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Reforming the Age Discrimination in Employment Act: Proposals and Prospects

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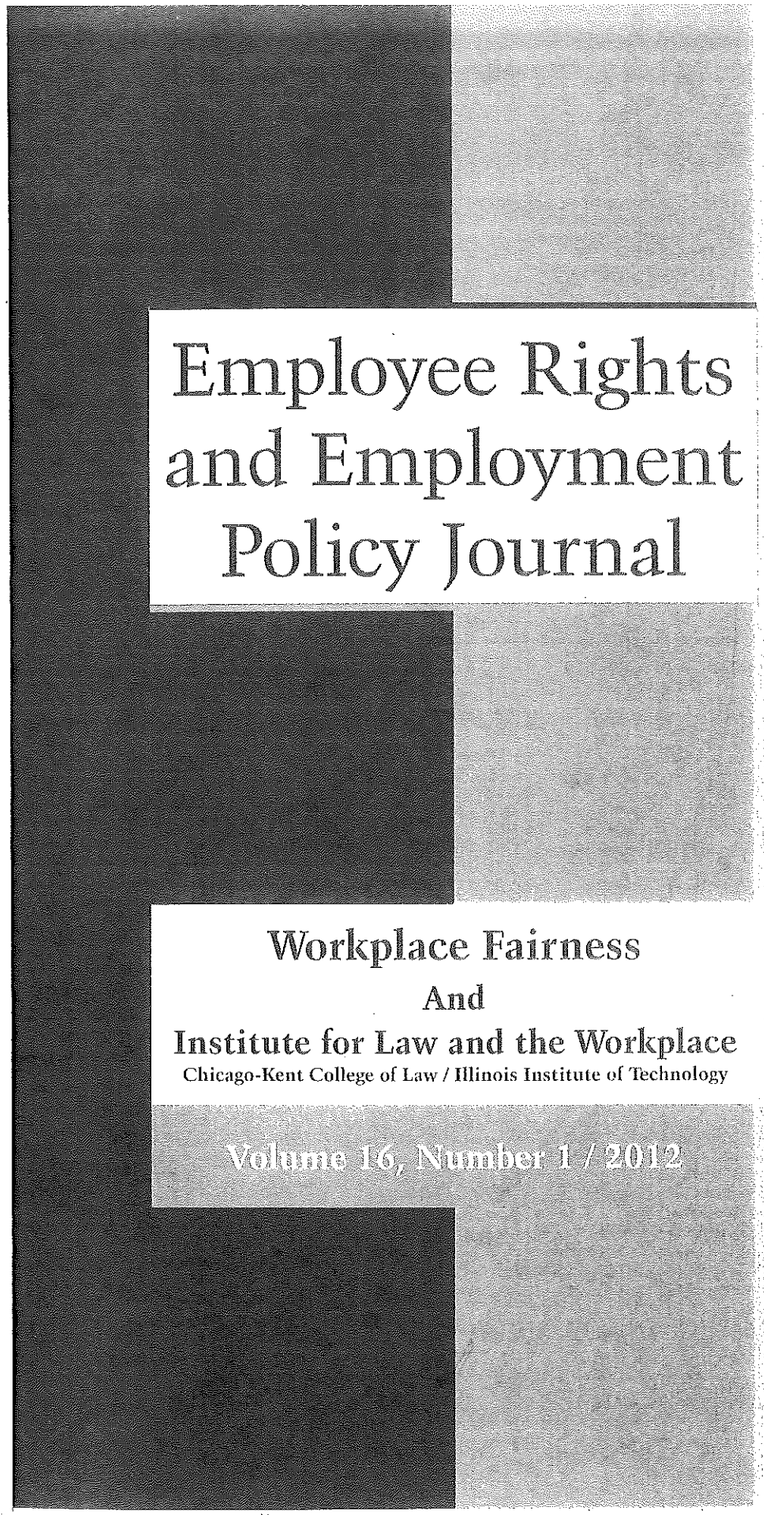

REFORMING THE AGE DISCRIMINATION IN EMPLOYMENT ACT: PROPOSALS AND PROSPECTS

BY
MICHAEL C. HARPER*

I. INTRODUCTION – THE IMPORTANCE OF AGE DISCRIMINATION

As the "baby-boom generation, persons born between 1946 and 1964,"[1] continues to age, so does the potential American labor force.

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1. Mitra Toossi, Labor Force Projections to 2020: A More Slowly Growing Workforce, MONTHLY LAB. REV., Jan. 2012, at 43.

The share of this potential population, defined as the "civilian noninstitutional population" by the Bureau of Labor Statistics (BLS), that is fifty-five years and older rose from 26.4 percent in 1990 to 31.4 percent in 2010 and is projected to reach 36.6 percent in 2020.[2] In 2010, fifty percent of the potential civilian labor force was at least forty years of age.[3] Furthermore, perhaps because of independent economic trends, the labor force participation rate of older Americans also continues to rise. Participation rates for those fifty-five and older rose from 30.1 percent in 1990 to 40.2 percent in 2010 and are projected by the BLS to reach 43 percent in 2020.[4] The median age of the labor force rose from 34.6 in 1980 to 41.7 in 2010 and is projected to be 42.8 years by 2020.[5]

One might expect that these demographic trends would focus the attention of current federal policy makers on whether American employment law adequately protects older workers from age-based discrimination. Such expectations might be augmented by a review of how federal law has regulated age-based employment discrimination through the Age Discrimination in Employment Act (ADEA).[6] The ADEA is now half way through its sixth decade. Since its passage in 1967 as a supplementary statute to Title VII of the 1964 Civil Rights Act,[7] the upper age limit on the ADEA's protected class has been almost completely eliminated,[8] its treatment of discrimination in employee benefit plans has been strengthened and clarified,[9] and its protections have been better insulated from prospective, coerced, or manipulated waivers.[10] Yet, as an effective tool against discrimination in employment, the ADEA still lags behind Title VII, especially in the proof methodologies that it offers[11] and in the remedies that it affords.[12] For no good policy-based reason, ADEA's prohibitions of age discrimination are more difficult and less attractive to enforce for private plaintiffs than are the cognate prohibitions in Title VII. Furthermore, Congress has made no attempt since the original passage of the ADEA to fashion the statute's prohibitions against discrimination in hiring and discharge to address the special problems that employers' rational but perhaps socially costly assumptions about career paths and future productivity may pose for ADEA's protected workers – and for the achievement of the statute's goals of fair treatment and full economic utilization of these workers.[13] Where the ADEA should be based on the Title VII template, it sometimes has not been;[14] where it should depart from that pattern for purposes of regulating discrimination in hiring and discharge, it has not.[15]

2. *Id.* at 46.
3. *Id.* at 47 tbl.2.
4. *Id.* at 50 tbl.3.
5. *Id.* at 61 tbl.6.
6. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-33 (2006).
7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).
8. *See* Pub. L. No. 90-202 § 12, 81 Stat. 602, 607 (1967), *amended by* Pub. L. No. 99-592 § 2(c)(1), 100 Stat. 3342.
9. *See* 29 U.S.C. § 623(f) (1988) (amended 1990).
10. *See* 29 U.S.C. § 626(f) (1988) (amended 1990).
11. *See infra*, text accompanying notes 80-118.
12. *See infra*, text accompanying notes 46-79.

Notwithstanding the obvious relative weakness of the nation's regulation of age discrimination in employment, however, the only bills to strengthen the ADEA that have been introduced during the 2008-2012 term of President Obama were reactive to a controversial 2009 Supreme Court decision.[16] No prominent voice in the Obama administration has argued that addressing the special employment problems of our older workforce should be part of a strategy for providing a stronger and fairer economic system. Moreover, the silence of the Congress and the administration cannot be explained by the anticipation of resistance from the conservative Republican-controlled House of Representatives elected in 2010. Even before that election, there were no calls from either the legislative or executive branch for a comprehensive reconsideration of the ADEA.

Contrast this relative silence on age discrimination in employment, not only with the enactment of the Lily Ledbetter Fair Pay Act[17] in January 2009, but also with the passage of the Paycheck Fair-

13. *See* Age Discrimination in Employment Act, Pub.L. 90-202, § 2, 81 Stat. 602 (codified as amended at 29 U.S.C. § 621 (2006)).
14. *See infra* text accompanying notes 46-118.
15. *See infra* text accompanying notes 119-36.
16. See Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. (2009) and H.R. 3721, 111th Cong. (2009), to overturn the Supreme Court's decision in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009); *infra* text accompanying notes 104-18. For another example of reactive legislation introduced before the election of President Obama, see section 305 of the Civil Rights Act of 2008, S. 2554, 110th Cong (2008), which would have conformed the disparate impact cause of action available under the ADEA to that available under Title VII. *See infra* text accompanying notes 80-103.
17. Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. This Act overturned the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), treating the initiation of Title VII filing periods to challenge sex-based pay discrimination. The Ledbetter Act provides that

> an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by ap-

ness Act[18] in the House of Representatives in the same month. The latter bill, had it been able to garner the necessary sixty votes to overcome any filibuster in the Senate, would have amended the Equal Pay Act (EPA)[19] to make compensatory and punitive damages available as a remedy for the gender related pay disparities prohibited by the EPA,[20] to include within those prohibitions most such disparities not justified by a "job-related" "business necessity,"[21] and to provide for enforcement of the prohibitions through class actions governed by Rule 23 of the Federal Rules of Civil Procedure,[22] rather than by the more difficult to use procedures of the Fair Labor Standards Act (FLSA),[23] which remain applicable to the EPA as well as to the ADEA.[24] As I will elaborate below,[25] all of these proposed enhancements of the EPA in the Paycheck Fairness Act suggest parallel amendments to enhance the ADEA.

