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AGE-BASED EXIT INCENTIVES, COERCION, AND THE PROSPECTIVE WAIVER OF ADEA RIGHTS: THE FAILURE OF THE OLDER WORKERS BENEFIT PROTECTION ACT

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INTRODUCTION

THE enactment in 1990 of the Older Workers Benefit Protection Act ("OWBPA")[1] can be hailed as further proof of a national consensus against age discrimination. The Democratic congressional leadership reacted quickly to overturn the Supreme Court's 1989 holding in *Public Employees Retirement System of Ohio v. Betts*[2] that employee benefit plans that discriminate on the basis of age do not violate the Age Discrimination in Employment Act ("ADEA")[3] unless they are a subterfuge for other forms of discrimination proscribed by the ADEA. This reaction was even more immediate and direct than that provoked by a series of race and sex discrimination

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1 Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. § 621 (1988 & Supp. III 1991)).

2 492 U.S. 158 (1989).

3 29 U.S.C. § 621.

cases decided by the Supreme Court in the same term.[4] Evincing a strong consensus, the OWBPA was passed almost unanimously by Congress and then accepted by the President a year before the enactment of legislation treating the race and sex discrimination cases.[5] Moreover, Title II of the OWBPA reflects further legislative and executive intent that the release or waiver of age discrimination claims under the ADEA be subject to special standards and scrutiny beyond those judicially developed for race and sex discrimination claims under Title VII.[6] Apparently, American political leaders have discerned and expressed a widely held belief that age discrimination in employment is not acceptable in our society.

This Article argues that the OWBPA nevertheless significantly compromises achievement of the antidiscrimination goals of the ADEA—promoting the "employment of older persons based on their ability rather than age," and prohibiting "arbitrary age discrimination in employment."[7] Both parts of the OWBPA, including Title I, which overrules *Betts* to provide only limited defenses to age discrimination in employee benefit plans, and Title II, governing waivers of ADEA rights, reflect a general acceptance of what this Article terms conditional age-based exit incentives. Employers offering such incentives provide a limited group of their employees, defined in part overtly or covertly by age, the opportunity to obtain some kind of valuable benefit if they resign their employment without forcing the employer to consider them for discharge. These exit incentives are conditional because they are not guaranteed for any employee who is discharged involuntarily and because they are offered only during a limited temporal window. Perhaps in part in response to the development of ADEA law, these exit incentives have proliferated during the last two decades.[8]

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[4] See Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Lorance v. AT&T Technologies, 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[5] See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (1988 & Supp. III 1991)).

[6] See 42 U.S.C. §§ 2000e to 2000e-17 (1988).

[7] 29 U.S.C. § 621(b).

[8] Exit incentive programs have been stimulated by the recessions of 1973-75 and 1983-85, as well as by major structural changes in the last two decades in the American economy brought about through mergers and retrenchments. See Elizabeth L. Meier, American Ass'n of

This Article explains how these incentives can be an effective means of thwarting achievement of the ADEA's goals. It will also argue that the OWBPA's general acceptance of these exit incentive windows is fundamentally inconsistent not only with the treatment that Title II of this Act grants to prospective waivers of ADEA-based rights, but also with the treatment given by the courts to the prospective waiver of Title VII-based rights. Finally, this Article will explain how Congress could meet the challenge posed for the ADEA by these exit incentive windows without completely denying employers the option to grant all the retirement benefits their employees deserve. The OWBPA's failure to meet this challenge constitutes a substantial qualification of the professed national commitment to the ADEA's antidiscrimination goals. Until now, the extent of this problem has not been fully appreciated by Congress, the courts,[9] or other commentators.[10]

Retired Persons, Early Retirement Incentive Programs—Trends and Implications 1 (1986) (unpublished manuscript, on file with the Virginia Law Review Association).

In a 1985 survey of 529 companies, Hewitt Associates found that 32% (or 169) had offered some form of voluntary separation plan. Of these plans, 72% (or 121) were "early retirement windows." Hewitt Assocs., Plan Design and Experience in Early Retirement Windows and in Other Voluntary Separation Plans 1 (1986). A General Accounting Office report found that 80% of the Fortune 100 companies had sponsored some form of an exit incentive program in the decade from 1979 to 1988. General Accounting Office, Age Discrimination: Use of Waivers by Large Companies Offering Exit Incentives to Employees 2 (1989). Another study conducted in 1985 found that larger companies are more likely to use age-based exit incentive programs; at the time of this study 41% of firms with more than one thousand employees had age-based exit incentive programs. See Meier, supra, at 4 (relying on an unpublished AARP study).

During the period of proliferation of these programs, Congress amended the ADEA to proscribe all forms of mandatory retirement and to raise the age cap on protected private sector employees from 65 to 70, while eliminating it completely for the public sector. See Pub. L. No. 95-256, 92 Stat. 189 (1978). It was amended again in 1986 to remove the age cap altogether. See Pub. L. No. 99-592, 100 Stat. 3342 (1986).

[9] See infra text accompanying notes 70-106.

[10] See, e.g., Neil H. Abramson, Early Retirement Incentives Under the ADEA, 11 Indus. Rel. L.J. 323 (1989) (describing and endorsing the dominant pre-*Betts* law); Andrea S. Christensen, Are Early Retirement Offers Coercive?, Proceedings of New York University 41st Annual National Conference on Labor, 13-1 (1988) (describing pre-*Betts* law); Charles B. Craver, The Application of the Age Discrimination in Employment Act to Persons over Seventy, 58 Geo. Wash. L. Rev. 52, 96-106 (1989) (describing pre-*Betts* law); Richard G. Kass, Early Retirement Incentives and the Age Discrimination in Employment Act, 4 Hofstra Lab. L.J. 63 (1986) (condemning all early retirement incentives, whether or not conditional); Judith A. McMorrow, Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act, 29 B.C. L. Rev. 347 (1988) (describing pre-*Betts* law).

The theses of this Article shall be developed in the following manner. Part I shall explain how conditional age-based exit incentive windows can be used by employers to achieve indirectly what the ADEA clearly prohibits when accomplished directly: the removal from employment of a group of employees chosen, at least in part, on the basis of their age. This Part further explains how this removal is accomplished by effectively inducing employees to waive prospectively their future ADEA protection. Part II analyzes the treatment of age-based conditional exit incentives by the courts before the passage of the OWBPA, stressing that the courts' acceptance of these incentives as simple noncoercive offers and their use of a vague standard of "voluntariness" to judge the enforceability of employee acceptance of the offers ignores the reality that has been highlighted in Part I. Part III then returns to the OWBPA. It outlines the Act's treatment of exit incentives in general and draws conclusions about the meaning of this treatment for conditional age-based exit incentive programs in particular. These conclusions include the strong inference that Congress did not intend to authorize much stronger judicial regulation of these incentives than that given before the *Betts* decision. Last, Part IV presents a theory of how Congress best could regulate exit incentive windows to serve the antidiscrimination goals of the ADEA without denying employers the discretion to grant the retirement benefits that they deem their employees to deserve.

I. The Effect of Conditional Age-Based Exit Incentive Windows: The Case for Regulation

A. Conditional Age-Based Exit Incentives and the ADEA

Any pension plan that provides retirement benefits solely to employees who have attained some minimum age encourages only older workers to exit from employment and thus is in some tension with the ADEA's goal "to promote employment of older persons based on their ability rather than age."[11] An employer that wants to limit the number of employees above a certain age in its workforce can be confident of doing so without discharging any older worker by offering sufficiently attractive retirement benefits to any worker above that age to induce most, or at least many of them, to choose retirement over work.

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[11] 29 U.S.C. § 621(b).

Yet the antidiscrimination commands and purposes of the ADEA need not and should not be read to condemn all retirement pensions.[12] It is certainly clear that Congress never intended such a broad reading. The legislative history of the development of the ADEA indicates that Congress has been concerned about encouraging the employment of older Americans who prefer a continuation of their employment to the retirement options available to them. Congress has been concerned about the inability of older workers who are displaced from jobs in which they are productive to find alternative employment that utilizes their skills.[13] Congress has also asserted the goal of avoiding public support of older workers who could effectively support themselves if judged fairly as individuals rather than on the basis of their age.[14] Yet this goal has never moved Congress to attempt to restrict retirement opportunities that older workers prefer to continued work. This is confirmed by Congress's continued support of the public social security system, which, like any private pension plan, encourages at least some older workers to retire.[15]

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[12] Sections 4(a)(1) and (2) of the ADEA provide:

> It shall be unlawful for an employer—
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> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

29 U.S.C. § 623(a).

[13] See, e.g., The Older American Worker: Age Discrimination in Employment, Report of the Seeretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (June 1965), *reprinted in* EEOC, Legislative History of the Age Discrimination in Employment Act 5 (1981) [hereinafter Wirtz Report] (report of then Secretary of Labor Wirtz, which led to the original passage of the ADEA, noting that age discrimination wastes a "wealth of human resources"); id. at 18-19 (asserting that unemployment rates rise with age); see also S. Rep. No. 723, 90th Cong., 1st Sess. 4 (1967) (setting forth views of leading ADEA sponsor, Senator Javits); 113 Cong. Rec. 34,742 (1967) (statement of Rep. Matsunaga).

[14] See, e.g., Select Comm. on Aging, 95th Cong., 1st Sess., Mandatory Retirement: The Social and Human Cost of Enforced Idleness 23 (1977) (expressing concern that society will not be able to support its retired members if the trend toward early retirement continues); 113 Cong. Rec. 34,744 (1967) (remarks of Rep. Hawkins); id. at 34,745 (1967) (remarks of Rep. Eilberg).

[15] Recent amendments to the social security law, however, have been framed to encourage longer employment. See John A. Svahn & Mary Ross, Social Security Amendments of 1983: Legislative History and Summary of Provisions, 46 Soc. Security Bull. 3, 7-48 (1983). The 1983 amendments provide that, beginning in 2003, the normal retirement age at which full benefits can be obtained will climb one month per year until it reaches age 67 in 2027. Furthermore, the benefit reduction that retirees must accept for taking the social security

Nor were the ADEA's antidiscrimination goals broadened to include the elimination of all retirement incentives by the clarification in 1978 that the ADEA proscribes age-based terminations pursuant to a retirement plan, regardless of how generous its terms.[16] Congress had a narrower purpose in overturning the Supreme Court's judgment in *United Air Lines v. McMann*[17] that the ADEA did not prohibit age-based mandatory retirement. This purpose was to prevent employers from leading employees into a retirement that they did not prefer to continued employment, not to prevent employees from choosing any attractive retirement made available to them.[18]

Congress also did not transform its general antidiscrimination goals by the final removal in 1986 of the age cap on private sector workers protected by the ADEA.[19] The elimination of the age cap means that employers cannot use retirement or direct discharges to rid themselves of productive workers over forty, no matter how far beyond forty they may be. It does not mean that employers cannot in any way make retirement more attractive to workers who have attained some high minimum age.

In contrast to the typical age-based pension plan, however, the use of conditional age-based exit incentive programs does not simply enable employers to encourage older employees to leave their jobs by making the alternative of retirement more attractive than continued

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system's early retirement option at age 62 will be increased from 20% to 30% by 2027. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983).

Inasmuch as the tendency of Americans to retire earlier seems as much influenced by increases in the subsidization of early retirement through defined benefit plans as by the social security system, it is not clear that Congress can encourage later retirement without greater regulation of private pension plans. See Richard A. Ippolito, Toward Explaining Earlier Retirement After 1970, 43 Indus. & Lab. Rel. Rev. 556 (1990); William J. Wiatrowski, Supplementing Retirement Until Social Security Begins, Monthly Lab. Rev., Feb. 1990, at 25, 26. This may explain in part the 1986 congressional passage of a requirement that all pension plans continue contributions and accruals without regard to an employee's age. See Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986). Plans can, however, continue to cap defined benefit levels and "the number of years . . . which are taken into account for purposes of determining benefit accrual." 29 U.S.C. § 623(i)(2).

[16] See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978).

[17] 434 U.S. 192 (1977).

[18] See H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528; S. Rep. No. 493, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 504.

[19] See Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986).

employment. Rather, employers can use these conditional incentive windows to induce older workers to leave jobs they would prefer to the retirement promised by the incentive benefits. Thus, conditional age-based exit incentives can be used to achieve precisely what the ADEA seeks to eradicate: the age-based elimination of productive older workers who would prefer continued employment to retirement.

B. Coercion and the Operation of Conditional Age-Based Exit Incentives

Conditional age-based exit incentives can be surprisingly effective in coercing older workers who may prefer to continue to work into accepting early retirement. However, the use and effects of these incentives are considerably more subtle than outright threats of discriminatory discharges based on age.

1. The Use of Conditional Exit Incentives to Induce Retirement

To understand how conditional exit incentive offers can be used to induce retirement from employees who would prefer continued employment, consider how a typical offer of this type would be weighed by an offeree. Assume that an employer announces to its workforce that because of general recessionary conditions or deep cuts in the demand for its particular product, employment will have to be cut by thirty percent over the next four months. The employer also announces at the same time that in order to avoid as many involuntary layoffs as possible, it will offer retirement incentives to all employees over the age of fifty-five. These incentives might include some significant lump sum payment; they might include continued health insurance coverage during at least some years of retirement; or they might consist of the allowance of earlier or greater pension benefits, perhaps by crediting all those who accept the offer with additional years of service or additional years of age to make them eligible for increased retirement benefits under the employer's defined benefit pension plan.[20] The offer is conditional, however, because the benefits

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[20] These examples represent the typical structure of early retirement incentives. The Hewitt Associates study, for instance, found that 64% of exit incentive programs augmented the pension benefit (sometimes by eliminating the normal early retirement reduction), 23% liberalized the requirements for pension elgibility, 51% provided for some cash payment, and 16% gave enhanced medical insurance coverage. See Hewitt Associates, supra note 8, at 9. Bridge subsidies that would continue until social security eligibility have also been common.

will only be granted to those who voluntarily retire within the next two months.[21] Those offerees who are involuntarily laid off, or those offerees who decide to retire after the expiration of the two month period, will not obtain the benefits. Finally, assume that the employer does not specify how it will determine who will be laid off to achieve the necessary residual amount of reductions in staff after the closure of the voluntary retirement window.

A post-fifty-five-year-old offeree in this typical exit window scenario might well rationally accept early retirement even though she prefers continuing employment. The reason is that the offeree must include in her calculations the chance that she will be terminated without the extra benefits offered for voluntary retirement. Thus, an offeree who prefers employment to retirement with increased benefits might prefer the latter to the perceived chance of continued employment plus the perceived chance of termination without enhanced benefits.[22] Clearly it is the conditional nature of the retirement incentive that makes the two preferences consistent, that, in other words, makes it rational for an offeree to accept the incentive even though she prefers continued employment.[23]

This is highly significant for an employer wanting to rid itself of more older workers than could be justified by individualized comparisons of the productivity of all its workers. For instance, assume an employer wanted to cut a section of its workforce in half and that one

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For a description of particular plans from major employers such as Exxon and Dupont, see Meier, supra note 8, at 3-6.

Employers are somewhat restricted by the Employee Retirement Income Security Act ("ERISA") in structuring the form of their offered benefits. Because any plan designed to provide retirement benefits is a pension plan under ERISA, employers must meet this Act's requirements, including those prohibiting discrimination in favor of highly compensated employees. See Larry I. Stein, Through the Looking Glass: An Analysis of Window Plans, 42 Lab. L.J. 665, 670-73 (1991).

[21] Open windows for a majority of conditional exit incentive plans last for one to three months. See Bureau of Nat'l Aff., Older Americans in the Workforce: Challenges & Solutions 65 (1987).

[22] Expressed algebraically, where preferences for employment = E, preferences for retirement = R, preferences for retirement with increased benefits = RIB, perceived chance of continued employment = C, and perceived chance of termination without enhanced benefits = (1.00-C) E > RIB, but RIB > C(E) + (1.00-C)R.

[23] If the incentive offers were not conditional, or if any forced retirement would also come with incentives, the two preferences would be contradictory. See supra note 22. If R = RIB, then R > C(E) + (1.00 - C)R and R > C(E) + R - C(R) and 0 > C(E) - C(R) and R > E. But E > RIB and if R = RIB, then E > R.

half of the employees in this section were over fifty. Assume further that the employer could eliminate half of these post-fifty-year-old employees on the basis of individualized analyses of relative productivity. Also, assume that by offering a conditional incentive, the employer could convince three-fourths of the post-fifty-year-olds to accept retirement, even though many of these employees would prefer continuing to work. Even if none of the other one-fourth that declined retirement were vulnerable to discharge, the employer increased by 50% (from 50% to 75%) the proportion of its older workforce that it could displace. If the one fourth of the older workers that declined the retirement incentive were as likely to be vulnerable to termination based on their relative productivity as the three-fourths that accepted the offer, the employer could increase from 50% to 80% (a 60% increase) the proportion of terminations in its workforce reduction drawn from its older workers.[24]

An employer is thus able to use an age-based retirement plan to eliminate significantly more older workers than it could terminate by individualized consideration of their productivity, despite the fact that many of these older workers prefer continued employment.[25] It is the

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[24] The retirement of 75% of the older workers enabled the employer to achieve the retirement of 37.5% of the targeted workforce. The displacement of 12.5% more of the original workforce would be necessary for the employer to achieve its 50% goal. If older workers were as likely to be displaced as younger workers at this point, one fifth of the residual 12.5%, or 2.5%, would come from older workers. This would mean that 80% of the younger workers would not be displaced and only 20% would be, while 80% of the older workers would be displaced and only 20% would not be.

