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## **“After You”: A Comparison of International Approaches to Employing and Accommodating the Differently Abled**

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### **ABSTRACT**

*When the United States introduced the Americans with Disabilities Act (ADA) in 1990, the anti-discrimination legislation was unique. The ADA gave disabled employees the opportunity for recourse against*

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wrongful discrimination in the hiring, firing, and day-to-day practices of employers. While most industrialized countries had failing quota systems intended to reward and punish employers into employing and accommodating the disabled, Congress intended the ADA to empower the employee. Despite its seemingly empowering approach, the ADA failed to substantially increase the employment of the disabled, resulted in proportionally few successful disability discrimination lawsuits, and left much of the responsibility for addressing the employment disparities of the disabled to the disabled themselves.

The disabled have consistently numbered among the most impoverished, underemployed, and unemployed demographics worldwide, particularly in countries using quota systems and anti-discrimination legislation alone. In the 1990s and 2000s, several law review articles focused on the prospect of an alternative “hybrid” approach to disability discrimination. In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD) that also encouraged the use of both quota systems and anti-discrimination legislation. Since then, more countries have initiated a hybrid approach. Over thirty years after the United States enacted the ADA, and fifteen years after the U.N. introduced the CRPD, it appears that a hybrid system may indeed be both the most successful approach to improving employment outcomes for the disabled, and the new norm.

#### HYBRIDS HIT THE ROAD IN DISABILITY EMPLOYMENT LAW

For most of the last century, countries around the world have taken two markedly different approaches to promote employing and accommodating the disabled.<sup>1</sup> At various times and by various authors, these approaches have been referred to by terms including *stick v. carrot*,<sup>2</sup> *anti-discrimination v. quota*,<sup>3</sup> *custodial v. integrationist*,<sup>4</sup> and *social v. medical*.<sup>5</sup> In this Comment, I will refer to these approaches

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<sup>1</sup> See Vai Io Lo, *Promotion of the Employment of Persons with Disabilities in Japan, the United States, and China: Carrot, Stick, or Both?*, 29 ARIZ. J. INT’L & COMPAR. L. 558, 559 (2012).

<sup>2</sup> See generally *id.*

<sup>3</sup> See generally *id.*

<sup>4</sup> See generally Samuel R. Bagenstos, *Comparative Disability Employment Law from an American Perspective*, 24 COMPAR. LAB. L. & POL’Y J. 649, 650–52 (2003).

<sup>5</sup> See generally Katharina Heyer, *From Special Needs to Equal Rights: Japanese Disability Law*, 1 ASIAN-PAC. L. & POL’Y J. 7, 1 (2000).

primarily as the quota system and the anti-discrimination legislation system, and to the persons these systems affect as disabled.<sup>6</sup>

Both the quota and the anti-discrimination legislation systems have repeatedly failed to increase employment for the disabled, a group the World Health Organization refers to as "the world's largest minority."<sup>7</sup> Now many historically quota-focused countries are moving toward models that incorporate both systems,<sup>8</sup> a hybrid "human rights model" exemplified by the United Nations Convention on the Rights of Persons with Disabilities (CRPD).<sup>9</sup> Quota, anti-discrimination legislation, and hybrid systems place responsibility on employers and employees to different degrees and pose different problems.

Two modern cases, *Kowitz v. Trinity Health* and *Shell v. Burlington Northern Santa Fe Railway*, illustrate questions raised not only by the Americans with Disabilities Act (ADA) anti-discrimination legislation in the United States but also by the earlier quota systems prevalent in Europe and Asia.<sup>10</sup> How can employers seek out and support disabled employees without infringing on their privacy or exacerbating differences between employees? How can disabled employees find work and navigate challenges without losing dignity or being unfairly advantaged? How, ultimately, can we reach employment equity for the disabled?

This Comment will investigate how different jurisdictions and international legislators around the world approach these questions using quota systems, anti-discrimination legislation, and, more recently, a hybrid approach. In Part I, I will examine the history and application of the quota system that predominated European law for most of the twentieth century and that still exists in some form in many

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<sup>6</sup> Said terms are chosen for consistency with disability law literature and reader understanding. The author acknowledges that these are not the only, or necessarily the most accurate, terms for these concepts.

<sup>7</sup> U.N. Dep't of Econ. & Soc. Affs., Factsheet on Persons with Disabilities, <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> [<https://perma.cc/994C-NCHY>].

<sup>8</sup> Bagenstos, *supra* note 4, at 655 ("[M]any European governments are moving away from a quota model toward an ADA-inspired model of anti-discrimination and accommodation.").

<sup>9</sup> See generally Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L. L. & COM. 287, 291 (2007).

<sup>10</sup> Cf. *Kowitz v. Trinity Health*, 839 F.3d 742, 744 (8th Cir. 2016); *Shell v. Burlington N. Santa Fe Ry.*, 941 F.3d 331 (7th Cir. 2019) (addressing, in the abstract, issues of privacy, dignity, equality, etc.).

nations today. Part I will also explore the history and application of the anti-discrimination legislation model that began with the ADA in 1990 and spread to countries such as Australia, Canada, and the United Kingdom. This Part will also further examine examples of anti-discrimination legislation, using *Kowitz* and *Shell* as illustrations. I will explore the outcomes of both quota and anti-discrimination legislation models.

Similarly, Part II will discuss the new hybrid approach supported by the Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, this Part will, again, discuss the history, application, and outcome of the new hybrid approach. Finally, I will return to the questions illustrated by *Kowitz* and *Shell* in Part I, using them as a framework to analyze the responsibilities, benefits, and disadvantages of each system for employees and employers. I will discuss each system's success in improving employment of the disabled. I will propose that not only is a redistribution of responsibility through hybrid systems fairer to employers and employees than either a quota or anti-discrimination system alone but the hybrid system is also the most consistently successful in increasing employment of the disabled. In a true hybrid model state, where quotas are enforced and resources are available such that disabled employees or the state can reasonably bring discrimination suits against employers, employment of the disabled is more likely to increase.

## I

### THE QUOTA AND ANTI-DISCRIMINATION LEGISLATION APPROACHES

In this Part, I will explain the history, application, and outcomes of two major approaches to international disability employment law: the quota system and anti-discrimination legislation. In the anti-discrimination section, I will also describe two cases from the United States, *Kowitz* and *Shell*, that illustrate dilemmas of the anti-discrimination approach. The history of these predecessors to the hybrid approach is necessary to understand and compare the new hybrid approach. I begin with the quota system.

#### *A. The Quota System Approach*

To fully understand the current state of disability employment law in the United States, it is necessary to understand the forerunner of anti-discrimination legislation—the quota system. The quota system is the

primary alternative approach to anti-discrimination legislation typified by the ADA.<sup>11</sup> I will first explain the origins of the quota system in post–World War I European countries early in the twentieth century. Then, I will describe features common to quota systems in Europe and Asia. Finally, I will describe how quota systems fail to meet the ostensible goal of increasing employment of the disabled.