That no such amendments, or others of comparable potential significance, have been proposed to strengthen the ADEA during the 2008-2012 term of the Obama administration may reflect the absence of any effective non-governmental representative of the interests of older Americans as workers. The American Association of Retired Persons (AARP) has been an effective lobbying force on behalf of older Americans as retired persons and as consumers of public and private goods. It did not, however, in 2009 present the incoming Obama administration and the relatively liberal 111th Congress with an agenda to better protect working older Americans from employment discrimination as the women's lobby presented the administration with an agenda to better protect women from discrimination.[26]

plication of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (codified at 42 U.S.C. § 2000e-5(e) (Supp. IV 2010)). Section 4 of the Ledbetter Act includes a conforming amendment to provide for the same initiation of the limitations period in ADEA actions, *id.* § 4, 123 Stat. 6 (codified at 29 U.S.C. 626(d) (Supp. IV 2010)), but the impetus for the statute was concern about the control of sex-based pay discrimination.

18. H.R. 12, 111th Cong. (as passed by the House, Jan. 9, 2009). Identical legislation was introduced in the 112th Congress on April 12, 2011, H.R. 1519, 112th Cong. and S. 797, 112th Cong., with no prospect for passage in the Republican controlled House of Representatives.

19. Equal Pay Act, 29 U.S.C. § 206(d) (2006).

20. H.R. 12, § 3(a)(3).

21. *Id.* § 3(c).

22. *See* FED. R. CIV. P. 23.

23. 29 U.S.C. § 216(b) (2006).

24. *See* 29 U.S.C. § 626(b) (2006).

25. *See infra* text accompanying notes 46-118.

26. *See supra* text accompanying notes 18-24. The American Association of Retired Persons (AARP) has been a very influential lobbying force on some issues of concern to retired rather than working older Americans.

Perhaps the continuing aging of the American workforce and the continued challenges to unemployed workers in the American economy will move the AARP or other advocates to do so if President Obama secures a second term.

Regardless of political developments, however, the continuing gap between the ADEA and Title VII also may reflect assumptions that age discrimination is less likely to be malignly motivated and therefore less serious than are the forms of discrimination proscribed by Title VII, including race, national origin, and religion, as well as the sex discrimination also addressed by the EPA. The assumption that age discrimination is less likely to be malignly motivated indeed is supported by the findings of the Wirtz Report,[27] the report of then-Secretary of Labor Willard Wirtz that Congress in Title VII mandated to study the "factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."[28] The Wirtz Report concluded that older workers did not face significant discrimination based on dislike or intolerant feelings toward the aging, unrelated to assumptions about their ability to do work.[29] The Report instead found that older workers were primarily disadvantaged by a different kind of discrimination – one based on general assumptions about the ability of older workers to perform work effectively "without consideration of a particular applicant's individual qualifications."[30]

Although there is no reason to doubt these findings of the Wirtz Report or their continuing relevance after the passage of almost five decades, the findings do not suggest age discrimination in employment is a less serious or more tractable social problem than are the forms of discrimination proscribed by Title VII. Indeed, the findings suggest age discrimination in employment may be more resilient and less subject to the progressive enlightenment of managerial decision makers than are forms of discrimination based on irrational feelings

27. *See* WILLARD WIRTZ, U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965), *reprinted in* 1 EEOC, Legislative History of the Age Discrimination in Employment Act (1981) [hereinafter WIRTZ REPORT].

28. WIRTZ REPORT, *supra* note 27, at 1 (quoting the Civil Rights Act of 1964, § 715 (codifed at 42 U.S.C. § 2000e-14 (2006))).

29. *See id.* at 2, 5-6.

30. *See id.* at 6.

of animus or intolerance. The findings thus can be read to suggest a statute designed to eliminate age discrimination should offer aggrieved victims at least as attractive and as complete remedies and at least as favorable methodologies of proof as those offered by a statute designed to eliminate these other forms of employment discrimination.

We should expect a form of employment discrimination based on assumptions or stereotypes about a group's ability to perform work in the present or future to be more resilient to the extent that the assumptions or stereotypes have a basis in truth. Some stereotypes about older workers may be as irrational as those on which some types of race and sex discrimination are based,[31] and thus should be as subject to the progressive enlightenment of managerial decision makers, regardless of the remedies afforded to discrimination victims. There is good reason to believe, however, that age discrimination is more likely to be economically rational than are race and sex discrimination and thus less amenable to cultural or attitudinal changes without proper legal or alternative economic incentives.

Discrimination on the basis of age, for instance, often may be economically rational because, as allowed in the Wirtz Report,[32] a worker's productivity eventually will decline at some usually unpredictable age. An employer considering applicants for positions that require an investment in training or that offer necessary training or experience for later promotion to more responsible positions must make decisions on the basis of predictions about an uncertain future. It may be efficient for an employer to do so on the basis of the relative probability of older and younger workers remaining as its employees for a sufficiently long time to provide maximum returns on the employer's early investments in the workers. Even where individualized assessments of workers may provide information beyond the simple age of the workers relevant to future predictions about the workers' likelihood of providing future productivity for the employer, those assessments may be too expensive to justify their marginal enhancement of foresight. Other easily identifiable characteristics being roughly equal, it therefore may be efficient for employers to prefer younger workers for employment in many positions, especially ones

31. Some studies, for instance, indicate that older workers may have higher job commitment and lower rates of absenteeism than do younger workers, despite the assumptions or stereotypes of many managers. *See, e.g.*, Vincent J. Roscigno et al., *Age Discrimination, Social Closure and Employment*, 86 SOC. FORCES 313, 314-15 (2007).

32. *See* WIRTZ REPORT, *supra* note 27, at 9.

requiring investments in training or offering the prospect of an advancing career with the employer.

This economically rational preference for younger workers may not be as strong when an employer is considering promotions or layoffs of incumbent workers, whose relevant individual characteristics it presumably can assess more easily than it can those of outside applicants. Yet, promotions to new positions also may require new skills and training and predictions about future returns; and employers may rationally decide to displace older, satisfactorily performing employees, rather than younger ones, during an economic downturn because of predictions about future productivity and likely retirement dates. Furthermore, for reasons explained by economic theory and supported by empirical studies, employees with substantial seniority with a particular employer are likely to have a wage higher relative to their productivity than are employees with little seniority.[33] The former employees of course are likely to be older than the latter, and a rational employer in an economic downturn understandably faces incentives to lay off the more highly compensated, senior employees rather than the cheaper, junior employees.

That discrimination against older workers is often economically rational for employers does not mean that it is not a problem for our society, however. An employer's rejection of a group of workers defined by age because the average member of the group will provide lower returns than the average worker outside the group means that all of the older workers in the age-defined group will be disadvantaged. To the extent that all employers practice the same kind of rational "statistical discrimination,"[34] older workers will be more likely to be underemployed or even unemployed at a time in their life when training opportunities and the energy to embark on new careers are lower than for younger workers. The underemployment and unemployment of older workers, moreover, is likely to be aggravated by the termination of more senior employees whose careers have produced higher wages than are justified by their current productivity. It may be rational for an employer concerned about general employee morale to lay off such workers rather than to lower their compensation or transfer them to jobs with less responsibility, but given the statistical discrimination that the workers are likely to face in the exter-

33. *See* sources cited *infra* note 122.

34. *See generally* Edmund Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

nal labor market from other employers, such layoffs are likely to result in further underemployment or unemployment of still productive workers. It is telling that older workers are more likely than younger workers to have long unemployment durations.[35]

The Wirtz Report thus appropriately concluded that age-based employment discrimination, even though primarily caused by generalizations and stereotypes rather than by intolerance or animus, leads to "the Nation's waste . . . of a wealth of human resources . . . and the needless denial . . . of opportunity for that useful activity which constitutes much of life's meaning."[36] The Report's concern with the annual economic loss of "several billion dollars" and millions of "manyears" of productive labor should only be magnified today as the first age cohort of the Baby Boom generation approaches age sixty-five, and the median age of Americans continues to rise.[37] Keeping able and interested older Americans in productive work must be a part of any comprehensive social strategy to contend with the economic problems posed by this aging population. More work for older Americans means savings for younger Americans on income support and health insurance.

The impact of even economically rational stereotype-based age discrimination on American society is aggravated by the injustice and frustrations felt by many older workers who perceive that they have not been treated fairly by their employers. That perception, whether or not accurate in particular cases, is reflected in the continuing growth in age discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) over the past dozen years as the Baby Boom generation has aged. Those charges numbered over 23,000 and constituted almost one-fourth of the total charges filed with the EEOC during the 2010 fiscal year, an increase of about 7,500 charges from fiscal year 1997, when less than one-fifth of the charges included allegations of age discrimination.[38] The perception of continuing age discrimination in the American workplace is also reflected in the results of studies conducted by social scientists.[39]

Not surprisingly, the social science literature does not clearly demonstrate the extent to which stereotypes and associated employment discrimination may have declined since the passage of the ADEA and parallel state-law prohibitions of age discrimination in employment. One analysis of studies published through 1999 found that continuing age bias "may . . . be less of a problem" than it was in previous decades.[40] Some studies, however, do show clear evidence of continuing age bias in the hiring decisions of at least some employers,[41] and other evidence suggests that older workers continue to be able to find jobs only in a limited set of industries and occupations.[42] Some research even suggests that the ADEA may have led to the hiring of fewer older workers in new jobs,[43] though other research suggests that the statute may have especially helped older workers retain jobs in which they and employers had made longer-term reciprocal commitments.[44]

While the nature of the reality of continuing age discrimination in the American workplace is thus not as clear as the perception of its continuing existence, and while the efficacy of the ADEA is also subject to debate, it is clear that the problem of age discrimination in

35. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS 47 (2011) (median duration of unemployment for all workers aged fifty-five to sixty-four and those aged sixty-five and above was 26.8 weeks and 31.8 weeks, respectively, compared to a median of 19.9 weeks for all workers sixteen and older; for men over age sixty-five, median weeks of unemployment was 43.5), *available at* <www.bls.gov/opub/ee/empearn2011 02.pdf>.

36. WIRTZ REPORT, *supra* note 27, at 5.

37. "[A] million manyears of productive time are unused each year because of unemployment of workers over age 45; and vastly greater numbers are lost because of forced, compulsory, or automatic retirement." *Id.* at 18. The nation's economy loses "several billion dollars" each year because of involuntary retirement. *Id.*

38. *See Age Discrimination in Employment Act (Includes Concurrent Charges with Title VII, ADA and EPA) FY 1997-FY 2011*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, <http://eeoc.gov/eeoc/statistics/enforcement/adea.cfm> (last viewed Apr. 27, 2012). As noted on the EEOC's website, individuals can file charges claiming multiple types of discrimination.