[25] The assumptions made in this hypothetical are not unrealistic. The Hewitt Associates study of exit incentive programs found that almost one fourth of the programs studied had acceptance rates of over 75%. See Hewitt Assocs., supra note 8, at 8. Another study found that the work performance of employees who accepted exit incentive offers was similar to that of employees who declined such offers. See Larry Reibstein, AT&T Study Shows Early Retirees Share a Range of Character Traits, Wall St. J., Sept. 4, 1987, at 17.

Furthermore, recent surveys of retired workers demonstrate that a substantial number are willing and able to continue to work, including many who retired because of special benefit incentives. See Employment Benefit Research Inst., Issue Brief: Economic Incentives for Retirement in the Public and Private Sectors 5 (1986) (discussing 1981 survey by Louis Harris and Associates); William McNaught, Michael C. Barth & Peter H. Henderson, The Human Resource Potential of Americans Over 50, 28 Hum. Resources Mgmt. 455, 464-65 (1989) (analyzing 1989 survey of retired workers by Louis Harris and Associates). Moreover, the threat of layoff after declining a retirement incentive offer has proven to be a very real one. Employers such as Combustion Engineering and Exxon have fired hundreds of employees after exit incentive programs failed to reach their targets. See Bruce Nussbaum, Kathleen Failla, Christopher S. Eklund, Alex Beam, James R. Norman & Kathleen Deveny, The End of Corporate Loyalty?, Bus. Wk., Aug. 4, 1986, at 42-49.

critical interaction between the offer of additional benefits and the threat of termination without these benefits that enables conditional age-based exit incentives to eliminate older workers who could not be induced to exit by either the offer of retirement incentives in traditional pension plans or the threat of forced terminations.[26]

2. *The Philosophy of Coercion and Conditional Offers*

None of this should be surprising. Anyone offered an exchange that he or she would prefer not to make may nonetheless accept the offer if he or she perceives that the offeror probably has both the power and will to obtain what he wants without giving anything in return.[27] My willingness to sell my box lunch to a stranger on a lonely mountain trail would be influenced by the stranger's size and demeanor, as well as by my state of hunger and the offered purchase price. The offer of some more than nominal price is important to my calculations. I might sell the lunch at a reasonable price to a burly, aggressive stranger without him directly threatening me, but I would not give him the lunch without him at least beginning to exert physical force.

A philosopher might argne that the last example is misleading because the hypothetical sale of my box lunch is coerced, whereas acceptance of a conditional exit incentive is not. The argument would

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[26] It is clear that by magnifying the threat of increased layoffs an employer can boost the number of acceptances of conditional exit incentives from employees who would prefer continued work. Consider again the formula RIB > C(E) + (1.00 - C)R. See supra note 22. This formula can be transformed into RIB > C(E) + R - C(R), then RIB - R > C(E - R), then RIB - R/ E - R > C. The lower the value of C, the more relative values of RIB and E, for cases where employees prefer continued employment to enhanced retirement (E > RIB), will satisfy this equation. The perceived chance of continued employment for those who decline exit incentives (C) is in the control of any employer.

The value of RIB can also be controlled by employers. By increasing the value of the exit incentives to a level that is still below the value of continued work for many employees, the employer can reduce the threat necessary to achieve the retirement of many who would continue to work. Through their control of these two variables, employers can balance several different objectives: maximizing the retirement of those they could not legally discharge, minimizing their outlay of funds, and insuring their threat of discharge is not so blatant as to be illegal. See infra text accompanying notes 80-83.

[27] A similar dynamic may cause corporate shareholders to tender their shares in response to a takeover raider's tender offer even though they would prefer that the takeover failed. The corporate shareholder may tender in such a situation because she fears that if the takeover succeeds without her tendering, her shares may be worth much less than the tender offeror's bid price. See Lucien A. Bebchuk, Toward Undistorted Choice and Equal Treatment in Corporate Takeovers, 98 Harv. L. Rev. 1693, 1717-35 (1985).

be that the stranger on the mountain could purchase my lunch only by the threat of an action that he was not legally entitled to take—forceful conversion. By contrast, the employer in my typical scenario obtains acceptance of its exit incentive offer from employees who wonld prefer continued employment ouly by threatening to take action that it is legally entitled to take—the discharge of relatively unproductive employees during a period of retrenchment. Indeed, the philosopher might argue that it is inappropriate to even denominate as a threat the employer's description of the action the employer will take after closure of the exit window.[28] The philosopher might further wonder whether the law should be concerned about individuals acccpting exchanges not merely because of promised benefits, but also partially because of the potential for adverse, but legal, consequences if the exchanges are rejected.[29]

It may be inadequate to answer the philosopher by arguing that descriptions of adverse consequences to which an offeree will be subject if he rejects an offer should be considered coercive threats whenever those consequences are not what the offeree would have expected

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[28] See Robert Nozick, Coercion, *in* Philosophy, Science, and Method 440 (Sidney Morgenbesser, Patrick Suppes & Morton White eds., 1969). This book has generated a rich philosophical debate about the distinction between threats and offers. See, e.g., Joel Feinberg, Harm to Self (1986); Alan Wertheimer, Coercion (1987); Harry G. Frankfurt, Coercion and Moral Responsibility, *in* Essays on Freedom of Action 75 (Ted Honderich ed., 1973); Daniel Lyons, Welcome Threats and Coercive Offers, 50 Phil. 425 (1975); Peter Westen, "Freedom" and "Coercion"—Virtue Words and Vice Words, 1985 Duke L.J. 541 (1985); David Zimmerman, Coercive Wage Offers, 10 Phil. & Pub. Aff. 121 (1981); see also Kenneth W. Simons, Offers, Threats, and Unconstitutional Conditions, 26 San Diego L. Rev. 289 (1989) (applying the theory of Nozick and his followers to the issue of acceptability of conditions on constitutional rights).

The dominant view seems to be that whether a proposal should be treated as a coercive threat rather than an offer should be determined by asking whether the proposal "threatens" to make the recipient worse off relative to some appropriate baseline, or rather "offers" to make the recipient better off relative to the baseline. Although differing in some important ways, most accounts, including that of Nozick, suggest at least two alternative baselines, one descriptive and one prescriptive: a coercive threat can be identified if the proposer wishes to place the reeipient in a position that is worse either than that in which he would expect to be in the normal course of affairs, or than that in which he morally ought to be placed by the proposer. See, e.g., Frankfurt, supra, at 69-71; Lyons, supra, at 436; Westen, supra, at 573-87.

[29] Some writers have argued that offers can be coercive in particular circumstances, such as when they conditionally offer something that the recipient does not want, but that is an improvement on a very great evil that the recipient must avoid. See Feinberg, supra note 28, at 229-42; see also Zimmerman, supra note 28 (arguing generally that an offer is only coercive if the proposer has itself prevented a preferred, preproposal situation from existing).

based on past experience.[30] The typical exit incentive offer described above tells offerees they will be in a worse position if they reject the offer than they were in before the offer was made; they will be more vulnerable to discharge. Yet this adverse effect would develop in the hypothetical even if the employer had not made the offer. The increased chance of discharge is not imposed to deter rejections of the offer. Rather, the offers give older employees the opportunity to make a bad situation, the increased chance of termination, somewhat better—if the offerees in fact view retirement with enhanced benefits as better than employment with the increased odds of termination.[31]

The philosopher can nevertheless be answered in two ways. First, offerees of age-based conditional exit incentives probably perceive these offers to carry a promise of increased vulnerability not only to discharges that are legal, but also to discharges that are not.[32] The threat of illegality indeed derives, at least in part, from the existence of prohibitions on age discrimination. It would certainly be rational for employees who are offered an expensive bribe for their jobs to think that the employer would prefer that they not continue to work. Employee-offerees who know that all employees past a certain age have been offered that bribe might also surmise that their employer wants to rid itself of older employees without individualized consideration of their relative productivity. Finally, these offerees might rationally conclude that an employer with such a desire might carry out promised discharges with some attention to age. Employees who accept conditional exit incentive offers thus could be induced by

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[30] Robert Nozick defines a proposal as coercive if it would make the recipient worse off than would the "normal . . . course of events." See Nozick, supra note 28, at 447. Several writers have interpreted Nozick to mean the normal course of events that regularly occurred in the period preceding the proposal. See Frankfurt, supra note 28, at 68-69; Westen, supra note 28, at 579 n. 119; see also Feinberg, supra note 28, at 219-20 (interpreting Nozick to mean the "statistically" normal set of circumstances that would have obtained absent the situation generating the proposal).

[31] Nozick stresses that a rational man would prefer to be given an offer but would not prefer to be given a threat. See Nozick, supra note 28, at 461-62.

[32] For Nozick and his commentators, the exit incentive proposal would be viewed as a threat if the situation after the proposal is rejected falls below a normative baseline that is defined by the morality of the society in which it is made. See supra note 28. Legality is at least one aspect of any moral baseline used to define threats and coercion. Many people would define many proposals to take certain actions well within the legal "right" of the proposer as immoral and thus a coercive threat. See, e.g., Mark Kelman, Choice and Utility, 1979 Wis. L. Rev. 769, 793. Few, however, would accept a conditional proposal to take illegal action as noncoercive.

implied threats of illegal discharges, just as I could be induced to sell my lunch on the mountain by an implied threat of forceful theft.[33] The protection of legal rights is expensive and uncertain. Just as I may not be able to prove my lunch was stolen, an employee may not be able to prove his job was taken because of his age. The employer's retirement incentive, like the mountain stranger's offered price for my lunch, may seem more valuable than a highly contingent legal right of action.[34]

C. Conflict with the Principles of the ADEA

Second and more important, even if age-based conditional exit incentives are not viewed as coercive, they still undermine fulfillment of the antidiscrimination purposes of the ADEA. Acceptances of conditional age-based exit incentives enable employers to achieve something condemned by the antidiscrimination provisions of the ADEA—the elimination of employees because of age from jobs they wish to continue to hold.

1. Age Discrimination

The condemnation by the ADEA's antidiscrimination principles of even noncoerced acceptances of conditional age-based exit incentives should be especially clear to the extent that such offers are driven by age-based categorizations or stereotypes. We often regulate exchanges that are driven by preferences that our society wishes to condemn,[35] and the ADEA certainly reflects our society's collective

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[33] The offeree of an unconditional retirement plan of course may also feel threatened by the announcement of imminent layoffs. If the plan offers benefits to those involuntarily terminated as well as to those who retire before termination, however, there is no reason for the threat to induce the retirement of those who prefer continued work.

[34] This point is not diluted by the fact that the ADEA no doubt sometimes produces false positives: erroneous findings of discrimination for discharges in fact not based on age. Even if understood by an employee-offeree who fears future age discrimination, this fact would not give the employee courage to resist a threatening exit incentive offer. The possibility that nonmeritorious claims can be successful does not compensate for the risk that meritorious claims may not be. Furthermore, an employer should be even more attracted to the use of conditional age-based exit incentive offers by the possibility that they may reduce the incidence of nonmeritorious as well as meritorious lawsuits.

[35] Cf. Cass R. Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev. 1129, 1152-53 (1986) (arguing that a democratic majority may decide that certain preferences, such as those for discrimination, "should not be gratified—not only because of harm to others or to the actor involved, but also because those preferences are . . . not . . . defensible on grounds other than self-interest").

judgment that we should not honor preferences driven by age-based stereotypes for the retirement of older workers.

2. *Alternative Justifications for Conditional Age-Based Exit Incentives*

It might, however, be argued that employers offer conditional exit incentives only to older employees for reasons other than a desire to eliminate older employees from their workforce without being subject to ADEA claims. The employer offering the typical conditional exit incentive described above, for instance, conceivably could have been indifferent to whether the offer resulted in more older workers leaving its workforce than would have been laid off under the age-neutral standards that the employer intended to apply to meet its reduction in force goals. The employer might have offered the extra benefits only to older employees because it determined that only older employees deserved and needed the extra benefits, and that simply discharging productive older employees would threaten to impair the morale of the remaining workforce. The employer might think that only older workers, because of their age and the consequent greater difficulty in obtaining alternative employment, have a special claim on the company to soften their termination.[36] The employer might further explain the limited window period for the additional benefits by stressing that it is only the major cutbacks in jobs demanded at the particular time of the offer that requires it to displace generally productive workers and that makes incumbent employee morale especially sensitive.

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[36] An employer's desire to give preferences to older workers should not pose a problem for the ADEA's antidiscrimination principles. The ADEA was framed to avert discrimination against workers because they are too old, not because they are too young. Indeed, the Act by its terms only protects workers who are older than 40, and there are no ADEA decisions finding preferences for older workers illegal. See 29 U.S.C. § 631(a). Unlike Title VII, the ADEA's antidiscrimination commands should be read to run in only one direction. Compare McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (interpreting Title VII to protect white employees from discrimination) with Rock v. Massachusetts Comm'n Against Discrimination, 424 N.E.2d 244, 246 (Mass. 1981) (construing Massachusetts statute similar to the ADEA). But see Hays v. Republic Steel Corp., 12 Fair Empl. Prac. Cas. (BNA) 1640, 1647 (N.D. Ala. 1974) (holding that the ADEA can be violated if one person within the protected age group is given preference over another person within the protected age group), aff'd in part and rev'd in part, 531 F.2d 1307 (5th Cir. 1976); 29 C.F.R. § 1625.2(a) (1991) (providing that preferential treatment by an employer because of age as between employees over 40 is unlawful).

To be sure, this explanation of why the exit incentive offer is age-based does not explain why it also must be conditional. An employer that was concerned about the future prospects of older employees after a reduction in force or about the impact of older employee layoffs on incumbent employee morale should be willing to offer extra retirement benefits to older employees who are involuntarily laid off, as well as to those who retire.

There might also be a benign reason for this aspect of a window plan, however. The benign explanation could not simply be that the employer is unwilling to give extra benefits to a discharged older worker who might force it to defend against an age discrimination suit, even one that is not meritorious. An employer that wanted to insure that a discharged older worker would not cost both extra retirement benefits and the amount necessary to defeat an invalid age discrimination claim could make the grant of the retirement benefits to a discharged employee dependent on the employee's willingness to waive any ADEA claim against her completed termination. However, an employer could argue that even a discharged employee who is willing to waive her ADEA claims has forced the employer to spend funds that would have been saved had she voluntarily resigned: those funds needed for evaluation of her individual worth to the company. The employer thus might defend the conditional nature of the exit incentive by claiming that although it wants to give more to older employees, it does not want to expend on any worker the costs of both extra benefits and an individual evaluation.

Even if plausible for some conditional age-based exit incentives, these explanations, however, are not adequate to reconcile these incentives with the ADEA's antidiscrimination commands and goals. Employment discrimination law generally does not excuse disparate treatment of a status group simply because the disparate treatment may have a benign motivation.[37] Disparate treatment, at least when

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[37] See UAW v. Johnson Controls, 111 S. Ct. 1196, 1203-04 (1991) (proscribing benignly motivated sex-based fetal protection policies and stating that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"). Consider also the Supreme Court's prohibition of sex-based pension plans. See Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

The primary exception to the general rule against discrimination both in the ADEA and in Title VII is the bona fide occupational qualification ("BFOQ"). Congress, however, intended this exception to be interpreted narrowly not to allow even cost-based defenses to disparate

there are attendant disfavored effects, is proscribed regardless of the state-of-mind of the employer.[38] Age-based exit incentive offers constitute disparate treatment of older workers and the effect of these offers (the displacement of older workers who prefer continuing to work) is contrary to the goals of the ADEA. It is therefore not clear why such offers should be legally acceptable simply because they may have benign motivations.[39]

Furthermore, even if some conditional age-based exit incentive windows might have benign motivations, it seems likely that most are at least in part driven by a desire to move older employees out of the workforce without the threat of age discrimination challenges. It may be revealing that conditional age-based exit incentives became popular only in the wake of the ADEA's prohibition of age discrimination, and especially after congressional clarification that forced retirement is illegally discriminatory.[40] The passage and elaboration of the ADEA would not have influenced employers who only want to give

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treatment in employment. *Johnson Controls*, 111 S. Ct. at 1209. The *Johnson Controls* Court held that the Title VII BFOQ defense should be applied "as narrowly" as the BFOQ provision in the ADEA was applied in Western Airlines v. Criswell, 472 U.S. 400 (1985). *Johnson Controls*, 111 S. Ct. at 1204. An employer claiming a BFOQ must be able to establish that it " 'had reasonable cause to believe . . . that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved,' " or the "employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." *Criswell*, 472 U.S. at 414 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 & n. 5 (5th Cir. 1969)). This defense therefore would only help to insulate from challenge an age-based exit incentive program where the employer could establish either that all or substantially all the older offerees could no longer perform their job, or that it was highly impractical to determine which of the offerees were exceptions to such a generalization.

[38] The approval of certain voluntary affirmative action plans by the Court does not challenge the proposition that benign motivation cannot excuse disparate treatment. See Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); United Steelworkers v. Weber, 443 U.S. 192 (1979). These decisions can be explained by the Court's determination that the effects of affirmative action plans can serve, rather than undermine, the ultimate goals of Title VII.