The quota system gained prominence in European countries during the first half of the twentieth century.<sup>12</sup> Following World War I, disabled veterans returned to the European workforce and needed to make a living.<sup>13</sup> In response, many European countries adopted a quota system that required employers to hire a certain number of disabled employees.<sup>14</sup> Several Asian countries, including China, Thailand, and Japan, also began operating quota systems.<sup>15</sup> Quota system governments often use levy-grant type systems.<sup>16</sup> They incentivize business by providing grants to businesses meeting or exceeding the required number of disabled employees in their workforces.<sup>17</sup> Additionally, those governments enlist levies to punish those that do not reach the quota.<sup>18</sup> The quota system was one of the predominant approaches toward increasing employment levels of the working disabled for the majority of the twentieth century.<sup>19</sup>

The philosophy behind most quota system countries is the medical model, a model reflecting the view that a disability is a medical problem requiring treatment or charitable help from others.<sup>20</sup> Governments often categorize disabilities by a grade or percentage,

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<sup>11</sup> See Lo, *supra* note 1, at 561.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 560–61 (listing Germany and the United Kingdom).

<sup>15</sup> *Id.* at 558–60.

<sup>16</sup> Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-discrimination Laws*, 18 *COMPAR. LAB. L.J.* 62, 68 (1996).

<sup>17</sup> *Id.* (“[German levy money] can, for example, be used to provide grants to help employers who exceed their quota obligations meet any extra costs like adapting buildings and providing special training.”).

<sup>18</sup> See, e.g., Carol D. Rasnic, *A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States*, 9 *ARIZ. J. INT’L & COMPAR. L.* 283, 298, 313 (1992) (regarding Germany’s imposition of “a monthly levy (‘ausgleichsabgabe’), of DM 200 per unfilled position”); Jun Nakagawa & Peter Blanck, *Future of Disability Law in Japan: Employment and Accommodation*, 33 *LOY. L.A. INT’L & COMPAR. L. REV.* 173, 180 (2010) (“[Japan’s] levy is fifty thousand yen (approximately \$500) per month for each person below the quota.”).

<sup>19</sup> See Lo, *supra* note 1, at 561.

<sup>20</sup> *Id.* at 558–59.

such as “sixth grade” or “20%,” indicating the degree of disability.<sup>21</sup> Many governments have excluded disability qualifying conditions in the quota system that anti-discrimination models recognize; for example, Japan had not recognized HIV as a disability at the time of a 2000 symposium on legal education in Japan.<sup>22</sup>

Even when applied to smaller groups of disabled persons, quota systems consistently fail to meet goals for increased employment of the disabled. In 2009, fewer than half of the private employers in Japan met a quota requiring 1.8% of their workforce to be disabled;<sup>23</sup> the public sector was not in compliance either.<sup>24</sup> In 1993, Britain’s now-abandoned, quota-focused system had fewer than 19% of employers with 3% of their workforce disabled.<sup>25</sup> This shortfall is due to the lack of prosecution and enforcement.<sup>26</sup> The repeated failures of the quota system to provide adequate remedies for discriminated-against individuals and to substantially increase employment for the disabled led legislators to search for alternatives. The search for alternatives eventually led to a new approach exemplified by the ADA.

### ***B. The Anti-discrimination Legislation Approach***

While the inadequacy of the quota system became evident when quotas were repeatedly unmet, the inadequacies of the ADA are less readily apparent. Rather than simply requiring an employer retain a set number of disabled employees, the ADA has more ambiguous goals for eliminating discrimination against the disabled and assuring “equality of opportunity, full participation . . . and economic self-sufficiency.”<sup>27</sup> For this reason, I will address not only the history and application of the ADA in this Section but also the *Kowitz* and *Shell* cases that demonstrate the problematic ambiguity of the ADA.

#### *1. History and Application*

Despite the ADA’s limitations, many countries recognize the United States as a highly influential example in the field of disability law.<sup>28</sup> This is largely due to the United States’ pioneering the Americans with

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<sup>21</sup> Nakagawa & Blanck, *supra* note 18, at 178–80.

<sup>22</sup> Heyer, *supra* note 5, at 6–7.

<sup>23</sup> Nakagawa & Blanck, *supra* note 18, at 180.

<sup>24</sup> *Id.*

<sup>25</sup> Waddington, *supra* note 16, at 66–67.

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

<sup>27</sup> 42 U.S.C.A. § 12101(a)(7) (West 2020).

<sup>28</sup> Bagenstos, *supra* note 4, at 656.

Disabilities Act of 1990.<sup>29</sup> In this Section, I describe the history of anti-discrimination legislation beginning with the United States’ ADA in 1990, the common features of anti-discrimination legislation, and the familiar outcome: continued underemployment of the disabled.

Prior to 1990, other civil rights and anti-discrimination legislation preceded the ADA. A view of disability commonly referred to as the “social model” elucidates the connection between general civil rights and anti-discrimination legislation.<sup>30</sup> The social model defines disability as a social construct resulting from the way society structures our workplaces and infrastructure.<sup>31</sup> For example, for many years, architects designed buildings with stair access but not elevator or ramp access. Because stairs are difficult or impossible for some disabled persons to climb, such as persons in wheelchairs, many became disabled by a stair-only design and struggled to navigate buildings. If all buildings had ramps and elevators rather than stairs, then persons in wheelchairs would not be “disabled”; they would be just as able as non-wheelchair users to navigate buildings. Thus, the social model recognizes that societal choices about how we live—constructing stairs rather than ramps and elevators to navigate buildings—have historically disadvantaged the disabled. It is the societal choice rather than the individuals’ innate limitations—a difficulty or inability to climb stairs—that makes navigating buildings difficult.

President George H.W. Bush envisioned that the ADA would allow disabled Americans to “pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>32</sup> President Bush also stated that the ADA would ensure that people with disabilities are “given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally [into] the rich mosaic of the American mainstream.”<sup>33</sup> He concluded his remarks by declaring, “Today’s legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and

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<sup>29</sup> *Id.*

<sup>30</sup> *See id.* at 650 (describing a move toward the social model and how activists and allies helped bring the ADA about “[t]hrough grass-roots protests, litigation, and insider lobbying”).

<sup>31</sup> *Id.* at 656–57.

<sup>32</sup> Arlene S. Kanter, *Let’s Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 *TOURO L. REV.* 301, 311 (2019).