39. *See, e.g.*, AM. ASS'N OF RETIRED PERSONS, STAYING AHEAD OF THE CURVE: THE AARP WORK AND CAREER STUDY 66-67 (2002), *available at* <http://assets.aarp.org/rgcenter/econ/d17772_multiwork.pdf> (two-thirds of workers aged forty-five to seventy-four responded affirmatively to the question "based on what you have seen or experienced, do you think workers face age discrimination in the workplace today"); Scott J. Adams, *Passed Over for Promotion Because of Age: An Empirical Analysis of the Consequences*, 23 J. LAB. RES. 447 (2002) (finding workers who believe their firms discriminate against older workers in promotion subsequently experience lower wage growth and are more likely to withdraw from labor market); Roscigno et al., *supra* note 31 (analysis of seemingly meritorious employment age discrimination claims); *see also* Erdman B. Palmore, *Research Note: Ageism in Canada and the United States*, 19 J. CROSS CULTURAL GERONTOLOGY 41, 43 (2004) (84 percent of Americans older than sixty report one or more incidents of some form of age bias).

40. *See* Randall A. Gordon & Richard D. Arvey, *Age Bias in Laboratory and Field Settings: A Meta-Analytic Investigation*, 34 J. APPLIED SOC. PSYCHOL. 468 (2004).

41. *See, e.g.*, Marc Bendick Jr. et al., *Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices*, 8 J. AGING & SOC. POL'Y 25 (1996); Joanna Lahey, *Age, Women, and Hiring: An Experimental Study*, 43 J. HUM. RESOURCES 30 (2008).

42. *See, e.g.*, Barry T. Hirsch et al., *Occupational Age Structure and Access for Older Workers*, 53 INDUS. & LAB. REL. REV. 401 (2000); Robert M. Hutchens, *Do Job Opportunities Decline with Age?*, 42 INDUS. & LAB. REL. REV. 89 (1988).

43. *See* Scott Adams, *Age Discrimination Legislation and the Employment of Older Workers*, 11 LAB. ECON. 219 (2004).

44. *See* David Neumark & Wendy A. Stock, *Age Discrimination Laws and Labor Market Efficiency*, 107 J. POL. ECON. 1081 (1999).

employment persists and can only become more salient as the American labor force continues to age.[45] The problem surely is sufficiently significant for the American economy to warrant as close attention and as strong a federal statute as that prohibiting race and sex discrimination. Further, a closer analysis of the probable nature of the barriers to the continuing productive participation of willing and able older workers in the American economy indicates that Congress must reconsider the incentives the ADEA provides not only to workers aggrieved by age-based discrimination, but also to employers considering either the termination of senior workers whose wages may have exceeded their productivity or the hiring of new older workers in positions that may provide bridges to their retirement. Closing the remedial and procedural gap between the ADEA and Title VII should be only the first part of the ADEA-reform agenda.

II. A REFORM AGENDA

A. Closing the Title VII Gap

Legislative efforts to enhance the regulation of age discrimination in employment should begin with amendments to the ADEA that would provide the age discrimination statute with the same procedural and substantive strengths Congress has provided Title VII. Congress should focus on eliminating four comparative deficiencies in the ADEA.

1. Providing for Compensatory and Punitive Damages

Section 7(b) of the ADEA provides that in any enforcement action a "court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the statute, "including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation . . . ."[46] Despite early rulings by some district court judges,[47] however, no court of appeals has upheld the grant of general consequential compensatory damages for non-pecuniary and future pecuniary losses, let alone any punitive damages, under the authority of this

45. *See supra* text accompanying notes 1-5.

46. 29 U.S.C. § 626(b) (2006).

47. *See, e.g.*, Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 713 (E.D. Wis. 1978); Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952, 956 (N.D. Ill. 1977).

provision.[48] Instead, successful private plaintiffs in ADEA actions have been limited to the recovery of amounts that could be treated as equitable relief, such as lost back pay and other forfeited benefits or front pay until a normal retirement age in lieu of reinstatement. ADEA plaintiffs also may recover an additional award of liquidated damages in an amount equal to any past wages or benefits lost because of the discrimination if the plaintiffs can demonstrate that an employer's violation of the statute was "willful,"[49] which the Court has held means the employer "knew or showed reckless disregard . . . whether the employer's conduct was prohibited" by the statute.[50] The availability of this liquidated damages remedy, which the ADEA incorporates from the Fair Labor Standards Act (FLSA),[51] is one reason that the lower courts have not found authority to award general compensatory and punitive damages under section 7(c)(1).

Before passage of the Civil Rights Act of 1991 (1991 Act),[52] the FLSA liquidated damages remedy, even as limited by the requirement of willfulness, offered ADEA plaintiffs more than was available to Title VII plaintiffs. Victims of race discrimination in employment, however, could sue for compensatory and punitive relief through section 1981,[53] and one impetus for the 1991 Act was to provide additional remedies for victims of illegal employment discrimination who could not use section 1981. Thus, the 1991 Act added a section 1981a to Chapter 42 of the United States Code, to allow the recovery of compensatory and punitive damages for intentional discrimination that is unlawful under Title VII, but is not subject to a section 1981 action.[54] Section 1981a also provides for the same recovery of com-

48. *See, e.g.*, Comm'r of Internal Revenue v. Schleier, 515 U.S. 323, 326, 326 n.2 (1995) (noting, with citations to the First through Eleventh Circuits, that "the Courts of Appeals have unanimously held, and respondent does not contest, that the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress," and citing, among others, Slatin v. Stanford Research Inst., 590 F.2d 1292 (4th Cir. 1979)). *But see* Shea v. Galaxie Lumber & Constr. Co., 152 F.3d 729, 734-35 (7th Cir. 1998) (interpreting FLSA to authorize punitive as well as compensatory damages in retaliation action).

49. 29 U.S.C. § 626(b). Section 7(b) of the ADEA includes a proviso stating that "liquidated damages shall be payable only in case of willful violations." *Id.*

50. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 126 (1985).

51. Section 7(b), 29 U.S.C. § 626(b), incorporates the remedy from section 16 of the FLSA, 29 U.S.C. § 216(b) (2006), but includes the proviso conditioning liquidated damages on willfulness that is not included in the FLSA.

52. Pub. L. No. 102-166, 105 Stat 1071.

53. 42 U.S.C. § 1981 (2006). The availability of § 1981 to private-sector employees had been confirmed by the Supreme Court soon after the passage of Title VII. *See* Johnson v. Ry. Express Agency, Inc. 421 U.S. 454 (1975); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

54. Section 1981a(a) states: "provided that the complaining party cannot recover under [42 U.S.C. § 1981], the complaining party may recover compensatory and punitive damages . . . ." 42

pensatory and punitive damages for intentional discrimination on the basis of disability that is unlawful under the Americans with Disability Act or the Rehabilitation Act of 1973.[55] Nothing in the 1991 Act, however, provided a new remedy for plaintiffs who could demonstrate intentional discrimination unlawful under the ADEA.

The compensatory and punitive damages remedy provided by section 1981a in most cases would provide a more valuable remedy for victims of age discrimination and thus a stronger inducement to sue and a greater deterrence of continuing discrimination than does the FLSA liquidated damages remedy. To be sure, the section 1981a compensatory and punitive damages remedy is capped, depending on the size of the employer, from $50,000 to $300,000,[56] and in some age discrimination cases victims may have lost back wages exceeding these amounts. Liquidated damages equal to such lost wages, however, may not be available in many ADEA cases because of the conditioning of the availability of such damages on the employer's willfulness, its knowledge or reckless disregard of its violation of the act.[57] In a typical intentional discrimination case, in which an ADEA plaintiff can prove that an agent of the employer denied an employment opportunity or benefit because of the plaintiff's age, the plaintiff may be able to demonstrate such willfulness on the part of the agent. Inasmuch as the Court has treated the ADEA liquidated damages remedy as "punitive in nature,"[58] however, employers may argue that they should not be held liable for liquidated damages unless the agent's willfulness can be imputed to them under the high standards for imposing section 1981a punitive damages on employers set by the Court in *Kolstad v. American Dental Ass'n*.[59] Those standards include showing that the "malice" or "reckless indifference" upon which section 1981a punitive damages are conditioned "are[,] contrary to an em-

U.S.C. § 1981a(a)(1).

55. 42 U.S.C. § 1981a(a)(2); *see* Americans with Disabilities Act, 42 U.S.C. §§ 12111-117 (2006); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-18 (2006).

56. 42 U.S.C. § 1981a(b)(3). The cap is $50,000 for employees of employers with between fifteen and 100 employees, $100,000 for employees of employers with between 101 and 200 employees, $200,000 for employees of employers with between 201 and 500 employees, and $300,000 for employees of employers with more than 500 employees. *Id.*

57. *See supra* text accompanying note 50.

58. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985) ("Congress intended for [the ADEA's] liquidated damages to be punitive in nature"); *see also* Comm'r of Internal Revenue v. Schleier, 515 U.S. 323, 331-32 (1995) (holding ADEA liquidated damages punitive for purposes of calculating recipient's tax obligations).

59. 527 U.S. 526 (1999). *See generally* Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of* Kolstad v. American Dental Association, 14 N.Y.U. J. LEG. & PUB. POL'Y 477 (2011).

ployer's good-faith efforts to comply with Title VII."[60] The standards also seem to include showing that the agent's malice or reckless indifference – which the *Kolstad* Court interpreted as knowledge of or indifference to violating the law,[61] the same test as that for willfulness under the ADEA[62] – was authorized or approved by a managerial agent of the employer.[63] Since these may not be easy standards to meet,[64] treating the liquidated damages remedy as punitive rather than as an alternative to the section 1981a compensatory damages remedy may render it much less available and thus less valuable.

