can take in breaking down employment barriers for disabled people. Employers in Germany, the United Kingdom, and the United States can take affirmative actions to help this community.

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