<sup>33</sup> *Id.*

the pursuit of happiness. . . . Let the shameful wall of exclusion finally come tumbling down.”<sup>34</sup>

The ADA offers a much wider umbrella of disability coverage than the quota system and covers the disabled, those associated with the disabled, and those treated as if they are disabled, though opening that umbrella may be easier said than done.<sup>35</sup> The ADA requires employers to provide reasonable accommodations in the application process or workplace to those with a qualifying disability when the employer knows of the disability, barring unreasonable requests that would create an undue hardship for the employer.<sup>36</sup> Reasonable accommodations may include flexible work schedules, new equipment, and policy changes.<sup>37</sup> The ADA also prohibits discrimination in employment practices.<sup>38</sup> While a physician might assess a disability before employment begins in quota-system countries, the ADA places the burden of proof on the disabled persons *after* discrimination occurs.<sup>39</sup> If employers do not comply with the ADA, then employees may be eligible to receive significant compensation through litigation.<sup>40</sup>

Despite legislators’ hope that the ADA would usher in a bright new era free of exclusion, society has continued to place obstacles in the path of the disabled. Like other civil rights legislation, the ADA leaves a great deal of ambiguity, and it is not as easy to measure its successes and failures compared to the quota system, where quota numbers are either met or not. However, the most recent progress report from the National Council on Disability shows that we are still far from the

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<sup>34</sup> *Id.* at 311–12.

<sup>35</sup> 42 U.S.C.A. § 12102(1)(C) (West 2020).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 12111(9).

<sup>38</sup> *Id.* § 12101.

<sup>39</sup> *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1524–25 (2002).

<sup>40</sup> *See, e.g.,* Lois A. Bowers, *\$2 Million Disability Discrimination Lawsuit Settlement Offers Lessons for All Operators*, MCKNIGHT’S SENIOR LIVING (Feb. 24, 2020), <https://www.mcknightsseniorliving.com/home/news/2-million-disability-discrimination-lawsuit-settlement-offers-lessons-for-all-operators/> [<https://perma.cc/H2TV-WD3P>] (describing \$2M disability employment discrimination lawsuit settlement); Brianna Smith, *Former Diversity Recruiter Sues Facebook over Alleged Discrimination*, LEGAL READER (Apr. 3, 2020), <https://www.legalreader.com/former-diversity-recruiter-sues-facebook-over-alleged-discrimination/> [<https://perma.cc/5QW2-KFRE>] (describing \$100M discrimination lawsuit); *Jury Awards Record \$13 Million in Disability Discrimination Case*, HR HUB.COM, <https://www.hrhub.com/doc/jury-awards-record-13-million-in-disability-d-0001> [<https://perma.cc/SE6N-RCSZ>].

“bright new era” President Bush envisioned.<sup>41</sup> The next section elaborates on some of the ADA’s ambiguities, using two modern cases as illustrative examples.

## 2. Kowitz and Shell: Gray Areas in Disability Accommodation

In 2016, Kowitz left many employers in the Eighth Circuit wondering what “notice of a need for reasonable accommodation” was and how they would recognize it.<sup>42</sup> In *Kowitz*, an employee, Kowitz, requested leave, and then an extension of leave, for corrective neck surgery related to her spinal disease.<sup>43</sup> Later, when her employer, Trinity Health, required employees in Kowitz’s job class to complete a training, Kowitz notified her supervisor in writing that she would be unable to complete the training because of her doctor’s orders.<sup>44</sup> Trinity Health fired her shortly afterward, and she brought suit on the basis of unlawful termination under the ADA.<sup>45</sup> While the United States District Court for the District of North Dakota granted summary judgment for Trinity Health, the Eighth Circuit reversed and remanded the decision.<sup>46</sup> The court noted Kowitz’s repeated communications to her supervisor about her spinal disease, ongoing treatment for the disease, and the disease’s effect on her ability to work were enough that a jury could have found she had put her employer on notice.<sup>47</sup> Consequently, the court found Kowitz’s employer should have initiated an interactive process to determine if, under the ADA, reasonable accommodation could have been made without undue burden.<sup>48</sup>

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<sup>41</sup> Cf. *Highlighting Disability / Poverty Connection, NCD Urges Congress to Alter Federal Policies That Disadvantage People with Disabilities*, NAT’L COUNCIL ON DISABILITY (Oct. 26, 2017), <https://ncd.gov/newsroom/2017/disability-poverty-connection-2017-progress-report-release> [<https://perma.cc/CCY8-R4UL>] (“People with disabilities live in poverty at more than twice the rate of people without disabilities . . . [o]nly 32 percent of working-age people with disabilities are employed compared with 73 percent of those without disabilities.”).

<sup>42</sup> See Rachel S. Kim, *Help Me, Help You: Eighth Circuit Diminishes Notice Requirement for Employees Seeking an ADA Accommodation*, 83 MO. L. REV. 409, 410 (2018).

<sup>43</sup> *Kowitz v. Trinity Health*, 839 F.3d 742, 744 (8th Cir. 2016).

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

<sup>45</sup> *Id.* at 745.

<sup>46</sup> *Id.* at 748.

<sup>47</sup> *Id.* at 747.

<sup>48</sup> *Id.* at 746–48 (citing *Equal Emp. Opportunity Comm’n v. Convergys Customer Mgmt. Grp.*, 491 F.3d 790, 795 (8th Cir. 2007)).

Though the *Kowitz* decision may appear favorable to employees, it also created ambiguity for both employees and employers.<sup>49</sup> Decisions sparking confusion over when and how notice is made, and the obligations for making and recognizing notice in the workplace, have the potential to be counterproductive for employees in the long run. The implications for invisible disabilities, such as many common developmental, learning, and mood disorders, may be particularly complicated by such an uncertain standard. These disorders can make it difficult for employees to communicate their needs to employers. Invisible disabilities can also be difficult for employers to recognize since these disabilities are not as readily apparent.

More recently, the 2019 Seventh Circuit case *Shell v. Burlington* illustrated issues that arise at the other end of the notice spectrum: before an employee is hired and before the disability even exists.<sup>50</sup> In *Shell*, an obese man, Shell, argued that a company discriminated against him under the ADA when the potential employer denied his job application on the basis that he may one day develop disabilities.<sup>51</sup> Specifically, Shell took a medical examination when he applied to an intermodal equipment operator position that required him to operate heavy machinery.<sup>52</sup> The medical examiner determined that he was obese.<sup>53</sup> The company refused to hire him because someone of his Body Mass Index (BMI)<sup>54</sup> would be at risk of developing conditions such as “sleep apnea, diabetes, and heart disease” that could lead to loss of consciousness while operating machinery, making the work environment dangerous.<sup>55</sup> The court held that the possibility of having a disability in the future is not the equivalent of having a disability in the present.<sup>56</sup> As such, the court found the company did not discriminate when it refused Shell the job on the basis of potential disabilities.<sup>57</sup>

In *Shell*, the employer proactively screened for disability prior to employment and took action because of the possibility of a

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<sup>49</sup> Kim, *supra* note 42, at 410.

<sup>50</sup> See *Shell v. Burlington N. Santa Fe Ry.*, 941 F.3d 331, 337 (7th Cir. 2019).