Part of the civil rights reform agenda, moreover, is the elimination of caps on the compensatory and punitive damages available to employment discrimination victims. Legislation to eliminate the section 1981a caps has been regularly introduced in Congress.[65] The inclusion in the Paycheck Fairness Act of a provision to add as a remedy for EPA violations uncapped compensatory, and where there is employer "malice or reckless indifference," punitive damages, also bespeaks the civil rights community's understanding that compensatory and punitive damages offer a more valuable alternative than the FLSA liquidated damages penalty, which is now available to EPA plaintiffs even in the absence of any showing of willfulness.[66]

60. Harper, *supra* note 59, at 528 (quoting Kolstad v. Am. Dental Ass'n, 139 F.3d 958 (D.C. Cir. 1998) (Tatel, J., dissenting)).

61. *Kolstad*, 527 U.S. at 526-27.

62. *See supra*, text accompanying note 50.

63. *Kolstad*, 527 U.S. at 542-43. The Court cited, apparently as a minimum condition for imputing liability for punitive damages to an employer, a four-pronged test pronounced in RESTATEMENT (SECOND) OF AGENCY, § 217C (1958). *Kolstad*, 527 U.S. at 542. The tests would impute liability "if, but only if: (a) the principle authorized the doing and the manner of the act, or (b) the agent was unfair and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act." *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY, § 217C).

64. After attempting to analyze all Title VII cases in federal district court cases during a two-year period after the *Kolstad* decision, one scholar concluded that there "are simply not a significant number of Title VII punitive damage awards finding their way into published district court decisions." Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 772 (2008). *But see* Harper, *supra* note 59, at 497-506 (finding "numerous lower court decisions" that "have not applied the *Kolstad* standards strictly in accordance with the Court's apparent intent.").

65. *E.g.*, Civil Rights Act of 2008, S. 2554, 110th Cong., §§ 441-42 (2008) (titled the "Equal Remedies Act of 2008").

66. The EPA added a prohibition of discrimination in pay on the basis of sex, 29 U.S.C. § 206(d) (2006), to the FLSA. This prohibition thus is enforced through the FLSA's enforcement and remedial provisions, including the liquidated damages provision in section 16(b), 29 U.S.C. § 216(b). The FLSA also includes a provision, applicable to the EPA, that gives courts discretion to not award liquidated damages if the employer shows that its illegal act or omission "was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation . . . ." 29 U.S.C. § 260.

Regardless of whether and at what level caps are placed on how the compensatory and punitive damages available under section 1981a are set, there is no reason why the civil rights agenda also should not include equal compensatory and punitive damage remedies for victims of age discrimination. Whether or not these victims have been subjected to malign animus or intolerance rather than mere unfair stereotyping, the types of damages they may suffer do not differ. These damages, including the "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" expressly covered by section 1981a,[67] are not dependent on the type of discrimination suffered by the victims. Moreover, if age discrimination, as argued above, poses as significant a problem for our economy and society as do other forms of illegal employment discrimination, it should be subject to the same kinds of deterrence.

2. Providing for Rule 23 ADEA Class Actions

Similar considerations counsel in favor of amending the ADEA to allow private plaintiffs seeking to challenge an employer's pattern or general practice of age discrimination to have the same assistance of the class action procedures of Rule 23 of the Federal Rules of Civil Procedure[68] that are available to private plaintiffs challenging patterns or general practices of race, sex, national origin, or disability discrimination under Title VII or the ADA.

Currently, ADEA plaintiffs are confined to the procedures for collective actions set forth in section 16(b) of the FLSA.[69] The latter provision states that an action may be brought "by one or more employees for and in behalf of himself or themselves and other employees similarly situated."[70] It also provides, however, that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."[71] Courts have understood this provision[72] to preclude use of a Rule 23 class action through

67. 42 U.S.C. § 1981a (b)(3) (2006).

68. FED. R. CIV. P. 23.

69. 29 U.S.C. § 216(b). Section 7(b) of the ADEA states that the ADEA's provisions "shall be enforced in accordance with the powers, remedies, and procedures" of the FLSA, including those in § 216(b). 29 U.S.C. § 626(b).

70. 29 U.S.C. § 216(b).

71. *Id.*

72. *See, e.g.*, Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165 (1989). The Court in *Hoffman-La Roche* held that district courts may allow discovery of names and addresses of employees to facilitate notice of ADEA collective actions, provided that there is no appearance of judicial endorsement. *Id. See generally* Elizabeth K. Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 GEO. L. J. 119 (1982).

which an employer might be held subject to liability to all victims of a practice proscribed by the FLSA or the ADEA who do not "request exclusion" from the class after "the best notice practicable" directed by the court.[73] Rather than the opt-out procedure of Rule 23, lawyers representing ADEA plaintiffs like those representing FLSA plaintiffs, including those suing under the EPA provisions of the FLSA – thus must contact and convince prospective class members to opt in to their collective action.

The difference between an opt-out and an opt-in class is significant and has resulted in private attorneys being less able to challenge patterns and general practices of age discrimination than the forms of employment discrimination proscribed by the other federal anti-discrimination statutes. ADEA collective actions are relatively infrequent because of the difficulties lawyers face in obtaining the consent of potential plaintiffs.[74] These difficulties may be even greater than those facing lawyers assembling a group of plaintiffs victimized by some violation of FLSA's wage payment provisions. Potential ADEA plaintiffs are more likely to be dispersed and out of mutual contact if no longer employed by the defendant employer. If the ADEA challenge is to a policy, such as a promotion scheme or a layoff program, that affects incumbent workers; those workers probably will be less likely to agree to sue their employer than will those seeking some wrongfully withheld pay for overtime work.

Plaintiffs' attorneys have attempted to overcome the limitations of the FLSA opt-in procedure by including a supplemental parallel claim under state law and then requesting a Rule 23 opt-out class for this claim.[75] This strategy has sometimes been successful[76] and theoret-

73. *See* FED. R. CIV. P. 23(c).

74. *See* Spahn, *supra* note 72. Average opt-in rates for FLSA collective actions may be as low as 15 percent of potential plaintiffs. *See* Andrew C. Brunsden, *Hybrid Class Actions, Dual-Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 294 (2008) ("average opt-in rate for the twenty-one cases analyzed . . . is 15.71%"); Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 313 (2005) (estimating an average between 15 and 30 percent).

75. *See generally* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 AM. U. L. REV. 515 (2009); Brunsden, *supra* note 74.

76. *See, e.g.*, Lindsay v. Gov't Emps. Ins. Co., 448 F.3d 416, 420-21 (D.C. Cir. 2006); Salazar v. AgriProcessors, Inc., 527 F. Supp. 2d 873, 884-85 (N.D. Iowa 2007); Brickey v. Dolencorp, Inc. 244 F.R.D. 176, 178-79 (W.D.N.Y. 2007).

ically would be available for plaintiffs in any state with an age discrimination law that did not provide an alternative procedure for a collective action like that of the FLSA. However, some federal courts, most notably the Third Circuit Court of Appeals, have rejected supplemental federal jurisdiction over some state wage payment claims.[77] Furthermore, age discrimination actions based on state law, even where available as opt-out class actions in federal or state court, will be limited to a class of employees defined by arbitrary state boundaries.

The procedural advantage afforded by Rule 23 to victims of Title VII-prohibited discrimination over victims of age discrimination prohibited by the ADEA may have been marginally reduced, but certainly was not eliminated by the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.[78] The Court in *Dukes* held that a Rule 23 "class comprising about one and a half million . . . current and former female employees"[79] of Wal-Mart could not be certified to challenge the discriminatory effects of Wal-Mart's delegation of discretion to thousands of local supervisors to set the pay and determine the promotion of employees under their charge.[80] The Court based this holding on the failure of the class to satisfy the requirement in Rule 23(a)(2) that there be "questions of law or fact common to the class."[81] The class representatives, in the view of the five-Justice majority, did not offer significant proof that Wal-Mart had a common policy of sex discrimination that caused the supervisors to exercise their discretion in some common discriminatory fashion.[82] The Court also unanimously agreed that classes seeking individualized monetary relief, whether of an equitable nature or of a legal nature, cannot be

77. *See* De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 310-12 (3d Cir. 2003) (rejecting supplemental jurisdiction because of the novel issues of state law and the great disparity between the size of the opt-in federal claim class and the opt-out state claim class); *but see* Knepper v. Rite Aid Corp., 675 F.3d 249, 258-259 (3d Cir. 2012) (opt-out state law claims are not inherently incompatible with opt-in FLSA collective actions.)

78. 131 S. Ct. 2541 (2011).

79. *Id.* at 2547.

80. *Id.* at 2550-57.

81. *Id.* Rule 23(a) sets four prerequisites for the certification of any type of class action in federal court:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defense of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

FED R. CIV. P. 23(a).

82. *Wal-Mart*, 131 S. Ct. at 2553-57.

certified under Rule 23(b)(2),[83] which applies to classes seeking injunctive or corresponding declaratory relief for the class as a whole.[84]

Neither the Court's holding nor its interpretation of Rule 23(b)(2) eliminates the advantages of Rule 23 opt-out class actions over the opt-in collective actions required for the ADEA by the FLSA. The *Dukes* Court's holding concerning the meaning of Rule 23(a)(2)'s commonality requirement is not relevant to actions challenging common company policies, such as those governing promotions or layoffs, that would be typically challenged in an age discrimination suit. The holding also is not relevant to challenges to the discriminatory exercise of discretion by a single set of decisionmakers, such as those determining employment at a particular facility. Furthermore, under section 16(b) of the FLSA, only "other employees similarly situated"[85] may join collective actions challenging age discrimination. It seems highly unlikely that the Court would interpret this provision to allow collective ADEA actions in cases, like *Dukes*, challenging the decisions of variant and dispersed managers.[86]

The *Dukes* Court's unanimous and controlling dicta on the meaning of Rule 23(b)(2) may prove more limiting for Title VII class actions than its actual holding on Rule 23(a)(2) commonality.[87] This dicta means that even where commonality is met, Title VII plaintiffs seeking certification of a class asking for individualized monetary relief, including backpay, will have to satisfy the requirements imposed on Rule 23(b)(3) classes.[88] These requirements include the provision of "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," and also the opportunity to request exclusion, to opt out of the class. These additional requirements, however, do not

83. *Id.* at 2557-61; *id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part.).