[39] Also, judicial and legislative rejection of prospective waivers of rights to be free from status discrimination is not limited to waivers obtained by employers who intend to discriminate. See infra text accompanying notes 62-64. The use of prospective waivers is also proscribed for those who just wish to divert to more constructive purposes funds that might be expended on the defense of invalid charges of discrimination.

[40] See supra note 8; cf. Olivia S. Mitchell & Rebecca A. Luzadis, Changes in Pension Incentives Through Time, 42 Indus. & Lab. Rel. Rev. 100 (1988) (finding an empirical shift in pension plans toward rewarding early, rather than delayed, retirement, perhaps in response to developments in the ADEA).

some older employees the opportunity for increased severance benefits.

3. "Rational" Age Discrimination: Economic Justifications

Moreover, further analysis suggests that employers have strong reasons for wanting to displace older workers, especially during periods of substantial force reductions. Admittedly, most managerial decisionmakers are not likely to have the kind of animus toward older workers that has fueled racism and sexism at all levels of our society.[41] Managers are likely, however, to be influenced by the stereotypes regarding the capabilities of older workers that were the primary concern of the Congress that enacted the ADEA.[42] Many of these stereotypes are more powerful because they may contain an element of truth: for many jobs, at least at some age, average productivity starts to decline.[43]

In some situations it therefore may be economically rational for an employer to use age as a proxy for productivity, rather than to incur the costs of individual evaluations, including those costs engendered by employee anxieties. It may also be economically rational for an employer to want a reduction in force to remove productive older

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[41] Nevertheless, some age-based discrimination by younger management may be the unconscious product of unresolved child-parent conflicts, rather than a failure to empathize with older workers. See Martin L. Levine, Age Discrimination and the Mandatory Retirement Controversy 133-45 (1988).

[42] See Wirtz Report, supra note 13. It is interesting that 20% of the employers in the Hewitt Associates study stated that one of the reasons for offering their plans was to give "career opportunities" to "younger employees." See Hewitt Assocs., supra note 8, at 5.

Historians have correlated the spread of age-based thinking in the last century with the rationalization of modern society and the need for new organizing principles for social control as traditional family and community structures have eroded. See, e.g., Howard P. Chudacoff, How Old Are You? Age Consciousness in American Culture 184-85 (1989); Levine, supra note 41, at 75-94.

[43] For some jobs, however, even generalizations about age-related productivity decline may be inaccurate. For instance, some recent studies suggest that discriminating in *favor* of older workers in some jobs may be efficient because of lower turuover, absenteeism, and pilferage. See ICF Inc., Study for The Commonwealth Fund's Americans Over 55 At Work Program 6 (1991); see also Levine, supra note 41, at 108 (summarizing research and concluding that it has "failed to show a great overall decline in job performance at about typieal retirement age"); Note, The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act, 88 Yale L.J. 565, 576 (1979) (citing studies showing "an absence of meaningful connection between advancing age and declining levels of job performancc" in most industries); Daniel Goleman, The Aging Mind Proves Capable of Lifelong Growth, N.Y. Times, Feb. 21, 1984, at C1.

workers rather than equally productive younger workers, because both the projected future average productivity and the projected future average job tenure of the younger workers may be higher. Job tenure may be especially important if training and other turnover costs are significant. An employer may be particularly concerned that a reduction in force by reverse seniority that results in the displacement of only younger workers could generate especially high turnover costs when the remaining older workers later retire during the same period.

Some might argue that our society should not condemn such economically rational "statistical" discrimination against older workers.[44] Permitting employers to justify age-based generalizations because they are economically rational would seriously compromise the ADEA's promise of individualized consideration regardless of age, however. Therefore, it is not surprising that the ADEA, like Title VII, has been read to condemn all decisionmaking that is unnecessarily based on stereotypes or generalizations, whether or not economically rational.[45] It is inconsistent to condone incentives that induce unwanted retirement even if they have such a rational basis.

An economically rational employer may also want to get rid of older workers whose productivity is equal to that of younger workers because the average pay of the older workers is higher. Older employees may have generally higher wages relative to marginal productivity because there is an implied "life-cycle" agreement to pay wages above marginal productivity, as well as above the opportunity wage in the external labor market, at the end of a long tenure to compensate for

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[44] See Kenneth J. Arrow, Models of Job Discrimination, Some Mathematical Models of Race in the Labor Market, *in* Racial Discrimination in Economic Life 83, 187 (Anthony H. Pascal ed., 1973); Edmund S. Phelps, The Statistical Theory of Racism and Sexism, 62 Am. Econ. Rev. 659 (1972). For an application of statistical arguments to age discrimination, see Robert Hutchens, Delayed Payment Contracts and a Firm's Propensity to Hire Older Workers, 4 J. Lab. Econ. 439 (1986).

[45] See, e.g., EEOC v. County of Los Angeles, 706 F.2d 1039, 1042 (9th Cir. 1983); Smallwood v. United Air Lines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982); Hahn v. City of Buffalo, 596 F. Supp. 939, 953 (W.D.N.Y.), aff'd, 770 F.2d 12 (2d Cir. 1985) (all holding that economic justifications for age discrimination are not acceptable under ADEA); see also supra note 37 (discussing BFOQ defense). But cf. Laugesen v. Anaconda Co., 510 F.2d 307, 312 n.4 (6th Cir. 1975) (noting that a committee report on the ADEA suggests that the Act should not be read to " 'prevent an employer from achieving a reasonable age balance in his employment structure' ") (quoting H.R. Rep. No. 805, 90th Cong., 1st Sess. 7 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219), cert. denied, 422 U.S. 1045 (1975).

wages below marginal productivity paid in the earlier stages of employment.[46] Such long-term implied contracts may be attractive to employers because they discourage "worker shirking and malfeasance," and because they induce commitments to the firm that reduce personnel turnover costs and encourage interemployee cooperation and training.[47] They may be attractive to employees who appreciate being able to rely on a rising wage curve as they age and who may share in the returns from their workforce's greater efficiency. Such long-term commitments traditionally have not been enforceable in court, but worries about reputational costs and incumbent employee morale normally deter employers from opportunistic breaches.[48] Such concerns may not be sufficient deterrence, however, during reductions in force when employers need to be less sensitive to their external reputations and when incumbent employees are focused on job preservation rather than promises of wage enhancement. During such periods employers may want to take the opportunity to eliminate higher paid older workers.[49]

Doing so by laying off older workers without individualized consideration of their productivity relative to their wage, however, clearly

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[46] There is now an extensive theoretical literature based on the assumed importance of implied delayed payment contracts. See, e.g., Robert M. Hutchens, A Test of Lazear's Theory of Delayed Payment Contracts, 5 J. Lab. Econ. S153 (1987); Edward P. Lazear, Agency, Earnings Profiles, Productivity, and Hours Restrictions, 71 Am. Econ. Rev. 606 (1981); James L. Medoff & Katharine G. Abraham, Are Those Paid More Really More Productive? The Case of Experience, 16 J. Hum. Resources 186 (1981); Michael L. Wachter & George M. Cohen, The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation, 136 U. Pa. L. Rev. 1349, 1360-64 (1988).

[47] See Robert M. Hutchens, Do Job Opportunities Decline with Age?, 42 Indus. & Lab. Rel. Rev. 89, 90 (1988).

[48] However, similar express commitments to unionized employees, as embodied in collective bargaining agreements through wage scales, competitive seniority provisions governing layoffs in reductions in force, and protections from discharge without just cause, have been enforceable. See generally Wachter & Cohen, supra note 46 (describing a variety of collective bargaining agreements enforced by the courts).

In addition, some recent state law protecting nonunion employees from bad faith discharge can be viewed as achieving the enforcement of implied long-term employment contracts. See, e.g., Mont. Code Ann. §§ 39-2-901 to 39-2-914 (1992); Foley v. Interactive Data Corp., 765 P.2d 373 (1988).

[49] Cf. Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 254 (1st Cir. 1986) (" '[T]he company took steps to ease people out on retirement, which to me involved age. We didn't want to spend the money to retrain them and go on.' ") (quoting testimony of management supervisor in ADEA litigation).

contravenes the antidiscrimination commands of the ADEA.[50] Whether or not it should be illegal for an employer to impact older workers disparately by discharging everyone in a particular job making more than some set figure, there is no authority to support the legality of discharging everyone beyond some maximum age because of the average wage of workers beyond that age.[51] Any calculated effort to use conditional exit incentives to achieve the same result should also be unacceptable under the ADEA.

4. Worker Preferences for Conditional Age-Based Exit Incentives

It is true that some acceptances of conditional age-based exit incentives reflect uncoerced preferences for retirement plus extra benefits over continued employment. Moreover, many employees who receive special retirement benefits through exit incentive programs would have been laid off without any extra benefits had their employer not been able to offer any such program. Nevertheless, neither the ex ante

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[50] EEOC Guidelines provide that a "differentiation based on the average cost of employing older employees as a group is unlawful." 29 C.F.R. § 1625.7(f) (1992).

[51] Some lower courts have interpreted the ADEA to prohibit the disparate impact resulting from the refusal of continued employment to those who are paid more because of longer service. See, e.g., Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); see also Note, supra note 43 (discussing disparate impact analysis in this situation).

These decisions, which do not permit a cost reduction defense, seem to expand disparate impact theory to condemn generalizations based on status closely associated with age, such as seniority, when individual consideration would be feasible. See Alfred W. Blumrosen, Interpreting the ADEA: Intent of Impact, *in* Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 68, 106-07, 111-15 (Monte B. Lake ed., 1982); Steven J. Kaminshine, The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 Fla. L. Rev. 229 (1990); Mark A. Player, Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?, 14 U. Tol. L. Rev. 1261 (1983).

A Seventh Circuit decision seems to take the further step of condemning the discharge of an older worker after individualized consideration of whether his present contributions to the firm justifies his high salary. See Metz v. Transit Mix, 828 F.2d 1202 (7th Cir. 1987). In Hazen Paper Co. v. Biggins, 61 U.S.L.W. 4323 (Apr. 20, 1993), however, the Supreme Court rejected the *Metz* decision by holding that an employer's discharge of an employee because of a factor that is highly correlated with age, such as seniority, does not constitute actionable disparate treatment under the ADEA. Furthermore, the *Hazen* majority expressly reserved judgment on whether the ADEA encompasses any disparate impact claims. Justice Kennedy, in a dissenting opinion, noted that "there are substantial arguments that it is improper to carry over disparate impact from Title VII to the ADEA." Id. at 4325, 4327 (Kennedy, J., dissenting); see also Geller v. Markham, 451 U.S. 945, 948 (1981) (Rehnquist, J., dissenting from denial of certiorari) (stating that "[t]his Court has never held that proof of discriminatory impact can establish a violation of the ADEA").

preferences of those who accept exit incentives nor the ex post benefits of some such offers should justify the discriminatory effects of the offers on those who are induced to accept them in part because of a threat of a layoff that could never have been legally implemented. In the first place, in no other context has antidiscrimination law accepted the disadvantaging of some protected status group members by overt disparate treatment simply because that disparate treatment results in the advantaging of others.[52]

Second, the rejection of mandatory retirement seems to have been based in part on the general principle that the interests of some workers cannot justify discrimination against others.[53] Congress might have continued to permit mandatory retirement of employees older than some maximum age. Congress might have determined that permitting mandatory retirement plans would encourage employers to pay wages above marginal productivity for a limited period of time at the end of a long-term employment relationship by allowing them to avoid unbounded periods of wage payments in excess of productivity.[54] It might also have determined that a mandatory retirement

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[52] Consider, for instance, some hard Title VII cases. In Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), the Supreme Court held that employers are prohibited from offering sex-based pension annuities that provide lower annual benefits to women, even though the prohibition might result in the denial of the annuity option to all employees and clearly will result in the class of men taking proportionately less from their pension accounts than the amounts they contributed. Id. at 1079-86. In UAW v. Johnson Controls, 111 S. Ct. 1196 (1991), the Court interpreted the BFOQ defense narrowly to hold that employers cannot exclude women from jobs that are particulary hazardous to themselves or their unborn children. Id. at 1205. Finally, in Connecticut v. Teal, 457 U.S. 440 (1982), the Court held that even a facially neutral employment test cannot be utilized because of its disparate impact on blacks when the test does not have a business-related justification, even when the test is accompanied by an affirmative action plan that advantages more members of the protected class than are disadvantaged by the challenged practice. Id. at 445-56.

[53] See Select Comm. on Aging, supra note 14, at 39 (rejecting argument that collectively bargained mandatory retirement should be permitted, because perceived interests of the majority of workers cannot justify discrimination against the minority). The ADEA was amended in the next year to prohibit all forms of mandatory retirement. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189.

[54] See Edward P. Lazear, Why Is There Mandatory Retirement?, 87 J. Pol. Econ. 1261 (1979). The theory that employers pay older, long-term workers above their productivity, however, has not been empirically established and has been questioned by some researchers. See Peter Kuhn, Wages, Effort, and Incentive Compatibility, 4 J. Lab. Econ. 28 (1986). In addition, Martin Levine has suggested that employers could adjust to the prohibition of mandatory retirement by only paying above productivity until the age that the average employee voluntarily retires. See Levine, supra note 41, at 58.

option would limit stigmatization of some workers who are evaluated as unproductive at the end of their careers.[55] By directly prohibiting any form of mandatory retirement and by eliminating any cap on the ADEA protected class, Congress thus seems to have made the judgment that the right of all older workers to individualized consideration of their productivity must outweigh any economic or psychological benefits that some subset of workers may derive from mandatory retirement schemes.

There are several reasons to discount the ex ante expressions of employee preferences for conditional exit incentives, even if it is assumed that these preferences have not been coerced by an implicit threat of illegal discharge. First, we are sometimes hesitant to force people to accept choices they must make in a position of relative ignorance of probable consequences.[56] The assumption that individuals know what is best for them and should not be second-gnessed is weakest when these individuals do not have critical information about their alternatives. Offerees of exit incentives may be in such a position of ignorance, especially if they are told little about their particular standing with their employer and thus cannot judge the likelihood of their involuntary dismissal. Offerees may also be ignorant of their legal rights or the likely consequences of retirement under the offered incentives.[57]

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[55] See Richard Epstein, Forbidden Grounds 458 (1992); see also Levine, supra note 41, at 35 (explaining that mandatory retirement is not justified by the avoidance of stigmatization of some workers because the right to be considered as an individual free of discrimination cannot be sacrificed). In any event, the concern that the elimination of mandatory retirement increases the likelihood of potentially stigmatizing evaluations of older workers may be misplaced. Department of Labor studies indicate that firms that used mandatory retirement before it was prohibited were *more* likely to formally evaluate the performance of older workers. See U.S. Dep't of Labor, Final Report to Congress on Age Discrimination in Employment Act Studies 26 (1982).

[56] Cf. Paul C. Weiler, Governing the Workplace 75 (1990) (suggesting that lack of information in the private labor market may justify public policy intervention); Sunstein, supra note 35, at 1166 (discussing the pros and cons of government intervention in light of an "absence of information"); Steven L. Willborn, Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism, 67 Neb. L. Rev. 101, 127-29 (1988) (describing the argument from "imperfect information" in favor of government intervention).

[57] Absent compulsory disclosure, offeree ignorance is likely to be the normal case because there is no incentive to fully inform when employers hope to induce resignations without direct discharges. Cf. Richard A. Posner, Strict Liability: A Comment, 3 J. Legal Stud. 205, 211 (1973) (arguing that products liability law may be efficient because it provides consumers with the cost-justified protection they would want if sellers had fully informed them of risks); Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in

Second, we often regulate bilateral trades because of their external effects on third parties or society in general. Although the concerns expressed in the legislative history of the ADEA about the social burdens of supporting an increasingly elderly populous whose productivity is not fully utilized[58] were not intended to prevent the provision of attractive retirement benefits, these issues seem relevant to the question of whether retirement bargains induced by fear of even legal discharges should be regulated.[59] Furthermore, antidiscrimination laws like the ADEA may condemn any status-based actions—including those resulting from voluntary bargains—that perpetuate stereotypes, such as the lack of productivity of the elderly, that generate further cycles of prejudice throughout the society. The retirement of even productive workers who would prefer to continue to work could support stereotypes about the desire and capacity of older workers.

Good Faith, 93 Harv. L. Rev. 1816, 1831-33 (1980) (arguing that common law protection against unjust dismissal would provide employees the security they would purchase if companies had adequate incentive to provide complete information about the risks of discharge).

Of course, offerees of exit incentives, like employees contemplating seeking contractual protection from discharge, theoretically could insist on obtaining more information about their choice. The decision to reject their ex ante preferences about information would thus have to be based in part on paternalistic or distributive, as well as efficiency, justifications. See Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 597-603 (1982).

[58] These social burdens are real. Department of Labor data indicate that even older workers who do not drop out of the workforce altogether are more likely to be unemployed for longer periods than are younger unemployed workers. See Meier, supra note 8, at 21. This should not be surprising. Unemployed older workers typically have less mobility than unemployed younger workers. It is usually more efficient for employers to discriminate against older job applicants who they do not know than it is to discriminate against older incumbent workers who they do know and who have already undergone firm-specific training. See Hutchens, supra note 47, at 91.