<sup>51</sup> *Id.* at 334.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Body Mass Index (BMI)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthyweight/assessing/bmi/index.html> [<https://perma.cc/L57Q-675D>] (“weight in kilograms divided by the square of height in meters”).

<sup>55</sup> *Shell*, 941 F.3d at 334.

<sup>56</sup> *Id.* at 336.

<sup>57</sup> *Id.* at 337.

future disability or disabilities.<sup>58</sup> Such “pre-discrimination” was not ultimately recognized by the court.<sup>59</sup> Here, the employer was *too* proactive in addressing an employee’s disability, so much so that the employee was rejected because of possible disabilities before they even existed. *Shell* also differs from decisions like the one in *Kowitz* that seem to indicate a more lenient approach to recognizing disability that is less employer-friendly. Both *Shell* and *Kowitz*, however, serve to illustrate issues raised by the broadness and ambiguity of the ADA that are less apparent in quota systems.

## II THE NEW HYBRID APPROACH

Quota system and anti-discrimination legislation approaches are not mutually exclusive, and the United Nations provides for and encourages aspects of both in its Convention on the Rights of Persons with Disabilities.<sup>60</sup> The CRPD exemplifies an emerging hybrid model that incorporates both quota and anti-discrimination approaches.<sup>61</sup> All the countries referred to in this Comment as using a hybrid model are also signatories to the CRPD.<sup>62</sup> Under the hybrid approach system, when consistently enforced and with sufficient support, employment of the disabled has generally increased more substantially in hybrid countries than in non-hybrid countries.<sup>63</sup> Below, I will describe the history and application of hybrid approaches used by various countries.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 336–38.

<sup>60</sup> See Convention on the Rights of Persons with Disabilities, art. 27, *adopted* Dec. 3, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008) (referencing “reasonable accommodation” along with “affirmative action programmes” and “incentives” to safeguard and promote the right to work using legislation and other means).

<sup>61</sup> *See id.*

<sup>62</sup> Multilateral Treaties Deposited with the Secretary-General, United Nations, New York (ST/LEG/SER.E), as available on <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-15&chapter=4&clang=en> [<https://perma.cc/N2V4-RYUW>] (showing the 164 signatories including the United Kingdom, Australia, Canada, Sweden, and others discussed in this Comment).

<sup>63</sup> As further discussed below, Mexico and several Northern European countries have high employment rates and either meet these parameters or have similar systems in place. See generally Hugo Sandoval et al., *Disability in Mexico: A Comparative Analysis Between Descriptive Models and Historical Periods Using a Timeline*, SALUD PÚBLICA DE MÉXICO (2016), <http://saludpublica.mx/index.php/spm/article/view/8048/11276> [<https://perma.cc/49RU-59V6>] (regarding Mexico); Rachel Banning-Lover, *Russia and the US Have the Worst Employment Gaps for Disabled People*, THE GUARDIAN (June 23, 2016), <https://www.theguardian.com/global-development-professionals-network/2016/jun/23/russia>

Currently, 182 nations have ratified the Convention,<sup>64</sup> including all G7 countries other than the United States.<sup>65</sup> A diverse group of countries spanning the globe have recognized the CRPD since its inception in 2006, and its creation included the very people it would affect.<sup>66</sup>

The CRPD advocates for both a quota system and anti-discrimination legislation and has changed the legal landscape for disability law.<sup>67</sup> It refers to reasonable accommodation in Article 27 on Work and employment: “States Parties shall . . . [e]nsure that reasonable accommodation is provided to persons with disabilities in the workplace.”<sup>68</sup> In Article 5.4, the CRPD states that “[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”<sup>69</sup> In Article 27, the CRPD recognizes the right to work and requires states to promote employment opportunities.<sup>70</sup> This rhetoric calls to mind the quota system in section (h) that asks that states “[p]romote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include *affirmative action programmes*, incentives and other measures.”<sup>71</sup> The CRPD describes disability broadly to “include physical, mental, intellectual, and sensory impairments.”<sup>72</sup> The CRPD also “prohibit[s] all discrimination on the basis of disability” in Article 5.2,<sup>73</sup> “including denial of reasonable accommodation,” like the United States’ ADA.<sup>74</sup> The humanitarian

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-and-the-us-have-the-worst-employment-gaps-for-disabled-people [https://perma.cc/ZC5N-PUTW] (noting Austria, Luxembourg, and others).

<sup>64</sup> Multilateral Treaties Deposited with the Secretary-General, *supra* note 62.

<sup>65</sup> G7, EUR. COMM’N, [https://ec.europa.eu/info/food-farming-fisheries/farming/international-cooperation/international-organisations/g7\\_en](https://ec.europa.eu/info/food-farming-fisheries/farming/international-cooperation/international-organisations/g7_en) [https://perma.cc/5J2Q-F24H] (listing the G7 countries: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States).

<sup>66</sup> Paul Harpur & Richard Bales, *The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience*, 37 N. KY. L. REV. 363, 363 (2010) (describing groups involved in the creation of the CRPD).

<sup>67</sup> See generally Cerise Fritsch, *Right to Work? A Comparative Look at China and Japan’s Labor Rights for Disabled Persons*, 6 LOY. U. CHI. INT’L L. REV. 403 (2009).

<sup>68</sup> Convention on the Rights of Persons with Disabilities, *supra* note 60, at art. 27.

<sup>69</sup> *Id.* at art. 5.4.

<sup>70</sup> *Id.* at art 27.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at art 1.

<sup>73</sup> *Id.* at art 5.2.

<sup>74</sup> See *id.* at art 2.

goal of the CRPD builds upon medical and social models by actively encouraging inclusion.<sup>75</sup> Finally, the CRPD safeguards and promotes the “right to work” in Article 27.<sup>76</sup>

Though hybrid approaches vary substantially in their implementation, hybrid models that deviate from choosing either the traditional quota system *or* an anti-discrimination approach are quickly becoming more common in the twenty-first century. Some early statistics following the ratification of the CRPD indicate that the countries with the highest percentages of employed disabled citizens are those that take different approaches to employment of the disabled.<sup>77</sup> Those countries with the highest employment numbers<sup>78</sup> often use a hybrid model, which may include anti-discrimination legislation, a quota system, and/or additional social service support systems such as welfare, and dedicate a higher percentage of their gross domestic product to social programs for the disabled.<sup>79</sup>

Quota systems, anti-discrimination legislation, and hybrid systems produced markedly different employment metrics for the disabled in the 2010s. Northern European countries and Mexico showed high employment rates in the 2010s.<sup>80</sup> Eastern European countries and the United States, however, had larger employment gaps between employment numbers for the disabled and other workers.<sup>81</sup> The United Kingdom, Australia, and Canada have all ratified the CRPD and incorporated to varying degrees quota systems, support services such as vocational training and social security, and anti-discrimination legislation.<sup>82</sup> These three countries consistently outranked the United States in employing higher percentages of disabled persons generally and narrowing the unemployment gap between disabled and

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<sup>75</sup> Harpur & Bales, *supra* note 66, at 378.