84. Rule 23(b)(2) states that a "class action may be maintained if Rule 23(a) is satisfied and if: (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED R. CIV. P. 23(b)(2).

85. 29 U.S.C. § 216(b) (2006).

86. Note also that FED R. CIV. P. 20 allows plaintiffs to join in an action only if there is a "question of law or fact common to all plaintiffs. . . ."

87. This is certainly the view of Professor Coffee. *See* John C. Coffee, Jr., *"You Just Can't Get There From Here": A Primer on* Wal-Mart v. Dukes, 9 WORKPLACE L. REP. (BNA) 1278 (July 29, 2011).

88. Employment discrimination class actions, whether or not they seek individualized relief, would not meet the conditions of Rule 23(b)(1), which require the necessity of avoiding a risk of either "inconsistent or varying adjudications" or "adjudications . . . [that] would substantially impair or impede" the ability of non-parties to protect their interests. FED R. CIV. P. 23(b)(1). No court has certified a Rule 23(b)(1) class in an employment discrimination case.

make Rule 23(b)(3) class actions less practical or manageable than are FLSA collective actions, which not only require notice to all prospective class members, but also the active solicitation of their written consent to join the class.[89]

There is no plausible convincing rationale for the less favorable treatment of ADEA collective actions. Congress gave no particular consideration to the FLSA opt-in collective action model when it elected to use the FLSA enforcement system for the ADEA. Section 216(b) itself is a historical anomaly[90] that should be amended in the light of the development of the modern Rule 23 class action. Not surprisingly, the Paycheck Fairness Act included a provision stating that "any action brought to enforce [the EPA] may be maintained as a class action as provided by the Federal Rules of Civil Procedure."[91] The same kind of provision should be included in an ADEA reform statute.

3. Providing an Equivalent Disparate Impact Cause of Action

The Paycheck Fairness Act, as passed in the House of Representatives to strengthen the EPA, highlights a third way in which the ADEA should be brought to equivalence with Title VII: enacting an express cause of action to challenge ostensibly neutral employment practices that disproportionately disadvantage older workers without a job-related business justification that cannot be served by an alternative practice with neutral effects. The Paycheck Fairness Act would have provided for disparate impact actions against disparities of pay between men and women by amending the EPA to eliminate the "any other factor other than sex" defense in that statute and by substituting a "bona fide factor other than sex" defense that would require the employer to prove job-relatedness and business necessity

89. 29 U.S.C. § 216(b). To certify a class under Rule 23(b)(3), a court, in addition to making the findings required by Rule 23(a), see *supra* note 81, must find "that the questions of law or fact common to class members predominate over any question affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED R. CIV. P. 23(b)(3). In theory an ADEA action could obtain the written consent of a group of "similarly situated" employees whose cases present a common question of law or fact, but who could not meet these additional Rule 23(b)(3) requirements. Given the difficulty in securing the written consent of a widely dispersed group of employees or former employees, however, this possibility seems no more than theoretical.

90. Section 216(b) was added to the FLSA in 1947 when Rule 23 included an opt-in requirement. Section 216(b) replaced a provision that had allowed labor unions and other entities to bring representative actions on behalf of employees. Because the opt-in provision was an explicit part of the statute, however, it did not evolve with Rule 23. *See* Brunsden, *supra* note 74, at 280-81; Spahn, *supra* note 72, at 129-32.

91. H.R. 12, 111th Cong. § 3(c)(4) (as passed by the House, Jan. 9, 2009).

and would allow a disadvantaged employee to prove the existence of an adequate alternative employment practice that the employer has refused to adopt.[92] The ADEA, unlike the EPA, however, does not seem to condemn all disparities that an employer cannot justify with a statutory defense; instead, the ADEA's basic prohibitions track the language of the original prohibitions of Title VII, in addition to providing employers a "reasonable factors other than age" (RFOA) defense not available in Title VII actions.[93] To codify an age-based disparate impact cause of action, Congress thus would have to amend the ADEA both by eliminating the RFOA defense, and by adding a provision, like that in section 703(k) of Title VII as enacted through section 105 of the 1991 Act.[94]

In *Smith v. City of Jackson*,[95] the Supreme Court, based on the RFOA defense and Congress' failure to codify a disparate impact cause of action in the ADEA at the same time it codified such an action in Title VII, held that the "scope of disparate-impact liability under ADEA is narrower than under Title VII."[96] More specifically, an employment practice not ostensibly based on age but that nonetheless disproportionately disadvantages older workers need only be a reasonable means of achieving legitimate business purposes; it does not have to be a necessary means for achieving such goals to be permissible under the statute.[97] Importantly, this means that "[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."[98] The Court subsequently narrowed the gap between Title VII and ADEA disparate impact actions by clarifying that since the RFOA is an affirmative defense, the burden of proving a reasonable justification is on employers.[99] The gap nonetheless remains wide

92. *Id.* § 3(a).

93. 29 U.S.C. § 623(f)(1) (2006).

94. 42 U.S.C. § 2000e-2(k) (2006). Without changing its meaning and therefore its legal equivalence to section 703(k), however, a new ADEA provision could be more simply and clearly stated than the negotiated, convoluted codification of the disparate impact cause of action as previously formulated by the Supreme Court.

95. 544 U.S. 228 (2005).

96. *Id.* at 240.

97. *Id.*

98. *Id.* at 243.

99. *See* Meacham v. Knolls Atomic Power Lab, 554 U.S. 84, 97 (2008). Clarification was necessary because the Court had stated in *Smith* that Congress' failure to amend the ADEA after its decision in Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989), meant that "*Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to

because disadvantaged employees in ADEA disparate impact cases, unlike those in Title VII disparate impact cases, cannot challenge justifications by offering alternative practices that do not result in a disparate impact.

The importance to disparate impact litigants of the consideration of alternative practices indeed seems to have been recognized by the EEOC during the Obama administration. In February, 2010, the EEOC proposed a new regulation that would have included in a list of "[f]actors relevant to determining whether an employment practice is reasonable" for purposes of the ADEA's RFOA defense "whether other options were available and the reasons the employer selected the option it did."[100] After the solicitation of comments and review by the White House's Office of Management and Budget (OMB), however, the relevant factors were modified and the availability of "other options" factor was deleted.[101] This deletion was not surprising be-

the ADEA," 544 U.S. at 229, and the Court in *Wards Cove* had pronounced that the burden of persuasion remained on plaintiffs to prove the lack of a business justification for an employment practice that disproportionately disadvantaged a Title VII protected class, 490 U.S. at 659-60.

100. The proposed regulation would have provided:

> To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer. Factors relevant to determining whether an employment practice is reasonable include but are not limited to, the following:
>
> (i) Whether the employment practice and the manner of its implementation are common business practices;
>
> (ii) The extent to which the factor is related to the employer's stated business goal;
>
> (iii) The extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (*e.g.*, training, guidance, instruction of managers);
>
> (iv) The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
>
> (v) The severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
>
> (vi) Whether other options were available and the reasons the employer selected the option it did.

Definition of "Reasonable Factors Other than Age" Under the Age Discrimination in Employment Act, 75 Fed. Reg. 7212-18 (proposed Feb. 18, 2010) (to be codified at 29 C.F.R. § 1625.7).

101. A divided EEOC had tentatively approved the rule in November, 2011, subject to OMB review and another EEOC. *See* 38 Empl. Discrimination Rep. (BNA) 183 (Feb. 8, 2012). The final regulation provides:

> To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer. . . . Considerations that are relevant to whether a practice is based on a reasonable factor other than age include, but are not limited to:
>
> (i) The extent to which the factor is related to the employer's stated business purpose;
>
> (ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
>
> (iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
>
> (iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
>
> (v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

Differentiations Based on Reasonable Factors Other Than Age (RFOA), 77 Fed. Reg. 19080-19095 (published Mar. 30, 2012, eff. Apr. 30, 2012) (codified at 29 C.F.R. § 1625.7).

cause the consideration of "other options" is difficult to accord with the Court's *Smith v. City of Jackson* opinion.

Not being able to stress the availability of less discriminatory alternative employment practices could be critical for plaintiffs in a range of potential ADEA disparate impact cases of relevance to the fulfillment of the goals of the ADEA. These cases include ones challenging the use of such ostensibly neutral screening criteria for employment or continued employment as educational attainment, technological training, and scores on aptitude tests. Although the Wirtz Report recognized all of these criteria as barriers to the employment of older workers,[102] such metrics also may be useful to predict future productivity. Plaintiffs thus may be able to challenge the disparate impact of such employment criteria only by offering alternative screening standards, such as individualized assessments of past experience and technological adaptability.

Similarly, older employees disproportionately harmed by an employer's decision to discharge employees with more seniority and experience, and thus higher pay and benefits under the employer's compensation system, probably can successfully challenge the decision only by offering the alternative of modifying the compensation system to afford older senior employees the opportunity to work at lower cost to the employer.[103] As the Wirtz Report also recognized,[104] one set of barriers to the employment of older workers is the higher costs those individuals may impose on employers. Since labor costs

102. Wirtz Report, *supra* note 27, at 11, 13.

103. Even the opportunity to offer this alternative may not be adequate for plaintiffs, however. *See infra* text accompanying note 128.

104. WIRTZ REPORT, *supra* note 27, at 16.

clearly are a reasonable and legitimate business consideration, plaintiffs must be able to present some alternative way to lower labor costs to overcome this barrier to the achievement of the goals highlighted by the Wirtz Report and by the ADEA.

The policy arguments against providing a robust disparate impact mode of proof for age discrimination cases are not persuasive. Justice Stevens's opinion for the Court in *Smith* attempts to explain the RFOA provision by asserting that "intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII."[105] Although this assertion may be historically accurate, there is no reason to think that it is true today, especially in light of the greater economic rationality of age discrimination discussed above.[106] Furthermore, the prevalence of intentional discrimination is not directly relevant to the need for a robust prohibition of employment practices that unnecessarily aggravate a social problem, like the underutilization and premature loss of productivity of a segment of the work force. Similarly, Justice Stevens's assertion "that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment"[107] is relevant, not to disparate impact cases challenging ostensibly neutral criteria other than age and to the need for a RFOA defense, but rather to disparate treatment cases challenging age-based classifications and thus to the ADEA's "bona fide occupational qualification" defense[108] to such classifications.