[59] An additional reason why we regulate transactions may also be relevant to at least some exit incentive offers. Based upon wisdom gained from collective experience, we are sometimes paternalistic toward even those who act with full information. One basis for paternalism is a pattern of myopia from individuals who regularly overdiscount the future when making particular choices and live to regret it. Cf. Sunstein, supra note 35, at 1164; Weiler, supra note 56, at 74; Willborn, supra note 56, at 128 (all noting the problem of undervaluation).

This is perhaps most likely to be true for immediate lump sum payments, which may entice the acceptance of early retirement from workers who come to regret their decision soon after their bonus is dissipated. However, it could be true for any early retirement, which may ultimately lead to retirees having lower annual benefits than they would have had had they been able to work to a normal retirement age. See Meier, supra note 8, at 24.

D. Conditional Age-Based Exit Incentives and Prospective Waiver of ADEA Rights

Finally, a cogent argument that the fulfillment of the antidiscrimination promises of the ADEA requires regulation of even the noncoerced acceptance of conditional age-based exit incentive offers can be based on an appreciation of how acceptance functions as a prospective waiver of ADEA rights, and of why Congress and the courts have resisted prospective waivers of antidiscrimination guarantees. Acceptance of conditional exit incentive offers functions as a prospective waiver of ADEA rights both from the perspective of employee-offerees and from that of employer-offerors.

Consider first the perspective of the offerees. As suggested above, employees within the ADEA's post-forty-year-old protected class may accept a conditional exit offer because of the fear of future age-based terminations without extra benefits. They may do so in part because they are unaware of or uncertain about the protection the ADEA would afford against some possible future termination. Moreover, even if an accepting employee fears only a legal discharge, the acceptance means that the ADEA cannot be applied in evaluation of any possible future termination of employment.

The functional equivalence of a conditional exit incentive with the waiver of ADEA rights is even more clear from the perspective of an employer who wants to effect the removal of an employee because of age. The retirement incentive enables such an employer to accomplish its age-based goals without worrying about an ADEA challenge. The employee's resignation obviates a future age-based discharge.[60] Leaving that resignation unregulated seems especially anomalous because even waivers of ADEA claims against completed terminations are subject to regulatory oversight.[61] There is no clear reason why an employer should be able to insulate its disparate treatment of an older employee more easily by explicitly or implicitly telling that employee that she might be fired and can obtain a bonus by resigning instead, than by firing the employee and then telling her that she will

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[60] It thus should not be surprising that attorneys advise employers to implement conditional exit incentive programs to avoid the risks of litigation. See, e.g., Joel L. Finger, Age Discrimination Problems in the Context of a Reduction in Work Force 18 (1983); Paul T. Shultz & Cheryl D. Fells, Current Developments in Employee Benefits, 8 Employee Rel. L.J. 325, 334 (1982).

[61] See 29 U.S.C. § 626(f).

receive higher severance pay if she signs a release of any right to sue for her discharge.

In fact, Congress and the courts have understood that waivers of future protection against possible acts of discrimination should be disfavored relative to releases from liability for past discriminatory acts. Indeed, although the OWBPA permits some waivers of ADEA claims against past discrimination if they meet specific standards for being "knowing and voluntary," it unequivocally prohibits any waiver of "rights or claims that may arise after the date the waiver is executed."[62] This prohibition only confirms pre-OWBPA judicial decisions that never suggested that prospective waiver should be permissible. ADEA law on prospective waiver is also in conformity with the Supreme Court's pronouncement in *Alexander v. Gardner-Denver Co.*[63] that "there can be no prospective waiver of an employee's rights under Title VII," although voluntary and knowing settlements of matured discrimination claims are acceptable.[64]

The functional equivalence of the acceptance of conditional exit incentives with prospective waivers is confirmed by an analysis of the reasons why Congress and the courts might sensibly want to prohibit prospective waivers. For heuristic purposes, I shall contrast the polar context for waiver of a legal right: the settlement of an initiated lawsuit. Why might we permit a defendant employer to purchase a plaintiff's lawsuit via settlement, but not permit that same employer to purchase, perhaps through paying additional wages, an employee's right to bring a claim against future discrimination? Some of the reasons for regulating private bargains noted above may suggest answers.

First, we can be more comfortable with an employee's ability to understand and protect her own interests at the settlement of a lawsuit. After commencement of a suit, an employee is in a much better position to understand what she is trading. She is probably represented by an attorney; she is focusing on a particular act or course of discrimination; and she has had an opportunity to collect information

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[62] Id. § 626(f)(1)(C).

[63] 415 U.S. 36 (1974).

[64] Id. at 51. In Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991), the Court did qualify the *Alexander* decision by holding that individual employees could prospectively trade the judicial forum promised by the ADEA for an arbital forum. Regardless of the importance of this decision for the waivability of the ADEA procedural system, however, there is no suggestion in *Gilmer* that a federal substantive antidiscrimination right could be waived prospectively. Id. at 1652.

on exactly what happened. The employee who waives her right to sue prospectively, by contrast, knows little of what she is giving up. She can only speculate on whether and the extent to which the employer is likely to discriminate. She can only guess how likely it is that she could prove any discrimination that does ensue.

Furthermore, an employee who waives her rights prospectively is less likely to anticipate her long-term interests and thus is more needful of paternalism.[65] An employee who waives her rights to be free of discrimination at the outset of employment may be blinded by her need for a job and the immediate prospect of a higher salary. Any form of future discrimination, especially age discrimination if she is young at the time of waiver, is contingent and may only occur much later. After discrimination has occurred, the likelihood of myopia is reduced.[66]

Second, prospective waivers, unlike settlements, can be viewed as undermining the goals of statutes that regulate market relationships to reduce the occurrence of activity condemned as intrinsically bad. A settlement not only avoids costly litigation, but also to some degree penalizes a defendant who may have been guilty of a bad act and at least partially compensates a plaintiff who may have been a victim of this act. A settlement thus generally discourages rather than encourages future acts of discrimination. By contrast, the prospective sale of a right to be free of discrimination primarily facilitates future acts of discrimination. The employer who has purchased the right to discriminate is surely more likely to indulge discriminatory preferences.[67]

This perspective may distort the actual disincentives to discriminate created by the allowance of prospective waivers because an employer would have to take into account the costs of purchasing a waiver before using it to indulge its taste for discrimination, just as an employer must take into account possible litigation costs, including settlement costs, before discriminating without the immunity that would be provided by a valid waiver. Yet there are good reasons to think that it would be cheaper for employers to purchase discrimina-

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[65] See supra note 59.

[66] However, given the glitter of a lump-sum bonus, it is not eliminated.

[67] Moreover, it also might be argued that this process would undermine the moral force of the waived prohibition. See Judith A. McMorrow, Who Owns Rights: Waiving and Settling Private Rights of Action, 34 Vill. L. Rev. 429, 462 (1989).

tion through prospective waivers than through settlements. First, for the reasons stated above, employees would be much more likely to undervalue their protection from future discrimination than their protection from discrimination that has already occurred. Second, employers that are satisfied with having the discretion to discriminate against only a segment of those within a protected status group, such as older employees, can reduce the costs of discrimination by purchasing waivers through bids calibrated to attract only employees who place the lowest value on their protection from discrimination. If trades of protection from discrimination can only occur after a discriminatory act, employers can only guess which employees it can most cheaply subject to discrimination because they would sell their protection at the lowest price. Third, the longer an employer must wait to purchase the discretion to discriminate, the more legal, administrative, evaluative, and reputational costs it must incur in addition to those necessary to pay off an employee.[68] Clearly, the discretion to discriminate can be purchased most cheaply before any discriminatory act has occurred. Conditional retirement incentive offers can identify those employees who will sell their ADEA protection most cheaply, and such offers can avoid any costs of evaluation, reputation, and litigation that would have to be incurred before securing postdischarge settlements.[69]

In sum, the unregulated allowance of conditional age-based exit incentive windows is inconsistent with the antidiscrimination principles of the ADEA. These incentives may cause the retirement of workers who prefer the continuation of work. They do so by what

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[68] It would also be more expensive to induce the plaintiff to settle after the plaintiff has incurred the costs of litigation. The plaintiff would probably not consider the avoidance of these costs when comparing the value of settlement with the value of the right to litigate.

[69] This analysis also suggests that there is more reason to regulate waivers of protection from discrimination immediately after potentially discriminatory terminations than there is to regulate settlements that occur later, after the commencement of litigation. The former waivers are closer to the middle of the spectrum; those sacrificing rights have less information than they would have after filing some claim, and the costs of achieving immunity from suit are less for an employer before the filing of a claim. This helps explain the greater attention given by Congress to nonprospective waivers of ADEA rights than to nonprospective waivers of Title VII rights. ADEA waivers have more typically been employer-initiated and effected immediately after termination before commencement of any lawsuit. See infra text accompanying notes 167-68; Amy Wax, Note, Waiver of Rights Under the Age Discrimination in Employment Act of 1967, 86 Colum. L. Rev. 1067, 1082-84 (1986); see also McMorrow, supra note 67, at 456-59 (noting the public deterrent and educative effects of the publication of lawsuits as an added reason to closely scrutinize prelitigation waivers).

most would consider at least an implicit threat of termination, perhaps illegal termination, without an enhancement of benefits. They also may effect the waiver of what would have been the future protection of the ADEA, and by doing so enable an employer to eliminate employees from its workforce on the basis of age without facing the possibility of claims of discriminatory discharge. Early retirement incentives have become especially popular in the past two decades and, without adequate regulation, probably will continue to be so, as employers appreciate that such incentives can indirectly achieve the sometimes economically rational age discrimination that the ADEA directly prohibits.

II. AGE-BASED CONDITIONAL EXIT INCENTIVE WINDOWS IN THE COURTS

Prior to passage of the OWBPA, a number of older workers who had come to regret their retirements pursuant to conditional exit incentive windows tried to use the ADEA to challenge these windows. None of these challenges, however, resulted in judicial recognition of how conditional windows conflict with the purposes of the ADEA. The lower federal courts instead developed basically two approaches to the treatment of the challenges, each blind to how conditional windows are used both to displace older workers who would prefer not to retire and to secure from these workers the sacrifice of the protections of the ADEA.

A. The Constructive Discharge Approach

The Seventh Circuit's decision in *Henn v. National Geographic Society*[70] represents the majority approach to these challenges. Robert Henn and three other plaintiffs challenged the Geographic Society's securing of their retirements through an incentive offer made to all advertisement salespersons older than fifty-five. The offer was generous, consisting of "a severance payment of one year's salary, retirement benefits calculated as if the retiree had quit at 65, medical coverage for life as if the employee were still on the payroll, and some supplemental life insurance coverage."[71] It was, however, conditioned on the salesperson's retiring within two months of the original

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[70] 819 F.2d 824 (7th Cir.), cert. denied, 484 U.S. 964 (1987).

[71] Id. at 826.

offer date and was described as a "one-time opportunity."[72] The plaintiffs testified that they accepted the offer because they feared they would lose both their jobs and the extra benefits if they declined. The plaintiffs had apparently been criticized for their recent performance, and Henn stated that his supervisor had told him that " '[s]ome of you older guys will not be around at the end of the year.' "[73] The plaintiffs claimed they became more nervous during the window period because their superiors would not tell them whether they should accept the offer.

During the company's decisionmaking process that resulted in the retirement offer, a memorandum was produced that stressed the aging of the sales force and concluded that older salespersons should be fired. It stated that

> "[i]f an age balance is not struck soon our average age will obviously increase. Serious repercussions will result if younger sales personnel are not available to cultivate clients in new growth industries and insure future sales. To attract youthful qualified sales personnel we must be cognizant of industry practices and offer required incentives."[74]

The Seventh Circuit, in an opinion by Judge Frank H. Easterbrook, upheld the trial court's grant of summary judgment to the Society. In Easterbrook's view, employees who accept early retirement incentives can challenge under the ADEA only those working conditions they would have confronted as the alternative to retirement. Thus, "the appropriate question in early retirement cases" is "whether the existing conditions (ignoring the offer of early retirement) violate the ADEA. If they do, then the employee may recover for that violation whether or not he took the package of benefits (though the value of the package would be taken into account in computing damages)."[75]

Furthermore, the standard for determining whether the alternative or existing conditions violate the ADEA is one of constructive discharge: "Only a constructive discharge, where an actual discharge would violate the ADEA, supports a claim of the sort plaintiffs pursue."[76] To satisfy such a standard, a plaintiff must show that the

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[72] Id.
[73] Id. at 830.
[74] Id. (quoting employer's internal memorandum).
[75] Id. at 829.
[76] Id. at 826.

employer has made its working conditions "so intolerable" that a reasonable employee would think he had no alternative but to resign.[77] Judge Easterbrook agreed with the trial court that Henn and his fellow plaintiffs had not been constructively discharged. Easterbrook also concurred that "dark hints" of "unpleasant consequences" if performance standards are not met go "with the territory" of being a salesperson,[78] and concluded that no reasonable jury could find that the Society had, or would have, treated the plaintiffs so poorly as to force their resignation.[79]

This constructive discharge approach to claims like those in *Henn* has been accepted by numerous lower courts.[80] Furthermore, there seems to be little to fault in Judge Easterbrook's application of the doctrine. Ignoring the offer of early retirement, the *Henn* plaintiffs did not show that the Society had created or would create a working situation so intolerable for plaintiffs as to make their resignations reasonable. Absent the offer of early retirement, reasonable salespersons who wanted to continue to work would not resign simply because they were threatened with discharge if their performance did not improve dramatically. Moreover, even if the "dark hints" were considered sufficient to induce reasonable resignations, without a record of actual discharges it would be very difficult to prove that resignations were forced on the basis of age rather than on the basis of performance.[81]

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[77] This is the general objective constructive discharge standard employed by most lower courts. See, e.g., Lewis v. Federal Prison Indus., 786 F.2d 1537, 1542-43 n.4 (11th Cir. 1986); Goss v. Exxon Office Systems Co., 747 F.2d 885, 887-88 (3rd Cir. 1984); Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983). A number of lower courts have also required plaintiffs claiming constructive discharge to prove that the employer intentionally coerced the resignation. See, e.g., Bartman v. Allis-Chalmers Corp., 799 F.2d 311, 314 (7th Cir. 1986), cert. denied, 479 U.S. 1092 (1987); Bristow v. Daily Press, 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981).

[78] *Henn*, 819 F.2d at 826.

[79] Id. at 830.

[80] See, e.g., Gray v. York Newspaper, Inc., 957 F.2d 1070, 1082 (3rd Cir. 1992); Mitchell v. Mobil Oil Corp., 896 F.2d 463, 467 (10th Cir.), cert. denied, 111 S. Ct. 252 (1990); Hanchey v. Energas Co., 925 F.2d 96, 99 (5th Cir. 1990); Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1113 (1st Cir. 1989); Schuler v. Polaroid Corp., 848 F.2d 276, 279 (1st Cir. 1988); Bodnar v. Synpol, Inc., 843 F.2d 190, 192 (5th Cir.), cert. denied, 488 U.S. 908 (1988); Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981).

[81] *Henn*, 819 F.2d at 829-30.

The fault is not in the application, but rather in the theory of constructive discharge. By requiring plaintiffs to prove that the alternative conditions offered by the employer are themselves both discriminatory and so unattractive as to compel resignation, the constructive discharge theory ignores how conditional retirement incentives interact with threats of future adverse personnel decisions. Threats that would be insufficient to cause reasonable men to resign absent a conditional offer of extra benefits could be sufficient to cause resignation with such an offer. As noted in Part I, it may be very reasonable for an employee who would prefer to continue to work, even under the threat of discharge, to elect retirement with extra benefits that would not be available with any discharge.[82] The conditional nature of the retirement incentive offered in *Henn* may have induced the plaintiffs to resign even though they would have preferred continued employment. Had the benefits available to them after discharge and retirement been identical, they may never have elected retirement. The Geographic Society, like other employers since the passage and elaboration of the ADEA, may have calculated that it could effect the elimination of many of its older workers without individual evaluation of their productivity and without making itself vulnerable to ADEA claims. It could do so with muted threats of imminent termination, insufficient to warrant a finding of constructive discharge, if it supplemented those threats with a substantial retirement bonus that would be unavailable after closure of a limited temporal window.

Judge Easterbrook and others who have embraced the constructive discharge theory might not be troubled by this analysis.[83] In *Henn*, for instance, Easterbrook expressed confidence that acceptance of an early retirement incentive offer cannot be coerced or involuntary, and thus illegal, as long as the alternative is not worse than a "status quo" that complies with the ADEA.[84] Viewing the conditional retirement

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[82] See supra text accompanying notes 20-23.

[83] See cases cited supra note 80; see also Abramson, supra note 10, at 346-50 (discussing constructive discharge theory).