<sup>76</sup> *Id.* at 377.

<sup>77</sup> Devon Haynie, *Clocked Out for Good*, U.S. NEWS & WORLD REP. (Sept. 16, 2016, at 11:35 a.m.), <https://www.usnews.com/news/best-countries/articles/2016-09-16/worldwide-people-with-disabilities-struggle-to-find-jobs>; *see also* Banning-Lover, *supra* note 63.

<sup>78</sup> Haynie, *supra* note 77; *see also* Banning-Lover, *supra* note 63.

<sup>79</sup> U.N. DEP’T OF ECON. & SOC. AFFS., DISABILITY AND DEVELOPMENT REPORT, at 262, U.N. Sales No. 19.IV.4 (2018), <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/07/disability-report-chapter2.pdf> [<https://perma.cc/LD72-7MBW>].

<sup>80</sup> Haynie, *supra* note 77.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

nondisabled citizens.<sup>83</sup> Despite wide acceptance of the CRPD, enacting and enforcing legislation is still largely up to individual political bodies.<sup>84</sup> CRPD compliance has been uneven, and many adopters still significantly under-employ the disabled.<sup>85</sup>

One downside of the CRPD is that countries may initially claim to commit to hybrid models but provide little information about their implementation and outcome. For instance, China has gravitated toward a hybrid model while providing tax incentives and other support for the disabled to start their own businesses.<sup>86</sup> Unfortunately, statistics on employment outcomes in China over the past decade have been less widely disseminated than other countries, though a Cornell University study showed that only 28% of those certified as disabled in 2017 were working.<sup>87</sup> Such an unreliable hybrid may muddy the waters in assessing the efficacy of the hybrid model.

Other countries have passed hybrid legislation but followed it with subpar enforcement, much like many early quota systems did. The Czech Republic, Argentina, and Korea have both quota systems and anti-discrimination legislation yet continue to see low employment rates for their disabled, perhaps due to a lack of actual enforcement.<sup>88</sup> Japan serves as another example of a country with a hybrid model in practice but not in execution. In 2010, a Japanese court found that any burden, not just an unreasonable burden or even a decrease in the business's efficiency, was enough to discharge employers from making a reasonable accommodation.<sup>89</sup> Though Japan also ratified the CRPD and has anti-discrimination legislation, its employment rates remained low for years in comparison to others worldwide.<sup>90</sup>

In contrast, the countries that have had the most success in high employment for the disabled often use both quota and anti-

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<sup>83</sup> *Id.*; OECD, SICKNESS, DISABILITY AND WORK: BREAKING THE BARRIERS 51 (2010), [https://read.oecd-ilibrary.org/social-issues-migration-health/sickness-disability-and-work-breaking-the-barriers\\_9789264088856-cn#page53](https://read.oecd-ilibrary.org/social-issues-migration-health/sickness-disability-and-work-breaking-the-barriers_9789264088856-cn#page53) [<https://perma.cc/L94E-MMQV#page53>].

<sup>84</sup> Harpur & Bales, *supra* note 66, at 385 (“Implementing accessibility standards will require political will and significant resources.”).

<sup>85</sup> See Haynie, *supra* note 77.

<sup>86</sup> Lo, *supra* note 1, at 590.

<sup>87</sup> ANKE SCHRADER, ET AL., DISABILITY IN THE WORKPLACE IN CHINA: SITUATION ASSESSMENT 3 (2018), [https://ecommons.cornell.edu/bitstream/handle/1813/90124/CC035\\_12\\_03\\_Disability\\_Workplace\\_China\\_Situation\\_Assess.pdf?sequence=1](https://ecommons.cornell.edu/bitstream/handle/1813/90124/CC035_12_03_Disability_Workplace_China_Situation_Assess.pdf?sequence=1) [<https://perma.cc/N7GY-7GJR>] (noting that China's legislative framework “lacks specificity and clear measures of enforcement”).

<sup>88</sup> Kanter, *supra* note 9, at 309–10.

<sup>89</sup> Nakagawa & Blanck, *supra* note 18, at 183–84.

<sup>90</sup> Banning-Lover, *supra* note 63.

discrimination approaches, strongly enforce both approaches, and have other strong social supports such as social security.<sup>91</sup> Perhaps most importantly, many of the more successful hybrid states place substantial responsibility with the state itself.<sup>92</sup>

### III THE HYBRID APPROACH IS THE MOST SUCCESSFUL AND FAIR APPROACH

In this Part, I will return to the questions mentioned in the introduction raised by cases like *Kowitz* and *Shell*:

- 1) How can employers seek out and support disabled employees without infringing on their privacy or exacerbating differences between employees?
- 2) How can disabled employees find work and navigate challenges without losing dignity or asking for unfair advantages?
- 3) How, ultimately, can we reach employment equality for the disabled?

I first analyze the implications of how employers approach employment and support the disabled. Next, I analyze the implications of how quota and anti-discrimination legislation systems implicate employees in self-advocacy. Finally, I discuss the pros and cons of each approach and recommend the hybrid system as the most balanced and successful approach.

#### *A. Employers*

Disability categorization and certification in quota system countries are often done by grade or percentage and are sometimes confined to a specific list, so they run the risk of being underinclusive. For example, Japan recognized only 5% of its population as disabled in the 1990s.<sup>93</sup> Meanwhile, the United States recognized 20% of its population as disabled in the 1990s.<sup>94</sup> However, many quota system countries have been underinclusive of the disabled. Mental illness was not recognized

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<sup>91</sup> Haynie, *supra* note 77.

<sup>92</sup> See, e.g., Paul Harpur et al., *Australia’s Fair Work Act and the Transformation of Workplace Disability Discrimination Law*, 30 WIS. INT’L L.J. 190, 221 (2012) (describing Australia’s Fair Work Act and state enforcement of disability rights through prosecution).

<sup>93</sup> Heyer, *supra* note 5, at 6.

<sup>94</sup> *Id.*

by the historically quota-focused Japanese system until an amendment to the Persons with Disabilities Promotion Law in 2005.<sup>95</sup>

In Japan, as in other countries, citizens may become eligible for a pension following examination by a doctor and assignment of a disabled “grade.”<sup>96</sup> The government may also provide vocational training and placement opportunities.<sup>97</sup> Japan’s Hello Work public offices assist disabled citizens with job placement, and job coaches are available throughout the employment life cycle.<sup>98</sup>

At this early stage, many quota system-based countries also take responsibility by using subsidized employment agencies to place workers and by implementing initiatives that encourage employers to hire disabled employees or threaten employers with penalties for not doing so, or both.<sup>99</sup> Grant and levy quota systems vary in terms of the percentage of the workforce and the benefit or cost to the employer of compliance. In 1992, for instance, Germany required that public and private employers with sixteen or more positions fill at least 6% of those positions with disabled employees, and employers were penalized 200 DM (about \$305.60 USD)<sup>100</sup> per unfilled work position per month.<sup>101</sup> In Japan, the levy against noncompliant employers was approximately \$500 USD per unfilled person below quota in 2010.<sup>102</sup> Some countries, such as Italy and Greece, even go so far as to reserve specific positions or industry carveouts for the disabled.<sup>103</sup>

The quota system also places substantial responsibility on the employer to seek out disabled employees or risk punishment, but so many employers shirk or buy their way out of the responsibility that even modest quotas have often gone unmet.<sup>104</sup> Employers have also tried avoiding punishment for not meeting quotas through methods perpetuating segregation. In Japan, for instance, many large companies bought subsidiaries to employ disabled persons in order to meet quota

<sup>95</sup> Lo, *supra* note 1, at 564.