In her concurring opinion in *Smith,* Justice O'Connor makes more relevant, but still non-compelling, arguments for not applying a strong, or, in her view, even a compromised disparate impact analysis in age discrimination cases.[109] She notes that one justification for disparate impact cases is the avoidance of the perpetuation of past discrimination against a protected class,[110] but she fails to acknowledge that disparate-impact proof has been used to challenge employment practices that disproportionately disadvantage protected groups and

105. Smith v. City of Jackson, 544 U.S. 228, 241 (2005).
106. *See supra* text accompanying notes 32-34.
107. 544 U.S. at 229.
108. *See* 29 U.S.C. § 623(f)(1) (2006).
109. 544 U.S. at 248, 267 (O'Connor, J., concurring).
110. *Id.* at 248, 258. Justice O'Connor cited the seminal case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Court first used disparate impact analysis in a case brought by disadvantaged black workers challenging educational achievement and aptitude test standards.

thereby aggravate social problems even in the absence of any perpetuation of historical discrimination.[111] The fact that the "artificial, arbitrary, and unnecessary barriers to employment"[112] faced by older workers do not derive from the legacy of historical discrimination does not mitigate the social and economic problems caused by the underemployment and early withdrawal from the work force of such workers. Justice O'Connor also attempts to distinguish the relevance of disparate impact proof for age discrimination by noting that the Wirtz Report identified "advances in technology and increasing access to formal education," as real, rather than artificial, barriers to the employment opportunities of older workers.[113] Yet, as explained above,[114] even under the robust disparate impact proof afforded by Title VII, plaintiffs could not successfully challenge such barriers, or ones based on increased labor costs,[115] without offering some alternative standards for the efficient assessment of workers' productivity relative to costs. That older workers may not be able to challenge successfully employment practices that justifiably act as barriers to their employment does not justify preventing them from challenging those barriers that could be replaced with less restrictive alternatives, including more individualized assessments and adjustments of compensation levels.

Given the RFOA defense and Congress' failure in the 1991 Act to codify explicitly a disparate impact cause of action for the ADEA, it was proper for the Court in *Smith* to make it relatively more difficult for plaintiffs alleging age discrimination to press a disparate impact case. This legislative history, however, does not justify the ADEA-Title VII disparate impact gap for current congressional policy makers. To achieve its original goals, the ADEA should be refashioned to close this gap as well.[116]

111. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (Alabama prison system violated Title VII by using neutral minimum weight and height standards for prison guards because the standards disproportionately disadvantaged female applicants).
112. *Griggs*, 401 U.S. at 431.
113. Smith v. City of Jackson, 544 U.S. 228, 259 (2005) (O'Connor, J., concurring).
114. *See supra* text accompanying notes 87-89.
115. Justice O'Connor also noted the likelihood that employee benefits and compensation "increase as an employee gains experience and seniority." *Smith*, 544 U.S. at 259 (O'Connor, J., concurring).
116. Such refashioning would have been accomplished by passage of section 305 of the Civil Rights Act of 2008, S. 2554, 110th Cong.

4. Providing an Equivalent Causation Test for Disparate Treatment Liability

By modifying through section 107 of the 1991 Act, the test for establishing liability for intentional discrimination under Title VII,[117] Congress created an additional and unwarranted gap between the ADEA and Title VII for Congress to now eliminate. Section 107 amended Title VII to provide for liability when a complaining party proves that consideration of one of the Title VII-prohibited criteria was "a motivating factor" for the challenged employment practice, "even though other factors also motivated the practice."[118] While section 107 also amended Title VII to allow an employer to avoid remedies beyond "declaratory relief, injunctive relief, and attorney's fees and costs" by demonstrating that it would have taken the same action "in the absence of" (i.e. but for) the impermissible causation,[119] the minimal causation standard for Title VII liability is now "motivating factor."

The 1991 Act, however, did not by its express terms amend the ADEA.[120] As a result, the lower courts in ADEA disparate treatment cases, relying in part on dicta in a 1993 Supreme Court decision,[121] continued to require proof that age "had a determinative influence" on the challenged decision. The lower courts in ADEA cases also continued to look to the sex discrimination decision to which Congress responded in section 107, *Price Waterhouse v. Hopkins*,[122] reading the case in effect to adopt a "but-for" minimal causation standard for liability, not just for full remedies as does section 107.[123] This standard, as read by the lower courts, shifted the burden of persuasion onto employers to prove the absence of such causation where plaintiffs could demonstrate, through something Justice O'Connor in an influential concurring opinion termed "direct" evidence, that consideration of protected group status was a "substantial factor" in the decision being challenged.[124]

In June 2009, however, the Supreme Court in *Gross v. FBL Financial Services*[125] rejected *Price Waterhouse* as controlling precedent for ADEA cases. It did so not to adopt the "motivating factor" causation standard codified by Congress for Title VII cases in the 1991 Act, but rather to adopt the position taken by the dissenting Justices in *Price Waterhouse*: Proving actionable intentional discrimination requires proving that taking into account a prohibited factor was a necessary or "but-for" cause of the challenged employment decision.[126] The Court's majority in *Gross* offered no reasons, beyond those offered by the dissenters in *Price Waterhouse,* to interpret the controlling language in the ADEA differently than the majority in *Price Waterhouse* had interpreted identical language in Title VII.[127]

As a result of the *Gross* decision, there is thus now a clear distinction between the minimum level of causation for establishing liability in ADEA disparate treatment cases and the minimum level of causation for establishing liability in Title VII actions. In ADEA actions, liability turns on establishing that age was a necessary or but-for cause of the challenged decision.[128] While the exact reach of section

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117. Section 107(a) of the 1991 Act added a new section 703(m) to Title VII. *See* 42 U.S.C. § 2000e-2(m) (2006).

118. *Id.* Section 703 (m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

119. Section 107(b) of the 1991 Act amended section 706(g) of Title VII. That section now provides that if an employer proves that it

> would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . .

42 U.S.C. § 2000e-5(g).

120. *See generally* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1158-72 (1993).

121. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.").

122. 409 U.S. 228 (1989).

123. *See, e.g.*, Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893 (5th Cir. 2002); Febres v. Challenger Caribbean Corp., 214 F.3d 57 (1st Cir. 2000).

124. 409 U.S. at 265. The lower courts also continued to use Justice O'Connor's concurring opinion to limit the reach of section 107 in Title VII cases, at least until the Court's rejection, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97-102 (2003), of any distinction between "direct" and "circumstantial" evidence for purposes of proving a "motivating factor" under section 107.

125. 129 S. Ct. 2343 (2009).

126. *Id.* at 2350.

127. For a full discussion, see Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 105-11 (2010).

128. Theoretically, a distinction might be made between sufficient and necessary causation, with determinative causation referring to the former and but-for causation to the latter. This distinction could be important in cases where an illegal consideration, such as age, was sufficient to cause an adverse employment action, but was not necessary, perhaps because of the sufficiency of another illegal consideration, such as sex. The distinction between necessary and sufficient causation has not been made in the cases, however, as determinative and but-for causation have been treated as equivalent.

107 in Title VII cases remains unclear,[129] in at least some Title VII actions, by contrast, liability can be established where the plaintiff demonstrates that consideration of a prohibited status was a "motivating factor," whether or not the employer is able to limit the plaintiff's remedies by demonstrating that it would have made the same decision in the absence of the illegitimate consideration.

The *Gross* decision's adoption of a "but-for" causation standard already has begun to make a difference in the lower courts. In 2011, for instance, the Tenth Circuit Court of Appeals upheld,[130] based on *Gross*, a district court's finding, in a bench trial, that the plaintiff's evidence demonstrated only that "age was one of many reasons" for a termination, not that it was a "but for cause."[131] The appellate court found that the plaintiff's evidence, which included a supervisor's testimony that the sole decisionmaker stated "he needed somebody younger and faster"[132] was sufficient to prove age was a motivating factor, but did not necessarily prove the plaintiff would not have been terminated but for her age because of her abrupt departure from a performance review session.[133]

There is no good reason for anti-discrimination law thereby to make the proof of illegal age discrimination harder than the proof of the forms of discrimination covered by Title VII. If taking into account race or sex or national origin should be illegal, even in cases where the consideration did not make a difference in a final decision, then why should consideration of age also not be illegal, even if not determinative of a final decision? It cannot be because the other forms of discrimination are harder to prove than age discrimination and thus need a compensating lower causation threshold; if anything,

129. The *Desert Palace* decision left the reach of section 107, and its motivating factor standard, for Title VII cases unclear because it expressly declined to consider "when, if ever, section 107 applies outside of the mixed-motive context." Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 n.1 (2003). Moreover, many lower courts after *Desert Palace* have continued to distinguish "pretext" proof advanced under the burden shifting system first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), from "mixed-motive" proof under the section 107 system. *See, e.g.*, Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. 2007); Wright v. Murray Guard, Inc., 455 F.3d 702 (6th Cir. 2006); Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004). *See generally* Harper, *supra* note 127, at 124-32.

130. Harley v. Potter, 416 Fed. App'x 748 (10th Cir. 2011).

131. *Id* at. 751.

132. *Id.* at 750.

133. *Id.* at 753; *see also, e.g.*, Hnizdor v. Pyramid Mouldings, Inc., 413 Fed. App'x 915, 917 (7th Cir. 2011) (bigoted remark does not prove that age was the "but-for" cause, where employer had other reasons for relocating work); Kelly v. Moser, Patterson & Sheridan, LLP, 348 Fed. App'x 746, 751 (3d Cir. 2009) (evidence may show age was one of multiple motivations, but "no reasonable jury could conclude age played a determinative role in [plaintiff's] termination").

age discrimination, because it is more rational and calculated,[134] might in the average case even be more difficult to prove. If age discrimination has more legitimate justifications than the forms of discrimination condemned by Title VII, then these legitimate justifications ought to support age as a bona fide occupational qualification for particular jobs. Such justifications, however, are not relevant to the issue of whether age was considered to any particular degree.[135]

There is no more record of Congress making a calculated decision to treat the causation issue in age discrimination cases differently than there is of Congress deciding after full consideration to treat disparate impact cases differently under the ADEA than under Title VII or of Congress deciding that opt-out class actions are not as appropriate for victims of age discrimination as for victims of the forms of discrimination covered by Title VII or of Congress deciding that some form of compensatory damages ought not to be made available to victims of age discrimination. In all these cases, the gaps between the ADEA and Title VII seem to have been a function of historical coincidences and transitional political alignments. There is no good reason why Congress should not now close all the gaps.