[84] *Henn*, 819 F.2d at 826. Easterbrook presumably posits a "status quo" baseline of the conditions that would exist absent the offer, rather than the conditions that existed prior to the offer. Otherwise, his analysis would make vulnerable any exit incentive offer that also announced an increased possibility of discharges because of an economic downturn. See also *Bodnar*, 843 F.2d at 194 ("That risk inhered in elgible employees' failure to accept the SERIP [Special Early Retirement Incentive Program] bonus offer, the risk that their jobs might be

incentive as offering only an improvement in the offerees' position enabled Easterbrook to equate it with any pension plan that encourages early retirement. He could then easily conclude that it was irrelevant that the Society wanted to reduce the age of its sales staff and used the conditional retirement incentive to do so.[85]

There are, however, several critical difficulties with this response. Even if its assumptions were correct, it does not justify the constructive discharge doctrine that *Henn* and most other lower federal courts have applied. An employer that threatens to illegally fire its older employees if they refuse an early retirement offer has not necessarily constructively discharged these employees. For instance, assume the employer tells all of its older employees that after closure of the incentive window, they might be subject to more intense evaluation than will younger employees. This is clearly a threat of illegal discrimination, but, absent consideration of the retirement incentive, a reasonable employee who wanted to continue to work would wait to see actual evaluation results rather than resigning because she *might* be illegally discharged after a *possible* evaluation. The conditional retirement incentive must be considered to make resignation reasonable in this hypothetical, just as it must be considered to make resignation reasonable in *Henn* or in the paradigm window plan scenario.[86]

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eliminated because of economic pressure on the company, is likewise insufficient to suggest age discrimination. . . . It is thus fair here, as in *Henn*, to say that the SERIP afforded Appellants a means to mitigate that risk which was not available to other employees.").

In *Mitchell*, 896 F.2d at 467-68, however, the Tenth Circuit seemed to adopt a reading of *Henn* that posits a status quo baseline of the conditions that existed prior to the offer. In 1984, Mobil announced it intended to reduce the lump sum option in its pension plan. Yet during the following six-month period, all employees who had achieved eligibility under the old standards could still receive unreduced payments. The court held that the acceptance of early retirement during the six-month period could have constituted constructive discharge. Id. The basis of this finding was that offerees who did not retire during the six-month period would been in a worse position than they would have been in had Mobil not decided to restrict the lump sum alternative in its retirement plan in the first place. Id.

However, contrary to general discrimination law, the court concluded that there was no violation of the ADEA because Mitchell had not offered adequate proof that Mobil's purpose in constructively discharging older workers was based on a desire to reduce its older workforce. Id. at 471-73. For a discussion of how cases like *Mitchell*, which involve the reduction of an ongoing, nonconditional retirement plan, should be treated, see infra text accompanying note 200.

[85] *Henn*, 819 F.2d at 830.

[86] It might be argued that Judge Easterbrook's response also does not support the constructive discharge standard because that standard only requires proof that the offeree had no alternative but to resign, not proof that she was threatened with illegal discrimination.

Of course, the standards for constructive discharge in these cases could be lowered to fit within Easterbrook's coercion analysis. Any threat that the alternative to acceptance of an exit incentive offer will involve illegal age discrimination could be assumed to justify resignation and thus to invalidate any acceptance. At least one court has taken a step in this direction by finding that older employees who accepted a conditional exit incentive offer from Montgomery Ward made out a plausible case of constructive discharge by showing that Montgomery Ward executives had used commonly understood code phrases to signal which offerees would be vulnerable to the desire of senior executives to reduce the age of management personnel.[87]

But once it is acknowledged that any threat of illegal discrimination should be sufficient to invalidate acceptance of incentives, it becomes extremely difficult to distinguish valid from invalid conditional exit incentives. First, Judge Easterbrook's apparent presumption that most conditional exit incentives do not carry any threat of possible illegal action may be erroneous.[88] Any exit incentive window that is offered only to older employees carries some message, no matter how muted, that the offeror would like to reduce the number of older employees in its workforce. Such a message also always carries an indirect threat that the employer might act further on the desire after closure of the incentive window. In light of the expressed desire of some Geographic Society executives to reduce the age of their

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Courts taking the constructive discharge approach to conditional exit incentive offers, however, have required plaintiffs to prove not only constructive discharge, but also discriminatory age-based constructive discharge to ultimately prevail on their claims. See, e.g., Hanchey v. Energas Co., 925 F.2d 96 (5th Cir. 1990); Hebert v. Mohawk Rubber Co., 872 F.2d 1104 (1st Cir. 1989); Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988); Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981). *Henn*'s language has nonetheless led to some confusion on this point, as some courts following *Henn* have merged the constructive discharge issue with the age discrimination issue. See Kilgore v. Sears, Roebuck & Co., 722 F. Supp. 1535 (N.D. Ill. 1989) (holding that there was no prima facie case of constructive discharge because "a reasonable jury could not conclude . . . that Sears would have fired him *because of his age*").

[87] Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1484-85 (N.D. Ill. 1987), vacated in part on other grounds, 704 F. Supp. 162 (N.D. Ill. 1989); see also *Sutton*, 646 F.2d at 409 n.5 (suggesting that "possible" demotion or discharge is enough for constructive discharge); cf. Walker v. Mountain State Tel. & Tel. Co., 686 F. Supp. 269, 274 (D. Colo. 1988) (holding that demotion and relocation constitutes constructive discharge).

[88] The assumption may only be reasonable for tenured faculty and perhaps some employees covered by collective bargaining agreements with security from unjust discharge.

workforce, the offer in *Henn* to only older salespersons certainly must have carried this message.[89]

Yet proof that future discrimination has actually been threatened may be very difficult, much more difficult than proof that discrimination actually occurred in the past.[90] Moreover, if we set aside the traditional constructive discharge standard, it is difficult to resist concluding that whether a threat is sufficiently clear and direct to warrant a justifiable resignation should turn in part on the attractiveness of the incentives that would be foregone by a realization of the threat—in other words, on what Easterbrook tells us should be irrelevant to the question of validity.[91]

There is another important flaw in the position that conditional exit incentives are legal under the ADEA if the promised alternative to their acceptance would be legal. As explained above, there may be a number of reasons to regulate voluntary trades of legal rights. One of these reasons is the discouragement of activity that society collectively has decided to condemn. If the ADEA condemns the age-based elimination from the workforce of those who wish to continue to work, we should be troubled by employers' achievement of such results through conditional exit incentives, just as we are troubled by the encourage-

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[89] *Henn*, 819 F.2d at 826.

[90] *Henn* illustrates why threats of future age discrimination, when used with conditional exit incentives, can be subtle and thus much more difficult to prove than actual discriminatory discharges. Twelve of the fifteen older salespersons offered the Geographic Society's retirement incentive accepted it. The Society was able to achieve its goal of significantly reducing the age of its sales force without leaving the clear tracks of age discrimination that would have been created by the discharge of 12 of 15 older employees. See id. at 829-30; see also Bodnar v. Synpol, Inc., 843 F.2d 190, 194 (5th Cir. 1988) ("The appellants' vague and subjective impressions of threats conveyed by their supervisors when discussing the SERIP [Special Early Retirement Incentive Program] plan are too insubstantial a reed, in the absence of objective factors or actions suggesting age discrimination, on which to found a jury issue.").

[91] Indeed, the primary case on which the *Montgomery Ward* decision relied in its constructive discharge analysis, Downey v. Southern Natural Gas Co., 649 F.2d 302 (5th Cir. 1981), seems to have taken into account the plaintiff's potential loss of retirement benefits in deciding that he could have been constructively discharged by a threat of possible future discharge, even though the district court had found that his working conditions were not so intolerable as to give him no choice but to resign:

> Essentially, the test is whether a reasonable person in the employee's position would have felt compelled to resign. Downey asserts that his superior specifically advised him that he might be discharged, with a consequent loss of benefits. We regard that testimony as sufficient to create a contested issue of material fact regarding constructive discharge.

Id. at 304.

ment of future age discrimination by the voluntary prospective waivers of rights to be free of discrimination.

Unfortunately, the *Henn* approach is blind to this functional equivalence of the operation of an exit incentive plan with the securing of prospective waivers. In fact, the *Henn* plaintiffs traded the future protection of the ADEA for extra retirement benefits. The Geographic Society could have offered the same trade of ADEA rights for benefits by promising to give the extra retirement benefits to any older salesperson who was willing to waive her right to sue for any future discriminatory dismissal. If not regulated, this would have freed the Society to accomplish the same age-based terminations it in fact accomplished through the conditional exit incentives. Yet even when voluntary, prospective waivers are proscribed.

B. The Fair Process Approach

The only other lower court approach to the legality of conditional exit incentives is also flawed by a similarly excessive, though somewhat different, focus on the "voluntariness" of employees' acceptances. In *Paolillo v. Dresser Industries, Inc. (Paolillo II)*,[92] the Second Circuit, in an opinion by Chief Judge Wilfred Feinberg, held that plaintiffs should have an opportunity to prove at trial that their acceptance of a conditional exit incentive offer was not voluntary because they were given inadequate time fully to consider the offer. The *Paolillo* plaintiffs' employer, Whitney Chain, "in the midst of a significant business decline," offered all its employees of sixty years and older severance pay and certain other benefits if they agreed to retire early within six days after the original announcement of the offer.[93] The actual amount of extra benefits varied with each employee, presumably because of different ages, years of service, and salary. The *Paolillo* court assumed that two of the three plaintiffs had three days to decide on acceptance after their individual benefits were identified, and that the third may only have had one day.[94] One employee only obtained severance pay of $608.88 per month for two years, one only $388.75 per month for two years, and the third only a lump sum of $13,390.[95] There is no suggestion in the opinion, how-

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[92] 821 F.2d 81 (2d Cir. 1987), language modified, 884 F.2d 707 (2d Cir. 1989).
[93] Id. at 83.
[94] Id.
[95] Id.

ever, that Whitney Chain made any express threats of adverse consequences for employees who declined the offer.

The Second Circuit held that any acceptance of early retirement must be "voluntary" to be effective and that "it is relevant to the determination of voluntariness whether the employees received sufficient time to make a decision."[96] The court also suggested that the "reason for the compressed time period" and the "apparent complexity of the options open to them" would, inter alia, be relevant to whether they were given sufficient time.[97]

The *Paolillo* court's recognition that the process by which employees decide whether to accept early retirement may be relevant to whether their acceptance should be enforced provides a useful supplement to the *Henn* approach to voluntariness.[98] Even retroactive waivers of mature discrimination claims must be knowing and voluntary, and employees may need time to digest information about options. Courts considering releases of ADEA rights have understood this, and the OWBPA confirms it expressly by providing that retroactive waivers cannot be knowing and voluntary if they are made without a minimum time period of at least twenty-one days for consideration.[99] Also, the amount of time given for consideration of an offer may itself be relevant to the offerees' assessment of the threat of discharge after closure of the window.

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[96] Id. at 84.

[97] Id. Chief Judge Feinberg took his Second Circuit panel in *Paolillo* a step further in a decision that was withdrawn after rehearing. Paolillo v. Dresser Indus. (*Paolillo I*), 813 F.2d 583 (2d Cir. 1987). In this first decision, Judge Feinberg expressly placed the burden of proving voluntariness on the defendant employer: "the use of an early retirement plan to remove older workers from the work force because of their age is an exception to the ADEA's general prohibition against age discrimination, and accordingly, the party wishing to fit within the exception bears the burden of proving its applicability." Id. at 341.

[98] *Henn* itself actually expressed ambivalence about the relevance of the time period afforded offerees. On the one hand, it criticized the *Paolillo II* court by claiming that "the need to make a decision in a short time, under pressure, is an unusual definition of 'involuntary.'" *Henn*, 819 F.2d at 828. On the other hand, it also allows that the "voluntariness" question could turn on such things as the adequacy of information about the choice and whether the employee had an opportunity to digest complex information. Id. at 828-29.

[99] See 29 U.S.C. § 626(f)(1)(F)(i). Indeed, if the "waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual [must be] given a period of at least 45 days within which to consider the agreement." Id. § 626(f)(1)(F)(ii). Furthermore, any waiver agreement must provide "a period of at least 7 days following the execution of such agreement" during which the agreement can be revoked. Id. § 626(f)(1)(G); see infra text accompanying notes 172-75.

Yet *Paolillo*'s approach to conditional exit incentive offers seems more appropriate to waivers of mature ADEA claims than to the waiver of future ADEA protection. The opinion reflects no recognition that even fully informed and considered acceptances of conditional exit incentives enable employers to circumvent ADEA restrictions and displace older workers who may wish to continue to work. It thus fails to resolve the tension between conditional incentives and the broad goals of the ADEA.

The *Paolillo* approach has usually been considered to require more of conditional exit incentive programs than the constructive discharge approach of *Henn*.[100] However, if *Paolillo* is read to provide an alternative rather than a supplement to constructive discharge analysis, it might allow even the clearly coerced acceptances that *Henn* would invalidate. A conditional early retirement offeree who is confronted with the alternative of probable discharge will rationally choose retirement regardless of the amount of time and information he has been given to make his decision. Yet that offeree could claim that his choice was coerced by a constructive discharge.

At least one relatively early decision of the Sixth Circuit, *Ackerman v. Diamond Shamrock Corp.*,[101] employs *Paolillo* fair process standards of voluntariness to the exclusion of constructive discharge analysis. Edward Ackerman accepted a conditional early retirement offer after being told that he would be terminated after his job responsibilities were divided between two younger workers. The Sixth Circuit affirmed a summary judgment that his retirement was voluntary because the benefits of the agreement were generous, he had four weeks to consider it, and he stated that he was going to have an attorney examine it.[102] The *Paolillo* decision is not inconsistent with *Ack-*

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[100] See, e.g., Bodnar v. Synpol, Inc., 843 F.2d 190, 193-94 (5th Cir. 1988); see also infra note 106 (explaining the Fifth Circuit's approach in *Bodnar*).

[101] 670 F.2d 66 (6th Cir. 1982).

[102] Id. at 69-70. *Ackerman* was limited by a subsequent Sixth Circuit per curiam decision, Ruane v. G.F. Business Equip., No. 86-3955, 1987 U.S. App. LEXIS 11709 (6th Cir. Sept. 1, 1987), that suggests this circuit might itself apply at least a traditional constructive discharge standard in tandem with a voluntary process standard in future cases. John J. Ruane was given the option of electing retirement from his supervisory job or returning to a union-represented bargaining unit position. Id. at *1. Ruane elected retirement after understanding that returning to the bargaining unit would cost him over $10,000 in immediate payments and a monthly pension of $475. Id. The *Ruane* court refused to grant summary judgment for the employer against Ruane's claim of discriminatory discharge. Id. at *3. It distinguished *Ackerman* by asserting not only that Ackerman had been given adequate time to make his

erman.[103] Judge Feinberg indicated that any pressure that Paolillo felt to accept the offer because of the "uncertain future" of his employer would not make his acceptance involuntary.[104]

In any event, whether it stands alone or as a supplement to the constructive discharge approach, *Paolillo*'s fair process approach does not promise the kind of regulation of conditional age-based exit incentive offers that would protect achievement of the antidiscrimination goals of the ADEA.[105] In order to do so, Congress will have to recognize the actual impact of these incentives and require further regulation.[106]

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decision, but also that Ackerman "was not otherwise distinctly informed that he had no right to remain in his present employment." Id. The Sixth Circuit concluded that Ruane, by contrast, did not have "the potential option to retain his former employment." Id. This analysis suggests that at least any offeree who is told that he will be terminated if he does not accept retirement, can challenge his resignation under the ADEA if he can prove that it is age-based.

[103] By contrast, it does seem clear that any court taking a constructive discharge approach would have to reject *Ackerman*. As stated by a First Circuit panel following *Henn*: "[W]e explicitly reject the teaching of *Ackerman* and hold that, absent the option to choose to keep working under lawful conditions, an employer's offer of a choice between early retirement with benefits or discharge without benefits is nothing other than a discharge." Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1113 (1st Cir. 1989).

[104] *Paolillo II*, 821 F.2d at 84. On the other hand, the *Paolillo* plaintiffs presented no evidence that they were threatened with age-based discharges. Furthermore, in its reconsideration of the ease after trial, the Second Circuit criticized the trial judge for confusing its fair process approach to voluntariness with the issue of constructive discharge. The court's language suggests that in another ease it would use both theories: "The two situations are different, even though the departure of the employee in each is not truly voluntary." Paolillo v. Dresser Indus. (*Paolillo III*), 865 F.2d 37, 40 (2nd Cir.), langnage modified, 884 F.2d 707 (2nd Cir. 1989).

At least one circuit decision, without citing *Paolillo*, has used a fair process approach to supplement its purported reliance on *Henn* to reject a worker's claim that she was coerced into accepting an early retirement offer. See Gray v. York Newspapers, 957 F.2d 1070, 1085 (3rd Cir. 1992).

[105] The Second Circuit's subsequent review of the trial in *Paolillo* reveals another problem with its application of a fair process approach. The appellate court agreed that plaintiffs still carry an additional burden of proving that a desire to eliminate older workers motivated the adoption of the age-based coercive termination plan. It apparently is not sufficient for plaintiffs simply to show that the plan was offered to employees selected on the basis of age and that the plan operated to force resignations. *Paolillo III*, 865 F.2d at 40. This additional motivation analysis seems inconsistent with discrimination law's general condemnation of disparate treatment regardless of motivation. See supra notes 37-39.

[106] A Fifth Circuit decision, written after *Henn* and *Paolillo*, that indicates a willingness to use the two approaches together to determine whether an acceptance of an exit incentive is "voluntary," nevertheless affirmed a summary judgment for the employer without appreciating the real impact of the conditional incentive. See Bodnar v. Synpol, Inc., 843 F.2d 190, 193-94 (5th Cir. 1988).