<sup>96</sup> See Nakagawa & Blanck, *supra* note 18, at 178.

<sup>97</sup> Lo, *supra* note 1, at 570–71.

<sup>98</sup> *Id.*

<sup>99</sup> *E.g., id.*

<sup>100</sup> See Harold Marcuse, *Historical Dollar-to-Marks Currency Conversion Page*, UC SANTA BARBARA, <http://marcuse.faculty.history.ucsb.edu/projects/currency.htm> [https://perma.cc/MLN9-DP4J] (last updated Oct. 7, 2018).

<sup>101</sup> Rasnic, *supra* note 18, at 298, 304–05.

<sup>102</sup> Nakagawa & Blanck, *supra* note 18, at 180.

<sup>103</sup> Bernard Gutow, *Survey of Rights of Workers with Disabilities: Comparison of the United States with European Community*, 11 N.Y. INT’L L. REV. 101, 121 (1998).

<sup>104</sup> Waddington, *supra* note 16, at 67.

requirements rather than hiring the disabled directly.<sup>105</sup> A German study even explored doubling fines against noncompliant employers in the 1980s and found compliance was still likely to be subpar.<sup>106</sup> Furthermore, many countries do not follow through with proposed punitive systems for companies that do not meet quota requirements.<sup>107</sup> Once an applicant becomes an employee, an applicant’s recourse is limited, and the responsibility falls even more squarely on the applicant’s shoulders.

Some countries (e.g., Germany) require employers to gain approval from a government agency and to give notice to a disabled employee before a disabled employee may be terminated.<sup>108</sup> This does place some responsibility with the employer and provides a check against unmitigated discrimination in terminating employees. However, Germany’s welfare office, like the levy-grant system itself, has historically been inconsistent and informal in professional standards and enforcement.<sup>109</sup> In contrast to anti-discrimination-oriented nations that focus on compensating the individual, any fine for employer noncompliance in Germany went to the government to help all disabled persons rather than to the individual disabled person who was wronged.<sup>110</sup> The lack of individual remedies was presumed to be outweighed by the benefits of the system for all, but, in effect, the lack of individual remedies left much to be desired. Overall, the quota system places substantial responsibility on the employer and with the state when it comes to the application process, but little responsibility on the employer after an employee is hired.

The anti-discrimination system, on the other hand, places little responsibility on the employer to hire through means other than limited grant programs and requirements to provide options for the disabled. Few incentives exist to seek out disabled employees, and the responsibility is largely on the disabled employee to disclose or seek out aid at the risk of being stigmatized. Once the applicant becomes an employee, again, the responsibility is on the applicant to activate the interactive process at the risk of stigma. Ultimately, the disabled are rarely successful in their discrimination suits, and it may be that

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<sup>105</sup> Heyer, *supra* note 5, at 8.

<sup>106</sup> Waddington, *supra* note 16, at 70.

<sup>107</sup> E.g., Lo, *supra* note 1, at 572–73.

<sup>108</sup> Rasnic, *supra* note 18, at 304–05.

<sup>109</sup> *Id.* at 309–10.

<sup>110</sup> *Id.* at 304–05.

many suits go unfiled. Thus, the anti-discrimination approach is underutilized.

While the United States' approach is individualistic, it is also much more hands-off for employers than the quota system. This poses a Catch-22. Though anti-discrimination legislation provides more privacy and opportunities for employees to seek accommodation themselves, it also disincentivizes employers from proactively engaging with employees to offer such opportunities.<sup>111</sup> After all, the less an employer inquires into an employee's disability, the less likely an employer is to create a record subjecting itself to discrimination charges.

Australia, a long-time anti-discrimination legislation country, provides an example of a different approach to employer powers. Australia's addition of Fair Work Act powers in 2009 placed greater burden on employers and greater responsibility on the state throughout the employment cycle.<sup>112</sup> Rather than relying solely on private actions, the Fair Work Act directly involves the state in actively preventing, investigating, and prosecuting employer discrimination against the disabled in the public sphere.<sup>113</sup> As a result, employers must actively work with the state and comply with a wide array of production requests from Fair Work investigators.<sup>114</sup> Employers may face greater associated costs for noncompliance than the costs of private actions alone, especially given the difference in the resources private employees and state investigators can bring to bear.<sup>115</sup> Australia also recognizes and protects future impairments in its anti-discrimination legislation.<sup>116</sup> Because Australia recognizes and protects future impairments, Australian courts might have reached a different outcome than the United States court in *Shell*.

Overall, the quota system relies more on employers than anti-discrimination legislation. Due to noncompliance and poor enforcement, employers do not meet their responsibilities and leave employees with little recourse.

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<sup>111</sup> See, e.g., *The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www1.eeoc.gov/facts/ada17.html> [<https://perma.cc/53G8-JG43>] ("It is unlawful to: ask an applicant whether she is disabled or about the nature or severity of a disability . . .").

<sup>112</sup> Harpur et al., *supra* note 92, at 203.

<sup>113</sup> *Id.* at 193.

<sup>114</sup> *Id.* at 207–09.

<sup>115</sup> See *id.*

<sup>116</sup> Bagenstos, *supra* note 4, at 664.

### **B. Employees**

In the quota system, the citizen’s first responsibility is often seeking disability certification before seeking employment. The government and employers in quota system countries take responsibility for vocational training and job placement of the disabled citizen once the disabled citizen is recognized. Once a disabled citizen becomes employed in a quota system country, though, the employer’s responsibility lessens significantly.

Quota system countries provide few remedies for an employee who does not become disabled or recognize that they are disabled until after they are already employed. In pure quota systems, there are limited remedies for a disabled employee who does not receive accommodation or loses their job.<sup>117</sup> Fines usually go to funds that benefit the disabled in general rather than the individual wronged, and regulations for the treatment of employees (as opposed to applicants) are not so substantial or consistently enforced as to have “teeth.”<sup>118</sup>

As mentioned above, employers in anti-discrimination legislation-focused countries may be wary of proactively engaging disabled employees for fear of litigation, leaving the heavy lifting to the employees themselves. Many commonly recognized intellectual disabilities include symptoms such as confusion, cognitive impairment, and distractedness.<sup>119</sup> These traits make it incredibly difficult for disabled employees to advocate for themselves or navigate an ambiguous system in which the responsibility to do so rests so squarely on their shoulders.<sup>120</sup> Even if a disabled employee can advocate for themselves, that alone is no guarantee of success.