B. Encouraging the Fuller Employment of Older Workers

Strengthening the ADEA through closure of the above four gaps with Title VII – the gap in remedies, the gap in class action procedures, the gap in the disparate impact cause of action, and the gap in the disparate treatment causation standard – cannot be expected to occur except as part of a broader range of anti-discrimination legislation that includes strengthening the EPA and new prohibitions on sexual orientation discrimination. Passage of this range of rights-expansive legislation no doubt turns on the results of the 2012 elections. Regardless of the results of those elections, however, policy makers in Washington should think more deeply about how to use the anti-discrimination laws to encourage the greater and more productive use of an older labor force. Such thought might lead even a Congress not anxious to expand anti-discrimination litigation tools to

134. *See supra* text accompanying notes 32-34.

135. Legislation to overturn the Court's decision was introduced in both houses of Congress. *See* S. 1756, 111th Cong (2009); H.R. 3721, 111th Cong. (2009). Passage of these companion bills would have clarified that the "motivating factor" causation standard applies to "any Federal law forbidding employment discrimination." S. 1756, § 3; H.R. 3721, § 3. The bills thus would have closed this particular gap between the ADEA and Title VII. The bills were not reintroduced in the 112th Congress.

pass reforms of the ADEA that could encourage the fuller employment of older workers.

Our employment law should treat age discrimination as seriously as any other form of discrimination because age bias has as much of an impact on its victims and our economy. The dynamics of age discrimination may differ, however, because age, unlike most other types of status protected from discrimination, constantly changes over the course of every worker's career and accompanying job changes. Because of this change, employers may have variant incentives to treat workers differently over time. The incentives depend not only on the workers' particular ages, but also on whether the workers are incumbent employees or are instead applicants from the external labor market, and on how their developing careers fit within their employers' compensation structures. These variant incentives may suggest ways that the ADEA should be modified further to better achieve the goals of fuller and fairer productive utilization of older workers in our economy.

Three characteristics of the incentives of employers to prefer younger workers are particularly relevant. First, the incentives against hiring new older applicants increase with the age of the applicants. This is true because the older the applicants, the more likely their skills will decline sooner rather than later, perhaps because of an age-associated disability. The disincentive to hire older workers is probably compounded by the availability of legal remedies against age and disability discrimination, as employers rationally consider the costs of regulation and litigation in making personnel decisions.

Second, statistical discrimination against older workers based on employers' generalizations about these workers' current and future productivity is likely to be more efficient and thus more prevalent for decisions about workers in the external labor market than for incumbent workers. This is true because employers know their own workers best and can make more reliable individualized assessments of incumbent workers' not only current, but also likely future productivity. This greater knowledge about their own workers is probably particularly significant for those workers whose human capital is substantially firm-specific and thus only of use to their current employer. Employers generally are more able to place their current older employees in appropriate productive jobs than they are to place other workers from the external labor market.[136]

136. Not surprisingly, studies indicate that older workers on average have lower earnings after switching jobs. *See, e.g.*, David Shapiro & Steven H. Sandell, *Age Discrimination in Wages and Displaced Older Men*, 52 SO. ECON. J. 90 (1985). Older workers also have more difficulty securing new employment after losing jobs. *See, e.g.*, Hutchens, *supra* note 42.

Third, as recognized in the Wirtz Report[137] and noted above,[138] an employer has especially strong incentives to discharge more senior incumbent workers and not to hire more experienced new workers in cases where the workers' internal or external labor market experience would command higher compensation under the employer's compensation structure than the workers' productivity would justify. An employer may prefer more junior, and thus generally younger, workers who are not more productive, but who command lower wages under the employer's pay structure. Such a pay structure may be set to offer higher wages to workers with longer tenure to encourage them to stay on the job without shirking,[139] but it provides incentives to lay off at least some more senior, older workers, especially in periods of economic contraction. Even in such periods, an employer may suffer reputational costs with more junior, younger employees if it terminates all of its more senior, older employees and thus denies the promises contained in its pay structure. But if an employer retains some older workers under a kind of up-or-out system, it can still provide younger workers incentives to stay and to work hard.

Consideration of these variant incentives together highlights the special nature of the impediments to full employment of older workers. Older workers whose productive careers are aborted by the loss of employment for any reason may have greater problems continuing those careers with other employers less sure of their productivity. Furthermore, this may be true for a large group of older workers who could have continued to be especially productive for their former employers, even if not at a level justifying the compensation they once expected. Even many of those older workers who would like to work in jobs of less responsibility or intensity at lower compensation may not find employers willing to take a chance on their individual productivity because of statistical discrimination and concerns about the costs of litigation.[140]

137. WIRTZ REPORT, *supra* note 27, at 15-16.

138. *See supra* text accompanying note 33.

139. *See, e.g.*, Edward P. Lazear, *Agency, Earning Profiles, Productivity and Hours Restrictions*, 71 AM. ECON. REV. 606 (1981); Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 J. POL. ECON. 1261 (1979).

140. The number of such workers seeking transitional bridge jobs into retirement is likely to increases as the oldest cohort of the Baby Boom generation enters the traditional retirement years. *See* DAVID NEUMARK, AARP PUB. POL'Y INST., REASSESSING THE AGE DISCRIMINATION IN EMPLOYMENT ACT (2008), *available at* <http://assets.aarp.org/

Policymakers considering the reform of the ADEA ought to take into account these impediments and employers' underlying incentives to terminate or avoid hiring older workers. They should do so by compelling employers to retain productive incumbent older workers and to hire new experienced older workers, regardless of the compensation previously promised experienced employees. Policymakers also should consider allowing employers to hire older workers for a probationary period during which the employers would be insulated from age discrimination claims from the workers. Doing so would encourage employers to gain first-hand knowledge of particular older workers, whether the workers were hoping to start new careers or to transition to retirement by holding jobs of reduced responsibility.

1. Qualifying the Cost Justification for Age Discriminatory Effects

Regardless of whether it causes the displacement of older workers from jobs and workplaces in which they can be most productive, an employer's discharge of, or refusal to hire, older workers because their productivity has not kept pace with an experience-based upward incline in the employer's compensation structure is currently not illegal age discrimination.[141] An employer who prefers one worker to another because the first worker is equally productive at a lower wage makes an individualized economic assessment equivalent to that of an employer who prefers one worker to another because the first is more productive at the same wage. Businesses legitimately judge employees, as they judge other factors of production – based on a comparison between their marginal costs and their marginal productivity.

Furthermore, older workers who are disproportionately laid off, or not hired, because an employer has adopted a policy of avoiding the employment of more senior, and thus more highly paid, employees may not be able to press successfully a disparate impact challenge to the policy. This is certainly true under current ADEA disparate impact law, as explained above,[142] because the employer's desire to reduce labor costs is among the most "reasonable" of business justifications. Even under the more robust Title VII disparate impact proof structure, which allows plaintiffs to suggest alternative effective business practices with less of a differential impact, most such policies might be successfully defended because employers could provide business reasons for not adopting the alternative practices. If displaced incumbent older and more highly paid senior workers suggest that the employer instead adjust its pay structure or assign the older workers to lower paid positions,[143] for instance, the employer can claim concerns about the impact on its more junior work force, whose morale and motivation it wants to continue to buttress by the promise of increased wages.

Thus, if it is true that employment terminations, or refusals to hire, based on seniority or experience-based pay scales are inefficient for the economy, even while efficient for the employers that adopt them, these socially inefficient decisions must be addressed by a new ADEA prohibition. This prohibition should proscribe an employer discharging, or refusing to hire, an employee in the ADEA protected class because of where the employee fits within the employer's pay structure. An employer should not be permitted to use the wages it offers, rather than those demanded by an employee or applicant, as a justification for refusing to employ.

The prohibition should not and need not also proscribe depressing the wage of a protected employee based on an assessment of past or predicted future productivity, as long as the assessment is not based in any way on age. An employer may be constrained from reducing an employee's pay by an enforceable contractual commitment to the employee or by a collective bargaining agreement, but it should not and need not be constrained by the ADEA. The ADEA's goal should be to encourage the placement of older workers in positions in which they can be most productive, not to enforce or encourage promises of increased pay with experience or seniority or to otherwise attempt to inflate the pay of older workers.

Such a qualification on the legitimacy of cost-based defenses to terminations of and refusals to hire older workers would not prevent employers from achieving the reduced turnover and increased intensity of work that can be gained from commitments to pay experienced workers more. As I have previously acknowledged,[144] qualifying the

rgcenter/econ/2008_09_ad ea.pdf>.

141. The legality of such personnel decisions was confirmed by the Supreme Court's analysis in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The decision in *Hazen Paper* rejected a series of lower court decisions that had effectively interpreted the ADEA to prohibit an employer from using its own pay scale to justify terminating or refusing to hire an older worker. *See, e.g.*, Rivas v. Federacion de Asocianciones Pecurias de Puerto Rico, 929 F.2d 814, 821-22 (1st Cir. 1991) (dictum); Abbott v. Federal Forge, Inc., 912 F.2d 867, 875 (6th Cir. 1990) (dictum); Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987). The reform advocated in the text would require overturning *Hazen Paper* and could be promoted as such.

142. *See supra* text accompanying note 89.

143. *See id.*

144. *See* Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz*

cost-based defense would "probably result in a decline in the rising wages offered to more experienced workers by most [non-union] employers"[145] because the option of using less experienced and thus cheaper workers would no longer be available. Hiring less experienced and lower compensated workers in place of the more experienced, however, may not be part of an efficient bargain, but rather the opportunistic and manipulative breach of the commitment to pay those with greater experience more. Any employer that wishes to gain the benefit of a more sharply inclined experience-based wage curve can do so by enforceable contracts.