III. THE OWBPA AND EXIT INCENTIVE PROGRAMS

The OWBPA does not, however, provide for such further regulation. The OWBPA can and should be read to require use of a modified *Paolillo* fair process approach[107] in tandem with a liberally interpreted constructive discharge approach to conditional age-based exit incentive windows. Unfortunately, the OWBPA cannot be read to require the kind of regulation needed to correct the tension between early retirement incentives and antidiscrimination goals.

The two substantive titles of the OWBPA have independent origins and purposes. The final language and legislative history of each, however, reflects both an awareness of the potential for conditional age-based exit incentive programs being challenged by offerees, and also an intent that the pre-Act, or at least pre-*Betts*, judicial treatment of such challenges not be significantly altered.

A. Title I

1. The Rejection of Betts

Section 101's statement of the purpose of Title I of the OWBPA supports reading the Act to confirm, rather than modify, judicial treatment of offeree challenges to conditional age-based exit incentive windows. Section 101 expresses a congressional finding that the Court's decision in *Public Employees Retirement System of Ohio v. Betts*[108] required amending the ADEA "to restore the original congressional intent in passing and amending" the ADEA.[109] *Betts* interpreted language in section 4(f)(2) of the ADEA that provided "it shall not be unlawful . . . to observe the terms of a . . . bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes" of the ADEA.[110] *Betts* held that this language meant that the ADEA was not intended to prohibit age discrimination in employee benefit plans unless that discrimination operates as a "subterfuge" for age discrimination outside the benefit plans—discrimination in "hiring

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[107] See supra text accompanying notes 98-99.

[108] 492 U.S. 158 (1989).

[109] OWBPA, Pub. L. No. 101-433, § 101, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. § 621 (1988 & Supp. III 1991)).

[110] 29 U.S.C. § 623(f)(2); see *Betts*, 492 U.S. at 161.

and firing, wages and salaries, and other non-fringe-benefit terms and conditions of employment."[111]

This holding did not necessarily require any modification of the *Henn* or *Paolillo* approaches to challenges to conditional age-based exit incentive windows. Both the constructive discharge and voluntary process approaches are directed at determining whether exit incentives are only a way of offering extra benefits to older employees, or are also a method of forcing such employees to quit work "involuntarily." If the acceptance of an incentive is deemed involuntary under either approach, and if the reason for the coercion is the elimination of older employees because of their age,[112] then the plan can be said to be used as a subterfuge for age discrimination in employment, a form of discrimination proscribed even under the *Betts* regime.[113]

2. *The Special Treatment of Early Retirement Incentives*

More importantly, Title I's special treatment of "early retirement incentives" is also fully consistent with *Henn* and *Paolillo*. This special treatment is multifaceted. First, Title I provides a general defense to claims that an early retirement incentive plan is discriminatory beyond the general defense made available for other benefit plans. The general defense granted under the OWBPA for most benefit plans

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[111] 492 U.S. at 177.

[112] *Betts* did not require more proof of discriminatory motive than did *Henn* and *Paolillo*. Under the *Henn* approach, a finding that conditional exit incentive offerees have been constructively discharged by a threat of discrimination should be sufficient to also conclude that the offer was motivated by a desire to eliminate older employees. Proving subterfuge after proof of the constructive discharge of age-defined offerees might be burdensome under a modified *Henn* approach, like that taken in *Mitchell v. Mobil Oil Corp.*, under which a constructive discharge can be based on a threat of any deterioration of before-offer working conditions, regardless of cause. See *Mitchell*, 896 F.2d at 467; see also supra note 84 (explaining the facts and analyzing the approach in *Mitchell*).

Further, under the *Paolillo* approach, a finding that acceptances of exit incentives were coerced would not necessarily establish that the reason for the coercion was to terminate older workers. For instance, giving employees a short time to consider their options might be explained by financial pressures on the employer. However, without relying on *Betts*, both the *Mitchell* court and the *Paolillo III* court, in an additional post-trial decision, held that plaintiffs do have to prove independently that their coercion was motivated by a desire to terminate older workers. *Mitchell*, 896 F.2d at 471-73; Paolillo v. Dresser Indus. (*Paolillo III*), 865 F.2d 37 (2nd Cir), language modified, 884 F. 2d 707 (2nd Cir. 1989); see also supra note 105 (explaining *Paolillo III*).

[113] See AARP v. Farmers Group, Inc., 943 F.2d 996 (9th Cir. 1991) (holding that reducing pension and profit-sharing plan benefits for employees over age 65 in order to encourage retirement was a subterfuge for age discrimination under *Betts*).

tracks the pre-*Betts* standard for judging age-based employee benefit plans set forth in an EEOC regulation that purported to interpret section 4(f)(2). The OWBPA, like the regulation, validates benefit plans for which "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker."[114] This permits younger workers to receive greater amounts of benefits like life and health insurance that become more expensive with the age of the recipient, as long as the employer does not actually spend more on the younger worker. The general defense for early retirement incentive plans, by contrast, insulates plans that are "voluntary" and "consistent with the relevant purpose or purposes of this chapter."[115]

The OWBPA also gives special attention to early retirement incentives by specifically providing that such incentives cannot be illegal "solely" because of any of three characteristics. First, any pension plan may require the attainment of a minimum age as a condition of eligibility for receiving early or normal retirement benefits.[116] Second, a defined benefit plan may provide "payments that constitute the subsidized portion of an early retirement benefit."[117] Third, to those who retire before becoming eligible to receive social security benefits, a defined benefit plan may provide bridge payments that do not exceed the social security benefits that these early retirees will later receive.[118]

Each of these three special provisions has a clear purpose. First, any pension plan that provides retirement benefits only to employees who have attained some minimum age encourages only older workers to exit from employment and thus might be viewed to be in tension with the ADEA's goal "to promote employment of older persons based on their ability rather than age."[119] Hence, Congress found it necessary to clarify in the OWBPA that it did not intend, by overruling *Betts*, to indicate that a pension plan violates the Act solely

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[114] 29 U.S.C. § 623(f)(2)(B)(i). This provision makes specific reference to the EEOC interpretative regulation published at 29 C.F.R. § 1625.10 (1992), as in effect on June 22, 1989. This regulation was originally promulgated by the Department of Labor, the agency that was initially charged with the implementation of the ADEA. The regulation was expressly rejected by the *Betts* court. See *Betts*, 492 U.S. at 175.

[115] 29 U.S.C. § 623(f)(2)(B)(ii).

[116] Id. § 623(l)(1)(A).

[117] Id. § 623(l)(1)(B)(i).

[118] Id. § 623(l)(1)(B)(ii).

[119] Id. § 621(b); see supra text accompanying note 11.

because it only provides benefits to those who have reached some minimum age.[120]

Second, defined benefit pension plans, both in the public and private sectors, frequently promise younger retirees benefits that would be calculated by an actuary to have greater present value than the benefits promised older retirees. For instance, such plans often allow workers to retire before some "normal" retirement age and receive a level of monthly benefits that, although lower than that received by workers who retire at an older age, is still sufficiently high to be of greater actuarial worth.

Third, defined benefit pension plans also often provide for bridge payments to workers who retire before reaching the age required for receipt of social security benefits, continuing those payments until attainment of that age.[121] Each of these normal practices provides greater benefits to younger workers and thus would be vulnerable to challenge under the OWBPA if the only defense available was that which the OWBPA allows for most age-based benefit plans—actuarial cost justification. Congress thus found it necessary to include "safe harbor" exceptions in the OWBPA to clarify the legality of these common practices.[122]

3. *The Alternative General Defense Provision*

The congressional purpose in providing a different general defense for early retirement incentives is somewhat more difficult to identify. The statute does not exempt all retirement incentives, just those that are "voluntary" and "consistent with the relevant purpose or purposes" of the ADEA.[123] One must review the legislative history of Title I more closely to understand the intended meaning of these ambiguous words.

That history indicates that Congress was concerned with the impact of *Betts*, not on *Henn* or *Paolillo*-type involuntary discharge disputes, but rather on challenges to early retirement incentives that

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[120] In fact, no court has held that a minimum age floor in a retirement plan violates the ADEA simply because it excludes workers over the ADEA minimum protected age of 40. See, e.g., Cronin v. ITT Corp., 737 F. Supp. 224 (S.D.N.Y. 1990), aff'd, 916 F.2d 709 (2d Cir. 1990).

[121] See S. Rep. No. 263, 101st Cong., 2d Sess. 21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1526-27.

[122] Id.; see 136 Cong. Rec. S13,603 (daily ed. Sept. 24, 1990) (statement of Sen. Pryor).

[123] 29 U.S.C. § 623(f)(2)(B)(ii).

are offered to younger workers but not to older workers. The holding in *Betts* required a change in judicial treatment of these latter challenges because they are founded on the denial of a benefit on the basis of old age, rather than the encouragement of retirement on the basis of age. A prominent example, much discussed in OWBPA's legislative history,[124] can be drawn from *Cipriano v. Board of Education of North Tonawanda* (*Cipriano II*).[125] North Tonawanda had offered, pursuant to a collective bargaining agreement, a choice of two early retirement benefit packages for teachers who retired at an age between fifty-five and sixty during the three-year term of the agreement. Sarah Cipriano and another teacher, who had both passed their sixty-first birthday prior to the effective date of the agreement, sued under the ADEA to collect the retirement benefits for which they would have been eligible had they been a bit younger.[126]

The Supreme Court's *Betts* decision would have mandated that such a suit be summarily dismissed.[127] Whereas *Betts*' interpretation of the section 4(f)(2) subterfuge defense would have required the older plaintiffs to show that the employer's purpose in not making the offer to them was to treat them less favorably with respect to something other than retirement benefits,[128] they had only complained about the failure to offer equal retirement benefits. Before *Betts*, however, the lower courts disagreed about the degree to which section 4(f)(2) insulated early retirement decisions from such challenges.

In *Cipriano I*, the Second Circuit held that whether the grant of an early retirement option to younger workers that was denied older workers would violate the ADEA depended on the employer's reason for the denial. The court held that section 4(f)(2) afforded the defend-

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[124] S. Rep. No. 263, supra note 121, at 28; H.R. Rep. No. 664, 101st Cong., 2d Sess. 44 (1990); see also Older Workers Benefit Protection Act: Joint Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and the Special Comm. on Aging on S.1511, 101st. Cong., 1st Sess. 175, 303 (1990) [hereinafter Joint Hearing] (providing prepared statement of AARP advocate).

[125] 700 F. Supp. 1199 (W.D.N.Y. 1988), on remand from *Cipriano I*, 785 F.2d 51 (2d Cir. 1986), vacated in part, 772 F. Supp. 1346 (W.D.N.Y. 1991) (vacating in light of *Betts*).

[126] *Cipriano II*, 700 F. Supp. at 1201-02.

[127] See Robinson v. County of Fresno, 882 F.2d 444, 446 (9th Cir. 1989); Lynch v. J.P. Stevens & Co., 758 F. Supp. 976, 1019 (D.N.J. 1991); Gabarczyk v. Board of Educ., 738 F. Supp. 118, 122 (S.D.N.Y. 1990).

[128] *Betts*, 492 U.S. at 181. *Betts* also held, contrary to some previous lower court decisions, that the burden of proof on the subterfuge question remains with the plaintiff employee. Id. (rejecting, e.g., *Cipriano I*, 785 F.2d at 57).

ant employer the opportunity to demonstrate that the plan was not a "subterfuge" for evading the ADEA by proving that it had a "legitimate business reason for structuring the plan as it did."[129] On remand, the trial court found that the North Tonawanda School Board had met this burden by demonstrating that on average the retirement of a highly paid senior teacher between the ages of fifty-five and sixty would save the Board more total labor costs than the retirement of an even older teacher who was likely to retire relatively soon without any extra incentive.[130]

By contrast, the Seventh Circuit, in *Karlen v. City Colleges of Chicago*,[131] rejected an employer's defense of an early retirement plan's reduction in benefits after the age of sixty-four by interpreting section 4(f)(2) in accordance with the cost-incurred justification contained in the EEOC regulation that was expressly rejected in *Betts* and adopted for most benefit plans by the OWBPA.[132] As the Seventh Circuit

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[129] *Cipriano I*, 785 F.2d at 58; see also Patterson v. Independent Sch. Dist. No. 709, 742 F.2d 465, 467 (8th Cir. 1984) (stating that benefit plan "must not be a subterfuge to evade the purposes of the statute to eliminate discrimination based on age").

[130] *Cipriano II*, 700 F. Supp. at 1208. The circuit court decision had suggested that this would be a legitimate reason for structuring the plan to provide retirement incentives only for 55 to 60 year olds. See *Cipriano I*, 785 F.2d at 55.

The district court also held that while facially valid, the North Tonawanda early retirement plan did illegally discriminate against the two plaintiffs because it had been adopted after they were already older than the maximum age of eligibility. See *Cipriano II*, 700 F. Supp. at 1212. The court stated that since the plaintiffs were never given any incentive to retire, the only basis for denying them an opportunity to gain the special benefits was an assumption that they "would be retiring anyway," and this "is not the type of legitimate business reason contemplated by the Second Circuit." Id. at 1211. Although it is difficult to reconcile this holding with the court's acceptance of the general validity of the retirement plan, it may be that the district court was making the same distinction between acceptable and unacceptable business reasons attributed to the OWBPA below. See infra text accompanying notes 141-42.

[131] 837 F.2d 314 (7th Cir. 1988), cert. denied, 486 U.S. 1044 (1988).

[132] Id. at 319-20. In the *Karlen* decision, Judge Richard A. Posner expressed a better appreciation than has any other judge of the effects and purposes of conditional age-based exit incentives. Posner rejected the employer's plea that it must substantially reduce the early retirement incentive after age 64 to make the incentive a strong inducement for resignation:

> This strikes us as a damaging admission rather than a powerful defense. To withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed. Rather than offering a carrot to all workers 55 years and older, as in the *Henn* case, the City Colleges are offering the whole carrot to workers 55 to 64 and taking back half for workers 65 to 69. The reason is that the Colleges want to induce workers to retire by 65.

Id. at 320.

noted,[133] it is difficult to understand why the retirement benefits of workers who leave work after some age such as sixty or sixty-four should cost an employer more than the retirement benefits of workers who leave at a somewhat younger age. The *Cipriano* court may have been correct to assume that on average the retirement of highly paid senior workers at a younger age will save an employer more money than will the retirement of such workers somewhat later,[134] but this does not mean that without the age ceiling on the special retirement incentives, the cost of the older workers' retirement packages would be greater than those given to younger workers.

In *Betts*, the Supreme Court implicitly rejected the *Cipriano* "legitimate business reason" approach, as well as *Karlen*'s strict application of the EEOC regulation.[135] *Betts* held that benefit plans are not rendered illegal by offering more to younger workers, regardless of the employer's reasons, unless those reasons are to circumvent the ADEA's prohibition of discrimination in nonbenefit plan conditions.[136]

The legislative history of Title I of the OWBPA indicates that Congress's rejection of *Betts* extends to this treatment of challenges to early retirement incentive plans. The legislation that became the OWBPA was fashioned by a compromise in the Senate between the Democratic leadership and key Republican Senators who apparently represented the White House as well. This compromise produced a "final substitute" to Senate Bill 1511 that passed both Houses by overwhelming margins.[137]

The announcement of the Senate compromise was accompanied by a Statement of Managers that attempts to explain the intended meaning of some of the Act's more ambiguous provisions, including the general defense for early retirement plans.[138] That Statement con-

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[133] Id.

[134] *Cipriano II*, 700 F. Supp. at 1208.

[135] See Robinson v. County of Fresno, 882 F.2d 444, 446 (9th Cir. 1989) (applying *Betts* to reject a challenge to an early retirement plan and finding that *Betts*' "reasoning implicitly overrules the decisions of . . . *Karlen* . . . and *Cipriano*").

[136] *Betts*, 492 U.S. at 177.

[137] The vote in the Senate on September 24, 1990, was 94 to one. 136 Cong. Rec. S13,611 (daily ed. Sept. 24, 1990). The vote in the House of Representatives on October 3, 1990, was 406 to 17. 136 Cong. Rec. H8,738 (daily ed. Oct. 3, 1990). President Bush signed the bill on October 16, 1990. Pub. L. No. 101-433, 104 Stat. 978 (1990).