Though disabled employees may have more recourse, a greater likelihood of being recognized, and occasionally receive a larger payout, the vast majority of those who file claims do not receive a

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<sup>117</sup> See Rasnic, *supra* note 18, at 328 (In Germany, “a business’ ability to receive additional credit for retaining a disabled person with special difficulties in an employment setting provides no consolation to the individual who remains unemployed.”).

<sup>118</sup> Nakagawa & Blanck, *supra* note 18, at 180–82.

<sup>119</sup> Cf. *Does the Americans with Disabilities Act (ADA) Provide a List of Conditions That Are Covered Under the Act?*, SOC’Y HUM. RES. MGMT (Nov. 5, 2019), [https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/cms\\_011495.aspx](https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/cms_011495.aspx) [<https://perma.cc/6BND-GFFX>] (describing major depressive disorder, post-traumatic stress disorder, and schizophrenia, among others, as “medical conditions that would easily be considered a disability within the meaning of the law”).

<sup>120</sup> *Id.* at 216; see also Mark Bell, *Mental Health at Work and the Duty to Make Reasonable Adjustments*, 44 INDUS. L.J. 194, 201–03 (2015).

remedy.<sup>121</sup> The inability of the anti-discrimination system to meet its goals is compounded by the necessary time and money an employee must provide to bring a suit with low odds of success, statistics showing that disabled employees often do not self-identify due to stigma, and an underfunded Equal Employment Opportunity Commission.<sup>122</sup>

In summary, the ADA places greater responsibility on employees via the notice requirement than the quota system. Moreover, its ambiguity, complexity, and lack of accessibility undermine its effectiveness.

### *C. Reaching Equity*

In theory, the quota system approach places substantial responsibility on the employer to accommodate the disabled before they even begin employment. The quota system approach also provides substantial subsidized programs to help the disabled (e.g., workforce committees, placement agencies, and tax incentives), demonstrating a proactive role on the part of the employer. Undoubtedly, this has sometimes resulted in the employment of some disabled employees who otherwise would be without a job, though not to the extent desired. Consistent failures to meet quotas are compounded if one considers that fewer conditions widely viewed as disabilities elsewhere are eligible for support in many quota systems.

The quota system inherently “others” the disabled throughout the employment process and places the government in an overly paternalistic role.<sup>123</sup> The literal grading of employees by degree of disability and the placement of some employees in disabled-specific positions and environments may cause further stigma and discrimination.<sup>124</sup> This differentiation between the disabled and the rest of society is more readily apparent in quota systems than in the anti-discrimination model. In some instances, as in Germany, people must carry unique cards identifying their degree of disability and differentiating them from the rest of the population to directly benefit

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<sup>121</sup> See generally Maryam Jameel, *More and More Workplace Discrimination Cases Are Closed Before They're Even Investigated*, CTR. FOR PUB. INTEGRITY (June 14, 2019), <https://publicintegrity.org/business/workers-rights/workplace-inequities/injustice-at-work/more-and-more-workplace-discrimination-cases-being-closed-before-theyre-even-investigated/> [<https://perma.cc/B3VW-WGNB>].

<sup>122</sup> *Id.*; see also Rasnic, *supra* note 18, at 296.

<sup>123</sup> E.g., Rasnic, *supra* note 18, at 332 (describing the German government, which used a quota system at the time, as taking a “paternalistic stance over its people”).

<sup>124</sup> See Gutow, *supra* note 103, at 118–21.

from the system.<sup>125</sup> The fact that only 1% of the workforce was registered as disabled in quota-focused Britain in the 1990s shows the disparity between the disabled population and those whom the quota system registration requirements effectively capture.<sup>126</sup>

The ADA interprets disability much more broadly than many other quota systems, allowing for both mental and physical disabilities, past or present, or even disabilities perceived by others.<sup>127</sup> Compared to quota system states, anti-discrimination states are usually much more inclusive.

The quota system requires disabled citizens to buy in to a system in which they are labeled and differentiated from other citizens to receive any disability-related benefits. Under the ADA, the government does not engage in such grading or degree-assignment, and thus employees have more power to define themselves as disabled or not. However, the ADA does not avoid stigmatizing categorization entirely.

While ADA-covered employees have opportunities to disclose their disability prior to employment, the responsibility for proactive action weighs far heavier on employees than employers in comparison to the quota system.<sup>128</sup> Despite being socially driven in many ways, the anti-discrimination model is still largely rooted in a medical model system that also inherently “others” the disabled.<sup>129</sup> In order to receive the benefit of the ADA, employees must prove that they are, in fact, inhibited by a disability in a way that makes them different from other workers and requires they be treated uniquely.<sup>130</sup> Employees may feel stigmatized and degraded by the burden of proving their inhibitions and differences to an employer or a court.

Ambiguity can be overinclusive or underinclusive. As the *Kowitz* case illustrates, the lack of concrete expectations for employers can work to employers’ favor or detriment.<sup>131</sup> The same goes for

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<sup>125</sup> See Rasnic, *supra* note 18, at 302.

<sup>126</sup> Waddington, *supra* note 16, at 67.

<sup>127</sup> 42 U.S.C.A. § 12102(1), (3) (West 2020).

<sup>128</sup> See Kim, *supra* note 42, at 410 (describing possible employer-employee responsibilities for proactive action under the ADA in the Eighth Circuit).

<sup>129</sup> Bagenstos, *supra* note 4, at 657.

<sup>130</sup> See Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819, 847 (2015) (“[T]he person with a disability must prove that he or she has a medical condition or diagnosis in order to receive protection under the law.”).

<sup>131</sup> See generally Kim, *supra* note 42 (describing pros and cons of ambiguity for employers).

employees. Despite the philosophy of empowerment and equality that prompted the ADA, the practical implications of this legislation have effectively disempowered disabled citizens in many ways. The complexity of disability law and lack of awareness of resources further diminishes the likelihood that a disabled employee will litigate the issue. Finally, the vast majority of those filed claims fail, potentially further discouraging employees who not only must file suit but must also show that they are different and disabled.

Between 1990 and 2008, data from Ruth Colker of Ohio State University College of Law and the American Bar Association showed that over 90% of plaintiff-employees in ADA Employment Discrimination trial court cases were unsuccessful.<sup>132</sup> Disabled persons also find that becoming employed results in lesser pay or health insurance coverage than Social Security provides, disincentivizing an already difficult path to long-term, regular employment.<sup>133</sup> Given the disabled's low pay and employment rates, the possibility of the disabled pursuing the ADA's ambiguous litigation process seems unlikely.