Professor Jolls has argued cogently that prohibiting cost-based justifications for refusals to hire and for terminations of older workers and also preventing employers from departing from their experience-based wage promises would be efficient for the general economy because it would mimic the efficient inter-employer contracting that many workers and employers would prefer but cannot reach because of transactional and legal impediments.[146] Jolls argues that such an inter-employer contract would benefit employers as well as employees because it would enable employers to use more effectively the promise of late career wages as an inducement for intense early career work. The promise could not be broken by the termination of jobs with early career employers.[147]

Even if enforceable contracts, without the availability of a safety valve of preferring junior and thus cheaper workers, would not provide optimal efficiency for all employers, however, qualifying the cost-based justification for preferring younger to older workers seems to promote efficiency for the economy as a whole because it helps avoid the unnecessary dead weight loss of unemployed and underemployed productive older workers. Most clearly, qualifying the cost-based justification helps prevent older workers from being displaced from jobs in which they may be the most productive available workers and cast out into a labor market where rational statistical discrimination is practiced by employers uncertain of how to assess their future productivity. Qualifying the cost-based justification also prohibits

Report Agenda, 31 U. RICH. L. REV. 757 (1997).

145. *Id.* at 789.

146. *See* Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1830-39 (1996).

147. *Id.* For another argument that age discrimination laws can increase the efficiency of labor markets by helping to make secure long term wage commitments, see Neumark & Stock, *supra* note 44.

prospective employers from using an experience-based wage curve as a justification for such statistical discrimination against older workers, thereby helping to compel employers to provide individualized assessments of older, more experienced job applicants. Qualifying the cost-based justification does not prevent any employer from making efficient employment decisions on the basis of individualized assessments of productivity.

2. Insulating Employers from Discrimination Litigation During a Probationary Period for Older Workers

Any prohibition of employment discrimination against incumbent workers on the basis of some protected status provides a disincentive to hire workers of that status because doing so increases the likelihood of future regulatory and litigation costs. This disincentive is less significant for symmetrical prohibitions, such as those of race and sex generally in Title VII, because every potential employee is a member of one or another status, even if members of generally subordinated status groups are more likely to claim discrimination. Asymmetrical prohibitions like those against discrimination on the basis of pregnancy[148] and religious practice in Title VII,[149] or on the basis of disability in the ADA, however, pose potential regulatory costs that can discourage the hiring of those whom the statutes are designed to protect from discrimination.[150] The ADEA imposes such an asymmetrical prohibition by protecting only those forty and older[151] and by proscribing discrimination only against older and in favor of younger workers.[152]

The disincentive for the hiring of protected workers posed by asymmetrical prohibitions of discrimination against incumbent workers does not necessarily condemn such prohibitions. The benefit that

148. *See* Cal. Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (finding that the Pregnancy Discrimination Act does not prevent employers from offering more benefits for pregnancy).

149. *See* 42 U.S.C. § 2000e(j) (2006) (defining "religion" to require the reasonable accommodation of "religious observance or practice," but not requiring accommodation of secular practice).

150. Two studies since the passage of the ADA concluded that the sometimes costly accommodation requirements imposed by that statute have led to a decrease in the employment of the disabled. *See* Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693 (2000).

151. *See* 29 U.S.C. § 631(a) (2006).

152. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

anti-discrimination prohibitions provide to those protected workers who are hired may more than compensate for any discouragement of the hiring of additional workers. Furthermore, prohibitions of hiring discrimination against the protected class, especially if enforced through adequate procedures and with adequate remedies, presumably can outweigh the disincentives posed by prohibitions of discrimination after hiring.[153]

Nevertheless, the asymmetrical prohibition of age discrimination after hiring in the ADEA presents an especially strong case for taking into account the disincentive effects of regulation. This is because these effects must increase with the age of the worker and the benefits of protections against discrimination after hiring must decrease after some age.

The disincentive effects of post-hiring prohibitions against discrimination must increase with the age of hiring precisely because employers apply generalizations about the probable future productivity of job applicants. The older the applicant, the employer might assume, the greater the chance that the applicant will decline during his or her tenure after hiring, the greater the chance the employer will have to take adverse personnel actions, and the greater the chance there will be litigation.

The benefits of protections against post-hiring discrimination also must decline with age for several reasons. First, employees hired at an advanced age are less likely to be on long-term career tracks with the promise of increasing compensation. Few of those on a shorter term career track probably are given any promises of increased responsibility and pay after an age of normal retirement for the company. This explains the studies that indicate that older workers tend not to be hired in particular jobs with longer-term career paths.[154] This also indicates that employers have less incentive to discharge, rather than to redeploy, productive incumbent workers who are hired at a more advanced age.

Second, the costs to workers of discharge, or constructive discharge through adverse treatment, probably start to decline by the age of normal retirement. This is not only because the job and career opportunity being sacrificed is probably less significant, but also because the level of responsibility and intensity of work desired by the employee is probably less. The kind of work that should satisfy workers after their normal retirement age thus theoretically should be more available, at least if employers could get to know the older applicants without being concerned about enlarging exposure to post-hiring anti-discrimination charges.

Policymakers therefore might consider allowing employers to require employees hired after reaching an age close to normal retirement, say sixty-two, to waive their protection from being discharged or reassigned on the basis of age. The purpose of allowing such waivers, which could be attractive to the business community and thus part of a political compromise, would be to encourage the hiring of older workers by eliminating the disincentive of the threat of future age discrimination litigation. The primary underlying goal of the ADEA, we should remember, is the fuller utilization in productive employment of older workers still able and willing to work. Prohibitions of discrimination should serve, rather than impede, achievement of that goal.

Nonetheless, there are good reasons to hesitate before allowing employers to require any older hires to waive protection against future age discrimination. Responsible, more sophisticated employers concerned about their labor market reputations probably would be hesitant to extract such waivers, while other more opportunistic employers might use them strategically to limit their use of older employees. This strategic use could include not only rapid turnover of unprotected older hires in certain less-desirable jobs, but also the disfavoring of job applications of older workers who are younger than the cut-off age for waiver. The latter strategy could be discouraged by lowering the cutoff age from sixty-two, but doing so would allow opportunistic employers to eliminate the basic protections of the statute for a larger class of older workers.

Furthermore, an allowance of a waiver would not be politically attractive to employment rights advocates, in part because it ostensibly dilutes rather than strengthens the ADEA's commands, and in part because it draws some inevitably arbitrary lines based on generalizations about the workforce and career paths. Moreover, to be effective the allowance of waivers of protection from post-hiring, post-retirement age discrimination would probably have to extend to waivers of protection from post-hiring, post-retirement age protection from disability discrimination; employers contemplating hiring older

153. *See generally* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 273-82 (2000).

154. *See, e.g.*, Hirsch et al., *supra* note 42; Robert M. Hutchens, *Delayed Payment Contracts and a Firm's Propensity to Hire Older Workers*, 4 J. LAB. ECON. 439 (1986).

workers probably are at least as concerned about future age-associated disabilities and the costs of consequent claims of disability discrimination and for reasonable accommodations as they are about future claims of age discrimination. Yet, any proposal to compromise the ADA's commands could provoke even greater political opposition.

A more politically feasible and probably more effective compromise alternative would be to provide employers with a period of insulation from being sued for age discrimination by an employee after being hired initially after a high cut-off age, whether it be sixty-two or younger. During this probationary period, of perhaps a year, employers could escape their dependence on generalizations by gaining knowledge of older hires as individuals. They could do so free of the threat of being sued after making a mistake about the productivity of the older hires.

This compromise would not offer as much of an incentive, as would a waiver allowance, to hire workers in their most senior years because employers understand that workers' productivity may decline as they age after a probationary period. It also would not encourage as much opportunism, however, as employers would not have an incentive to disfavor workers below the cutoff age for jobs in which rapid turnover is costly and employers could not completely eliminate the statute's protections against age discrimination after hiring.

One indeed might wonder if employers should be granted a probationary period free of the constraints of the ADEA for all hires. An employer that is willing to hire an older worker is very unlikely to discharge that worker within the first year of employment because of the worker's age, rather than because of the worker's demonstrated lack of competence. This seems especially true for any job that requires an initial period of training during which the employee is relatively overcompensated. On the other hand, any probationary period carries some risk of insulating age-based discrimination, perhaps by different agents of the employer than those who did the initial hiring, and employers may not need the inducement of probationary hiring to consider otherwise attractive workers in their forties and early fifties.

The fact that a balance would have to be negotiated by policymakers by setting some age over which employers could treat otherwise ADEA-protected workers as probationary for a limited period actually might make this kind of reform more feasible in a divided political climate after the 2012 elections. As long as leaders think more deeply about how to serve the ultimate goals of the ADEA and are willing to compromise to achieve those goals a more fundamental structural change in the statute actually might be more politically feasible than ones that simply expands litigation tools by merging the statute's procedures and remedies with those of Title VII.

III. CONCLUSION

Providing employers with an insulated probationary period after the hiring of older workers, like eliminating an internal cost-based defense to age discrimination claims, might seem to modify the statute from being concerned exclusively with age discrimination, at least as narrowly defined, into a statute primarily concerned with the encouragement of the employment of older workers. Yet the goals of the ADEA always have included the promotion of "employment of older persons based on their ability rather than age" and helping "employers and workers find ways of meeting problems arising from the impact of age on employment"[155] Such employment-utilization goals seem increasingly important as the labor force has aged.[156] Since insulating employers from concerns about age discrimination litigation encourages them to be willing to assess the ability of older workers through providing the workers with more employment opportunities, it is fully in accord with employment-utilization goals. Similarly, eliminating the internal cost-based defense to age discrimination, by requiring employers to adjust their compensation structure to avoid the displacement of incumbent older workers, encourages employers to address a primary problem "arising from the impact of age on employment . . . ." These recommendations for an ADEA reform agenda, like the recommendations set forth in Part II.A. to strengthen the enforcement of ADEA's current commands, thus would help secure the original goals of the statute.

155. 29 U.S.C. § 621(b).
156. *See supra* text accompanying notes 1-5.