[138] Statement of Managers, 136 Cong. Rec. S13,596-97 (daily ed. Sept. 24, 1990).

firms declarations in earlier Committee Reports from both bodies that Congress did not accept the complete insulation of early retirement incentives from *Cipriano*-type challenges:

> Early retirement incentive plans that withhold benefits to older workers above a specific age while continuing to make them available to younger workers may conflict with the purpose of prohibiting arbitrary age discrimination in employment. The purpose of prohibiting arbitrary age discrimination in employment also is undermined by denying or reducing benefits to older workers based on age-related stereotypes. For example, it would be uulawful under this substitute to exclude older workers from an early retirement incentive plan based on stereotypical assumptions that "older workers would be retiring anyway."[139]

On the other hand, Congress' decision not to subject all "voluntary" early retirement plans to the equal cost-incurred standard that it adopted for the defense of other age-based benefit plans indicates that Congress wanted the courts at least to consider whether an employer's reasons for adopting an age-based retirement plan were consistent with the antidiscrimination purpose of the ADEA. The Statement of Managers in the Senate asserts:

> An early retirement incentive plan need not be shown to be consistent with every purpose of the ADEA in order to be found lawful. That would be an impossible burden for an employer to meet. As a general matter, the purpose implicated in considering an early retirement incentive plan or any particular feature of such a plan is the purpose of prohibiting arbitrary age discrimination in employment.[140]

These two quotations from the Statement of Managers suggest that the ambiguous general defense for early retirement incentives in the OWBPA was intended to allow the courts to fashion a different kind of compromise treatment of *Cipriano*-type challenges. In particular, courts might hold that while employers cannot justify a maximum age cutoff in an early retirement incentive by claiming that incentives are not needed for older workers who are likely to retire soon in any event, employers can justify a cutoff by demonstrating that it provides an incentive for workers in a particular age bracket to retire before they reach the cutoff date and lose the option of choosing extra bene-

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[139] Id. at S13,596.

[140] Id.; see also S. Rep. No. 263, supra note 121, at 28 (suggesting similar purpose).

fits.[141] The latter justification is not based on any generalization about older workers of a particular age, nor does it reflect a desire to deny older workers benefits. It is only in tension with the purposes of the ADEA for the same reason that conditional age-based exit incentives conflict with the purposes of the Act: it expresses a desire to induce the exit of workers who, but for a concern about loss of benefits, would prefer to continue to work.[142]

This interpretation of Congress's purpose in providing an ambiguous general defense for early retirement incentive plans is confirmed by looking more closely at the consideration of *Henn*-type constructive discharge challenges to these plans in the legislative history of Title I of the OWBPA. This history does not indicate that Congress was concerned about the impact of *Betts* on *Henn*-type, rather than *Cipriano*-type challenges. Instead, it strongly suggests that Congress wanted the OWBPA to preserve both the *Henn* and *Paolillo* approaches.

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[141] This is the argument rejected by Judge Posner in *Karlen*. See 837 F.2d at 320; see also supra note 132 (discussing Judge Posner's reasoning in *Karlen*). The Senate Labor and Human Resources Committee Report on S. 1511, the predecessor of the OWBPA, quotes Judge Posner's rejection of this justification with approval. See S. Rep. No. 263, supra note 121, at 27. It also states that

> [e]arly retirement incentive plans that deny or reduce benefits to older workers while continuing to make them available to younger workers may encourage premature departure from employment by older workers. This not only conflicts with the purpose of eliminating age discrimination in employee benefits; it also frustrates (rather than promotes) the employment of older persons.

Id. See generally Rebecca S. Stith & William A. Kohlburn, Early Retirement Plans After the Passage of the Older Workers Benefit Protection Act, 11 St. Louis U. Pub. L. Rev. 263, 263 n.4, 276 n.66 (1992) (stressing this language).

However, the amendment to S. 1511 on the floor of the Senate changed the requirement that voluntary early retirement incentive plans further the "purposes" of the ADEA to the requirement that such a plan be "consistent with the relevant purpose or purposes" of ADEA. Compare S. Rep. No. 263, supra note 121, at 2 (stating that bona fide voluntary early retirement plans that further the purposes of the Act are permissible) with 29 U.S.C. § 623 (f)(2)(B)(ii) (providing that voluntary plans are those consistent with the relevant purpose of the Act). Also, the Statement of Managers asserts that the relevant purpose of the Act for early retirment plans will be "prohibiting arbitrary age discrimination in employment." Statement of Managers, supra note 138, at S13,596.

[142] An employer's desire to save significant labor costs by inducing senior workers to resign so it can hire lower paid, and probably younger, new workers may also be consistent with the purpose of Title I as expressed in section 101: "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Pub. L. No. 101-433, 104 Stat. 978, 978 (1990).

First, the history suggests that by conditioning the general defense of early retirement incentives on their being "voluntary," Congress meant to approve the conjunctive use of *Henn* and *Paolillo*. The Statement of Managers provides that:

> In order to determine whether a voluntary decision has been made, among the factors that may be relevant are (1) whether the employee had sufficient time to consider his or her options; (2) whether accurate and complete information has been provided regarding the benefits available under the early retirement incentive plan; and (3) whether there have been threats, intimidation and/or coercion.[143]

Furthermore, the Committee Report on Senate Bill 1511, which after further amendments eventually became the OWBPA, cites *Paolillo* in support of *Henn*'s constructive discharge standard: "The critical question involving allegations of involuntary retirement is whether, under the circumstances, a reasonable person would have concluded that there was no choice but to accept the offer."[144]

These statements do not necessarily establish that Congress wanted the *Paolillo* fair process standard to be applied independently of the *Henn* constructive discharge standard. They do, however, make clear that Congress would not approve of using *Paolillo* as a substitute for, rather than as a supplement to, *Henn*. The OWBPA therefore should be read to confirm the lower courts' rejection of the early Sixth Circuit decision in *Ackerman*, in so far as that case held that an employer can induce early retirement by offering special benefits as an alternative to discharge without such benefits.[145] As further stated by the Senate managers: "no employee benefit plan . . . may require or permit the involuntary retirement of any individual."[146]

4. Limits to Title I Regulation of Early Retirement Incentives

On the other hand, the legislative history of Title I cannot be read to conclude that no conditional age-based exit incentive window offers are protected by the general OWBPA defense for early retirement

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[143] Statement of Managers, supra note 138, at S13,596.

[144] S. Rep. No. 263, supra note 121, at 27.

[145] See Ackerman v. Diamond Shamrock Corp. 670 F.2d 66, 69-70 (6th Cir. 1982); see also Ruane v. G.F. Business Equip., No. 86-3955, 1987 U.S. App. LEXIS 11709 (6th Cir. Sept. 1, 1987) (limiting *Ackerman* in Sixth Circuit); Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1112-13 (1st Cir. 1989) (criticizing and rejecting *Ackerman*).

[146] Statement of Managers, supra note 138, at S13,596.

incentives, either because they are all inherently coercive or because they are inconsistent with the antidiscrimination purposes of the ADEA. The Statement of Managers specifically states that "a plan that gives employees who have attained age 55 and who retire during a specified window period credit for 5 additional years of service and/or age would be lawful."[147] The Statement also lists other incentives, such as lump-sum payments and "flat dollar" or percentage increases in pensions, that "would remain lawful" if extended "to all employees above a certain age," rather than being capped off at a maximum age as in *Cipriano*.[148] The Senate Labor Committee Report agreed that "it may be permissible for an employer to establish a time-related 'window' program under which employees are offered a special incentive for a limited period of time in order to make retirement a more attractive option."[149]

By contrast, the history of the initiative to overrule *Betts* does not reflect a congressional recognition that any conditional age-based exit incentive window, by threatening the loss of a valuable special benefit, can induce retirement from employees who would prefer to work.[150] Nor does it evince an understanding that any conditional age-based offer may threaten an offeree with possible post-offer discrimination simply by communicating to him the offeror's desire to reduce the age of its workforce.

This legislative history suggests that the courts are free to develop the *Henn* and *Paolillo* approaches so that they fully comport with the theories of voluntariness on which they are based.[151] For instance, the language and legislative history of the OWBPA would support, if not require, finding even cost-efficient age-based incentives illegal

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147 Id.

148 Id.

149 S. Rep. No. 263, supra note 121, at 28.

150 The Statement of Managers instead specifically directs courts not to consider the "attractiveness of an early retirement incentive" when evaluating its legality. See Statement of Managers, supra note 138, at S13,596.

151 The Statement of Managers asserts that employee-plaintiffs retain "the burden of proof regarding the issue of involuntariness." Id. This assertion, however, seems inconsistent with the language of the OWBPA, which assigns "the burden of proving that [their] actions are lawful" to defendants "acting under" the general defense for early retirement incentives. See 29 U.S.C. § 623(f)(2). Moreover, the Senate Report on S. 1511, states that "[c]onsistent with the burdens of proof under section 4(f)(2)(B), the employer bears the burden to demonstrate that the employee's participation in the plan is voluntary." S. Rep. No. 263, supra note 121, at 27.

once they are deemed involuntary under the *Henn* and *Paolillo* standards. Age-based plans that are not "voluntary" cannot fit under the general OWBPA defense for early retirement incentives, and therefore should be prohibited regardless of motivation, like any other form of facial discrimination, despite suggestions to the contrary by the Second Circuit in its last *Paolillo* decision[152] and by the Tenth Circuit in an unusual application of *Henn*.[153] It would also be appropriate for future courts to follow the lead of the *Anderson v. Montgomery Ward & Co.* decision in finding acceptances involuntary when they are induced by signals that particular offerees, in part selected by age, will be particularly vulnerable to discharge after closure of the incentive offer window.[154] Such acceptances can be regarded as infected by "threats, intimidation, and/or coercion,"[155] whether or not the threats would have been sufficient to cause a reasonable employee to resign in the absence of the extra incentive offered by the employer.[156]

The discretion of the lower courts to expand *Henn*, however, is certainly limited. Congress did not contemplate the courts striking down age-based offers as inconsistent with the ADEA simply because they provide special encouragement to the retirement of older workers.[157] Nor did it view such offers as illegally coercive simply because the offerees know that the alternative to acceptance *may* be exposure to an involuntary termination or layoff plan that cannot be shown to be age-based.

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152 Paolillo v. Dresser Indus. (*Paolillo III*), 865 F.2d 37, 40 (2nd Cir.), language modified, 884 F.2d 707 (2nd Cir. 1989); see also supra note 105 (discussing *Paolillo III*).

153 Mitchell v. Mobil Oil Corp., 896 F.2d 463, 467 (10th Cir. 1990); see also supra note 84 (explaining the facts and analyzing the approach in *Mitchell*).

154 See 650 F. Supp. 1480 (N.D. Ill. 1987), vacated in part on other grounds, 704 F. Supp. 162 (N.D. Ill. 1989); supra note 87 and accompanying text.

155 See Statement of Managers, supra note 138, at S13,596.

156 This conclusion is also supported by the express disavowal in the Statement of Managers of a sentence in the Senate Committee Report on S. 1511. See Statement of Managers, supra note 138, at S13,596. The disavowed sentence states: "If subsequent layoffs or terminations are contemplated or discussed, employees should be advised of the criteria by which those decisions will be made." S. Rep. No. 263, supra note 121, at 27. The reason for the rejection was undoubtedly the concern of Republican Senators that stating the criteria for subsequent terminations would be sufficient to make the incentive offer coercive. See S. Rep. No. 263, supra note 121, at 62.

157 See Statement of Managers, supra note 138 at S13,596 ("The attractiveness of an early retirement incentive does not call into question the voluntariness of an employee's decision to take advantage of that incentive.").

The Senate Labor Committee Report states that "*threats of imminent layoffs*, intimidation or subtle coercion may, either individually or collectively, 'require or permit' involuntary retirement in any particular case."[158] But the OWBPA provision to which this language refers states that no "voluntary early retirement incentive plan shall . . . require or permit the involuntary retirement of any individual . . . *because of . . . age*."[159] The Senate Committee Report is thus consistent with the *Henn* requirement that a constructive discharge must be age-based to be illegal.[160] An offeree would have to prove not only that she was threatened with an imminent layoff, but also that the threat was either of being laid off for an age-based reason or was made to her because of her age. By stating that legal early retirement "window" plans are "often used by employers as a means of voluntary workforce reduction,"[161] the Senate Report, like the Statement of Managers,[162] contemplates the legal use of such plans during at least some reductions in force, all of which must threaten layoffs being conducted under some standard.

In sum, Title I, read in light of its legislative history, permits employers to encourage older employees to accept early retirement offers by the prospect of being laid off, as long as that encouragement is not effected through the threat of illegal discrimination. Thus, Title I limits, but does not eliminate, the basic tension between conditional age-based exit incentives and the principles of the ADEA.

B. Title II

The language and history of Title II of the OWBPA confirms this treatment of conditional age-based exit incentive windows by Title I. Title II provides a special system for the regulation of the waiver of ADEA rights. Because the ADEA borrows enforcement procedures from the Fair Labor Standards Act ("FLSA")[163] and patterns its sub-

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158 S. Rep. No. 263, supra note 121, at 27 (emphasis added).

159 29 U.S.C. § 623(f)(2) (emphasis added).

160 See supra note 86 and accompanying text.

161 S. Rep. No. 263, supra note 121, at 28.

162 Statement of Managers, supra note 138, at S13,596.

163 29 U.S.C. §§ 201-219 (1988). Section 7(b) of the ADEA states that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures" of particular sections of the FLSA. 29 U.S.C. § 626(b). The Supreme Court has taken the ADEA's incorporation of FLSA procedures seriously by holding that because the FLSA provides for legal damages and a jury trial, the ADEA does as well. See Lorillard v. Pons, 434 U.S. 575, 582 (1978) ("This

stantive commands on those of Title VII of the 1964 Civil Rights Act,[164] there had been an important debate before the OWBPA over whether the waiver of ADEA rights should be governed by the especially strict standards governing waiver of FLSA claims[165] or by the somewhat looser standards established by Title VII precedent.[166] Many members of Congress argued that there are strong reasons not

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selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.").

[164] Compare 29 U.S.C. § 623(a) (prohibiting age discrimination) with 42 U.S.C. § 2000e-2 (1988) (prohibiting race, color, religion, sex, and national origin discrimination).

[165] Relying on established Supreme Court precedent, the Secretary of Labor does not accept any waiver of FLSA rights that is not supervised either by the Department of Labor under section 16(c) of the FLSA, or by a federal court under section 16(b) of the FLSA. See 29 U.S.C. §§ 216(b), (c) (1988); Schulte Co. v. Gangi, 328 U.S. 108 (1946); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); see also Age Discrimination in Employment Act—Waiver of Rights: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 100th Cong., 2d Sess. 110-15 (1988) (documenting communications between Senator Metzenbaum and Labor Department officials).

[166] In contrast to the waiver of FLSA claims, the courts have long allowed waivers of mature Title VII claims without government supervision, so long as the waivers are "knowing and voluntary." See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974); Torrez v. Public Service Co., 908 F.2d 687 (10th Cir. 1990); Stroman v. West Coast Grocery Co., 884 F.2d 458 (9th Cir. 1989), cert. denied, 111 S. Ct. 151 (1990); Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986); Pilon v. University of Minn., 710 F.2d 466 (8th Cir. 1983); Cox v. Allied Chem. Corp., 538 F.2d 1094 (5th Cir. 1976), cert. denied, 434 U.S. 1051 (1978).

In the courts, the advocates of the Title VII "knowing and voluntary" standard for accepting unsupervised waivers under the ADEA held sway. The leading case is Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir.), cert. denied, 479 U.S. 850 (1986); see also Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3rd Cir. 1988) (rejecting traditional contract standards used in *Runyan* in favor of requiring a "careful evaluation of the release form itself as well as the complete circumstances in which it was executed" in order to determine whether a waiver is knowing and voluntary); Coventry v. United States Steel Corp., 856 F.2d 514 (3rd Cir. 1988) (holding same).

Only one district court held that releases of ADEA claims are unenforceable if not supervised in the same manner as the release of FLSA claims. See Gormin v. Brown-Forman Corp., 744 F. Supp. 1100 (M.D. Fla. 1990); Robert J. Aalberts & Eileen P. Kelly, Waivers Under the ADEA: An Analysis of the Age Discrimination in Employment Waiver Protection Act of 1989, 1989 Lab. L.J. 739; Michael A. Chagares, Determining the Validity of Waivers Under the Age Discrimination in Employment Act: The Third Circuit Approach and the Age Discrimination in Employment Waiver Protection Act, 19 Seton Hall L. Rev. 678 (1989); Paul I. Weiner, Can Employees Waive Age Discrimination Act Rights?, *in* N.Y.U. 41st Annual Nat'l Conf. on Lab. 12-1 (1988); Robert G. Haas, Note, Waivers Under the Age Discrimination in Employment Act: Putting the Fair Labor Standards Act Criteria to Rest, 55 Geo. Wash. L. Rev. 382 (1987); Wax, supra note 69.

to allow potential age discrimination claims to be as easily forfeited as potential race or sex discrimination claims under Title VII:

> ADEA waivers often do *not* arise in the context of an individual dispute. Employers offer "voluntary" exit incentives to groups of employees as part of voluntary or involuntary termination *programs*. There is no dispute between individuals and their employer. There is also no negotiation between individuals and their employer. The employer offers the exit incentives on a "take-it-or-leave-it" basis. Moreover, the incentive option is labelled "voluntary" and is financially attractive. In this context, older employees have little or no reason to suspect that their employer is a potential adversary. These older workers may be manipulated or even coerced into signing away their ADEA protections.[167]

Arguments such as these led Congress to pass riders to EEOC appropriation bills in both 1987 and 1988[168] suspending the operation of an EEOC regulation that permitted the waiver of ADEA claims without EEOC supervision.[169] They also led Congress to consider ADEA waiver legislation reported out of Senate and House Committees in 1989 that would have allowed waivers of ADEA claims only under strict standards after a bona fide claim of age discrimination had been made to the EEOC, a court, or directly to an employer.[170] However, it was not until the passage of Title II of the OWBPA that Congress agreed on a new system for treating waivers of ADEA rights.