On its face, the decision in *Kowitz* seems to be employee friendly. *Kowitz* suggests that employers may be responsible for accommodating employees even when employees have not explicitly requested an accommodation. However, as Rachel S. Kim pointed out in *Help Me, Help You*, the broader notice requirement that *Kowitz* introduced creates ambiguity for employers and employees, which can be problematic.<sup>134</sup> *Kowitz* is emblematic of two broader issues in workplaces around the globe: whether an employer or an employee should be responsible for initiating disability accommodation and when either party should be responsible for initiating disability accommodations.

Like the quota system, anti-discrimination legislation has not succeeded in reaching its goal. Though numbers from reputed sources vary, surveys generally show a continual decline in earnings and employment of the disabled since the enactment of the ADA.<sup>135</sup> In the two decades after the ADA went into effect, the employment rate for

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<sup>132</sup> *Id.*; see also Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999).

<sup>133</sup> See Lo, *supra* note 1, at 581.

<sup>134</sup> See Kim, *supra* note 42, at 422.

<sup>135</sup> See Haynie, *supra* note 77; see also Banning-Lover, *supra* note 63.

the disabled steadily decreased.<sup>136</sup> In 2015, twenty-five years after the ADA went into effect, the employment rate was 40% lower for disabled employees than for nondisabled employees, and disabled employees earned 33% less.<sup>137</sup> Historically, neither a quota system nor anti-discrimination legislation, such as the ADA, have been particularly effective in increasing the employment of the disabled.

The anti-discrimination legislation approach may help provide employees with recourse, but, in the absence of other support, this approach leaves a gap in ensuring that employers themselves are active in making sure disabled employees receive the support they need. Most high-income countries with the highest levels of employment of disabled citizens use the newer hybrid approach.

In the hybrid approaches, now exemplified by several of the countries that ratified the CRPD, employers and employees split responsibility. The most successful of these countries using a hybrid approach use levy-grant type systems to incentivize employers to hire the disabled, provide career services for the disabled, or engage in other creative methods that go beyond the traditional, more one-sided quota or anti-discrimination legislation options.<sup>138</sup> This encourages both employers and employees to seek each other out during the talent hunt. After hiring a disabled employee, these successful, hybrid approach countries continue to incentivize the employer to retain the disabled employee; the employee also has the option of recourse should they be discriminated against. In addition, successful hybrid approach countries increase the likelihood of successful discrimination remedies through government-supported programs. For example, ombudsmen in Australia have the power to prosecute employers<sup>139</sup> and can help

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<sup>136</sup> DAVID C. STAPLETON ET AL., HAS THE EMPLOYMENT RATE OF PEOPLE WITH DISABILITIES DECLINED? 1 (Dec. 2004), [https://ecommons.cornell.edu/bitstream/handle/1813/89911/DE50B\\_PDF1.pdf?sequence=1&isAllowed=y](https://ecommons.cornell.edu/bitstream/handle/1813/89911/DE50B_PDF1.pdf?sequence=1&isAllowed=y) [<https://perma.cc/95F5-TH4Q>].

<sup>137</sup> Kanter, *supra* note 9, at 831.

<sup>138</sup> See, e.g., Haynie, *supra* note 77 (describing Mexico, Switzerland and Nordic countries as having the highest rates of employment for the disabled); Sandoval et al., *supra* note 63 (describing Mexico’s progression from charity to medical/rehabilitation to social models and overlaps of these approaches); Banning-Lover, *supra* note 63 (describing high rates and noting Luxembourg’s quota system, Switzerland’s disability insurance for employers); *People with Disabilities*, ANGLINFO, <https://www.angloinfo.com/how-to/luxembourg/healthcare/people-with-disabilities> [<https://perma.cc/9CMN-HZVW>] (In Luxembourg, “[i]t is a penal offence to refuse to hire or make a worker redundant on the basis of a disability.”).

<sup>139</sup> See Harpur et al., *supra* note 92.

balance incentives between employer and employee when it comes to discrimination and compliance.

While the U.N. has recognized and encouraged both systems, many supporting the CRPD have yet to implement both, and employment of the disabled generally remains low.<sup>140</sup> Nations that ratified the CRPD committed to continually monitoring and reporting on their progress, placing responsibility in the hands of the State or an independent mechanism.<sup>141</sup> New state-funded enforcers, like the Fair Work Ombudsman in Australia, actively seek out discrimination while paying to monitor behavior and prosecute violators. Hence, these enforcers alleviate employee responsibility.<sup>142</sup> Australia has also shifted the burden of proof from the employee to the employer for the initial showing in accommodation claims.<sup>143</sup> It is notable that many of the countries with the highest employment of the disabled share a unique characteristic other than their approach that may play a role: many of them are Northern European countries. Within the United States, however, population density and economic activity does not seem to correlate closely with disability employment rates abroad. Midwestern and Great Plains states have the highest employment rates for the disabled;<sup>144</sup> these states are not likely to be compared to countries like Luxembourg and Austria.

Admittedly, as shown by China, a hybrid model without “teeth”—consistent and substantial enforcement of anti-discrimination legislation and actual provisions of a quota system and support programs—is still unlikely to meet its goals. Therefore, it is important that nations hoping to better employment outcomes for the disabled provide backing to state agencies to monitor and enforce compliance with the promotion of equality.

The more recently introduced hybrid approach, though not as long-standing, has thus far proven to be the most consistently successful approach to increasing employment of the disabled. Not only are more disabled citizens employed under the hybrid approach but also the approach more evenly distributes the responsibility of acting to employ the disabled.

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<sup>140</sup> See Haynie, *supra* note 77.

<sup>141</sup> Convention on the Rights of Persons with Disabilities, *supra* note 60, at art. 33, 35.

<sup>142</sup> See Harpur et al., *supra* note 92, at 194.

<sup>143</sup> *Id.* at 203.

<sup>144</sup> Haynie, *supra* note 77 (see figure titled “Employment Rate for People With Disability”).

### CONCLUSION

The quota system and the anti-discrimination legislation approaches to employing the disabled both present pros and cons and have historically failed to meet their objectives. In addition, both approaches unfairly allocate responsibility between employer and employee. The quota system frontloads substantial responsibility to employers during the application process but gives employees little recourse after they are hired. The anti-discrimination approach places a great deal of responsibility on the employee to self-advocate for their own needs, with limited chances of relief. Both approaches suffer from insufficient government enforcement.

Overall, a hybrid approach that requires employers to proactively employ disabled employees, anti-discrimination remedies for employees, and active government support and enforcement is the most successful and fairly balanced model. Employment statistics support that the hybrid model has generally been more successful than either approach alone. From a fairness standpoint, the hybrid model also balances responsibility for action between employer and employee throughout their working relationship by assigning responsibility to each party and holding each accountable.