Although that system adopts the Title VII "knowing and voluntary" standard, it also specifies minimum conditions that a purported waiver must meet in order to satisfy this standard under the

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167 H. Rep. No. 221, 101st Cong., 1st Sess. 11 (1989).

168 See Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act for Fiscal Year 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216 (1988); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987); 134 Cong. Rec. H8399 (daily ed. Sept. 27, 1988); 134 Cong. Rec. S10,022 (daily ed. July 27, 1988); 133 Cong. Rec. H12,401, 12,534 (daily ed. Dec. 21, 1987); 133 Cong. Rec. S14,383-84 (daily ed. Oct. 15, 1987).

169 52 Fed. Reg. 32,296 (1987) (codified at 29 C.F.R. § 1627.16 (1988)).

170 See H.R. 1432, 101st Cong., 1st Sess. (1989); S. 54, 101st Cong., 1st Sess. (1989). The Senate Bill would also have allowed waivers supervised by the EEOC or a court. See S. 54, supra, § 2. The House Committee on Education and Labor reeognized that its recommended legislation would "preclude employers from obtaining valid and binding waivers as a part of exit incentive and group termination programs through EEOC supervision of the waiver process during such programs." H.R. Rep. No. 221, supra note 167, at 17.

ADEA.[171] The framing of these conditions confirms that, although

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[171] Section 201 of the OWBPA provides:

Section 7 of the Age Discrimination in Emplyoment Act of 1967 (29 U.S.C. 626) is amended by adding at the end the following new subsection:

(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary.

Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calcnlated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to exeeuting the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effeetive or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calcnlated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or seleeted for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary uuless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of

Congress was aware and concerned about the potential for employers violating the ADEA through exit incentive programs, it did not generally condemn any particular classification of such programs. Congressional concern about the potential illegality of exit incentive programs is expressed by Title II's additional conditions on waivers "requested in connection with an exit incentive or other employment termination program offered to a group or class of employees."[172] First, employees must be given a period of at least forty-five days to consider such requests, rather than the twenty-one day period applicable to other waiver solicitations.[173] Second, at the start of the forty-five day period, employers must provide detailed, written information about the group termination program. This information is to include identification of the class of individuals eligible for the program, the factors that define their eligibility, the job titles and ages of these individuals, and the ages of all individuals in the same job classifications that are not eligible or selected for the program.[174] The reason for these informational requirements, as explained in the Report of the Senate Committee that drafted them, is to provide solicited employees with at least some of the information they need to make a realistic

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competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's right and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 626(f).

[172] 29 U.S.C. § 626(f)(1)(F)(ii); see id. § (f)(1)(G).

[173] 29 U.S.C. § 626(f)(1)(F)(ii).

[174] 29 U.S.C. § 626(f)(1)(H). As reported out of the Senate Labor and Human Resources Committee, S. 1511 also required an employer seeking a waiver in connection with an exit incentive program to inform solicited employees of "any demotion, termination, or other adverse action that the employer either knows or should know may occur if the individual declines to participate in such program, and the approximate date when such adverse action reasonably may be anticipated to take effect." S. 1511, 101st Cong., 2d. Sess. § 201 (1990). This provision was deleted when a compromise statute was agreed upon during consideration of S. 1511 on the Senate floor. See supra text accompanying note 138. Again, the reason for the deletion was probably the concern of Republican senators that such information could be the basis for questioning the "voluntariness" of the program. See S. Rep. No. 263, supra note 121, at 62 (explaining minority views); see also supra note 156 (explaining disavowal by managers of relevant sentence in committee report).

assessment of whether the exit incentive program "gives rise to a valid claim under the ADEA."[175]

This additional regulation of waivers requested in connection with an exit incentive program, however, should not be interpreted inconsistently with the legislative history of Title I to express a condemnation of all age-based exit incentives. The additional regulation of exit incentive program waivers indeed rests on an assumption that these programs, which are of course normally at least partially age-based, can be offered without the solicitation of waivers of any claims against the programs. This assumption is expressly stated in the House Committee Report on the House waiver protection legislation that was eclipsed by the OWBPA.[176] As the House Report acknowledged, that legislation would have effectively precluded employers from obtaining a waiver as part of an employee's acceptance of an exit incentive.[177] Yet rather than in effect condemn all exit incentive programs, the Committee Report notes that valid waivers are not necessary for the

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[175] S. Rep. No. 263, supra note 121, at 34. The drafters of subsection (H) hoped to discourage coercive age-based exit incentive programs by requiring disclosure of the age-based nature of the program as a condition of extracting waivers of claims against it. It seems doubtful, however, that the provision will accomplish this purpose. Most conditional exit incentive windows, like those offered in *Henn* and *Paolillo*, are overtly age-based. Offerees who wish to challenge such programs generally have difficulty proving not that they are age-based, but rather that they are accompanied by a concurrent threat of age-based constructive discharge. The full Senate's deletion of the additional requirement that employers seeking waivers tell offerees of any adverse action that is anticipated against those who decline the offer thus seems significant. See supra note 174.

Moreover, even though this additional disclosure requirement would have helped an offeree to establish constructive discharge, it still would not necessarily have enabled her to prove that the constructive discharge was age-based. For that she would have to prove that the employer threatened to subject her to adverse action on the basis of her age, not simply that the employer stated that she would be subject to the same risk of discharge in a reduction in force as other younger employees. See Bodnar v. Synpol, Inc., 843 F.2d 190 (5th Cir. 1988); *Henn*, 819 F.2d 824; see also supra note 86 (describing showing required under constructive discharge approach).

Furthermore, an employee who accepted the offer after full disclosure would have had to sign a valid waiver and therefore could not sue even if she did have a good case of age-based coercion. Only an employee who declined the offer and the accompanying waiver would be able to use the information provided in the waiver, and such an employee presumably would have a cause of action under the ADEA only if she were actually discharged. A shrewd employer, however, could satisfy its goal of reducing the age of its workforce by threatening older employees to an extent sufficient to induce acceptances of enough waivers to make actual age-based discharges unnecessary.

[176] H. Rep. No. 664, supra note 124, at 52; see also supra note 170 (explaining waiver provisions in the House and Senate bills).

[177] H. Rep. No 664, supra note 124, at 52.

offer of valuable exit incentive benefits, as evidenced by the high proportion of past exit incentive programs that had not solicited waivers.[178]

Moreover, under Title II an employer who does not seek waivers to insulate itself from lawsuits by exit incentive offerees need not provide any special information about its incentive program or meet any other Title II conditions for valid exit incentive waivers. Title II's treatment of exit incentive waivers is framed to prevent employers from attempting to insulate themselves from claims that their exit incentive plans do not meet the standards for legality set out in Title I; this regulation does not present alternative standards of legality for such plans.

Furthermore, Title II makes clear that Congress did not view the acceptance of age-based exit incentives as a de facto waiver of future ADEA protection. One condition for all valid ADEA waivers under Title II is that they do not "waive rights or claims that may arise after the date the waiver is executed."[179] Had Congress viewed age-based exit incentives as a waiver of future ADEA protection, this provision would have obviated any additional treatment of such incentives in either Title I or Title II. The only waiver of ADEA rights through exit incentive programs about which Congress was concerned was the waiver of the right to challenge the exit incentive program as being coercive or discriminatory itself, not the waiver or sacrifice of the protection that the ADEA would give to those threatened with future discharge if they decline a conditional retirement incentive.

The regulation of ADEA waivers established in Title II also confirms Congress's intent in Title I that courts treating conditional age-based exit incentive offers require both the *Henn* and *Paolillo* standards to be met. First, the *Henn* constructive discharge standard must be applied to avoid a significant loophole in Title II. Under Title II, an employer who discharges an employee must meet certain strict conditions before securing that employee's release of any age discrimination claims. If the *Ackerman* decision controlled, an employer who tells an employee that she will be discharged without extra benefits if she doesn't resign during the incentive window would not have to meet those strict conditions. Finding that a threat of

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[178] Id. at 25.

[179] Id. § 626(f)(1)(C).

imminent discharge, concurrent with an exit incentive offer, constitutes grounds for constructive discharge eliminates this loophole; an employer who wishes to avoid being sued for the constructive discharge would have to meet the Title II conditions in order to secure a waiver of the employee's right to sue.

Second, Title II also supports the conclusion that the *Henn* constructive discharge approach must be supplemented with the *Paolillo* fair process approach. By requiring minimum periods for consideration, an opportunity to consult with an attoruey, and clear written statements of what is being traded,[180] Title II expresses a congressional judgment that employees can be manipulated by employers to accept trades of important rights that the employees would not wish to make after full and knowledgeable consideration. Approval of acceptances of resignation incentives without consideration of the fairness of the process by which the acceptances are secured would be inconsistent with this design.

In sum, the OWBPA does not require employers to meet the specific conditions of Title II before securing acceptances of early retirement incentives. Congress clearly did not view the acceptance of a retirement incentive as the waiver of an ADEA right. However, courts should read the Act as a whole to require the kind of flexible, fair process approach to voluntariness taken by the *Paolillo* court, as well as the constructive discharge approach taken by *Henn*.

IV. The Alternative of Prohibition

The first two Sections of this Article argue that age-based conditional exit incentive windows obstruct achievement of the antidiscrimination goals of the ADEA, and that the pre-OWBPA judicial regulation of these incentives under both the *Henn* and *Paolillo* precedents was inadequate to remove this obstruction. The immediately preceding Section argues that the OWBPA can be fairly read to approve only a combined, perhaps somewhat modified, *Henn/Paolillo* approach. This raises the question of what more could have been, or still could be, done by Congress. The best answer is simply to expand the *Henn* approach and treat the offer and acceptance of any age-based *conditional* exit incentive as tantamount to discriminatory dis-

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[180] *Id.* § 626(f)(1).

charge and therefore illegal, without requiring proof of any significant threat of age discrimination against offerees who decline acceptance.

A. Prohibiting Conditions in Age-Based Exit Incentives

The only practical way to prevent employers from using retirement incentives to effect the termination of particnlar workers selected on the basis of age who would prefer continued employment is to prohibit age-based incentives from being temporally or otherwise conditioned. Offerees who know that a benefit that would be available to them if they retire now will be denied to them if they are discharged later must rationally take into account the chances of future discharge as well as the benefits of retirement when comparing acceptance of retirement and continued work. Therefore, the only way to be sure that an employer has not induced the retirement of employees who prefer continued work is to require the employer to make a binding promise that the standard of retirement that is offered one day will continue to be an option for the remainder of the offerees' employment, regardless of how that employment is ultimately terminated. If such a promise is made, employee-offerees can choose freely between continued work and retirement at a particular level without concern about the likelihood that they will not be allowed to continue to work in any event.

Treating the offer and acceptance of *conditional* exit incentives as tantamount to discharge would not prevent employers from offering general early retirement incentives to any group of employees, however selected. Employers could continue to make retirement as attractive as they wished, as long as they did not threaten the loss of both employment and the attractive retirement by making the retirement offer conditional. Eliminating the conditional nature of exit incentives by treating them as de facto discharges thereby avoids the most problematic conflicts with the goals of the ADEA, but still generally allows employers to use early retirement incentives.

It also would not be necessary to require employers to pay out the same present value of retirement benefits to a sixty-five-year-old that he was first offered as a fifty-five-year-old. The goal should be to insure that the offeree understands that he will not risk sacrificing a particular standard of retirement in the future by following his preference for continued work in the present. This requires only that the annualized retirement income of an offeree who at first declines retire-

ment and continues work until he is sixty-five will be at least equal to the annualized retirement income of the offeree who accepts retirement when it is first offered at age fifty-five.[181] Requiring more would be unnecessary. Like any pension plan that offers increased benefits at a later age, offering more than an equal annualized retirement income to someone who elects to continue employment to a later age would encourage employees who did not prefer work to retirement to nonetheless continue work to achieve a higher standard of retirement later. Employers can, of course, provide such incentives to continued work, but achievement of the antidiscrimination goals of the ADEA does not require them to do so.[182]

This solution to the tension between age-based conditional exit incentives and the antidiscrimination goals of the ADEA, however, would require a clarification of the treatment of the waiver of ADEA rights given in Title II of the OWBPA. Without a clarification, employers could circumvent any prohibition of such incentives by conditioning them on acceptance of a valid waiver of any claim of illegal discriminatory constructive discharge. Employers would of course have to meet all the Title II procedural standards, but meeting these standards would not eliminate the basic pressure on offerees to accept early retirement benefits to avoid the loss of those benefits in a later forced termination. Employers who used this loophole and made acceptance of their conditional exit incentives depend on a valid waiver would thereby escape the threat of litigation—employees who accepted the offer would have waived their right to sue, and employees who did not and remained at work could not claim that they were discharged.[183]

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[181] When lump-sum retirement incentives are offered, such annualization requires actuarial calculations, similar to those required by an application of the cost-incurred defense for general benefit programs as codified by the OWBPA. See Id. § 623(f)(2)(B)(i).

[182] In fact, most continuing, nonwindow, early retirement incentive plans subsidize early retirement much less than that which should be permissible. These plans may grant an annualized income based on what would be the present value of the aggregate pension that a worker would have achieved had she retired at the "normal" retirement age; that is, they give the worker credit for the years between her actual "early" retirement and the "normal" retirement age. See Ippolito, supra note 15, at 562. This still results in lower annualized pension benefits for the "early" retiree than for the "normal" retiree because the former has more years through which to spread the same present value of benefits. The level of subsidy is thus less than the subsidy that would be given by granting the same annualized benefits.

[183] Employers offering exit incentives have in fact increasingly elected the waiver option. The Government Accounting Office report to Congress found that usage of waivers increased

The clarification that is required to avoid this loophole derives from an appreciation that the acceptance of a conditional exit incentive effectively waives not only claims against discriminatory acts that have already occurred, but also protections against discriminatory acts that might occur in the future. As explained in Part I.D, an acceptance of a conditional exit incentive is like a prospective waiver in that it permits a prospective ADEA defendant to effect a discriminatory design without ever being subject to the risks of litigation. By contrast, an employer who settles a claim against a discharge that has already occurred has been vulnerable to suit and is not encouraged to effect further discrimination. The employer pays for what it has done, not for the right to do more in the future.[184] Therefore, ADEA rights of action against discharges effected through conditional exit incentives simply should not be treated as subject to waiver.[185]

B. Why the OWBPA Failed to Adopt This Approach

The simplicity of this solution to the tension between age-based conditional exit incentives and the antidiscrimination goals of the ADEA raises the question of why it was not perceived and embraced by a Congress quick to reverse the Supreme Court's insulation of discriminatory employee benefit programs from challenge and clear in its desire to insure that age discrimination protections not be involuntarily waived. There may be two answers to this question, one reflecting the interests of employers, the other the aggregate interests of older workers.

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after 1984, especially during the last two years studied, 1987 and 1988. Government Accounting Office, supra note 8, at 6. During these last two years 35% of the companies offering exit incentives made them conditional on the acceptance of waivers, generally "to avoid having terminated employees file claims and lawsuits after receiving enhanced benefits from exit incentive programs." Id. It is too early to tell whether the explicit requirements for valid waivers enacted in the OWBPA will result in reduced use.

184 See supra text accompanying notes 66-68.

185 This conclusion could not be avoided by adoption of the additional waiver disclosure standard for exit incentive programs reported out of the Senate Labor Committee but deleted from the OWBPA before passage on the Senate floor. See supra note 174. This standard would have required employers to inform offerees of "any demotion, termination, or other adverse action that the employer either knows or should know may occur if the individual declines to participate in such program, and the approximate date when such adverse action reasonably may be anticipated to take effect." S. Rep. No. 263, supra note 121, at 4. However, this standard would not change the fact that any waiver they signed would enable their employer to accomplish a discriminatory design that it might never have implemented absent the agreement.

From the perspective of employers concerned about the special costs of employing older workers, the no-waiver solution is undesirable because it impedes their use of early retirement to reduce the labor costs of filling certain job classifications. As a number of courts have observed, conditional exit incentives are offered not simply as a bonus to make retirement at any age above some minimum more attractive, but rather as an incentive for older employees, who are likely to be earning more, to retire sooner rather than later.[186] As these courts generally have failed to appreciate, however, this design is inconsistent with the commands of the ADEA because it rests on unfair blanket generalizations about older workers.[187] As argued in Part I, employers may not act on these generalizations through discriminatory discharges, and should not be able to achieve the same goals through conditional exit incentives.[188]

Of course, if the ADEA allows employers to discharge all workers who are earning more than their productivity warrants,[189] it also should be acceptable for employers to induce the resignation of any such workers through conditional exit incentives. Yet in order to be faithful to the ADEA's antidiscrimination principles, such exit incentives, like direct discharge notices, should be allotted on the basis of individualized assessments of productivity relative to pay, not on the basis of age. An employer that claimed it offered only unproductive older workers early retirement benefits because it felt less responsibility toward unproductive younger workers should then have to show that it directly terminated younger workers of comparable relative productivity.

It seems, however, that Congress did not fail to prohibit age-based conditional exit incentives simply because "efficiency" claims by employers provoked ambivalence about the application of general antidiscrimination principles to retirement. The legislative history of the OWBPA instead suggests that Congress was at least equally concerned that a prohibition of conditions in age-based exit incentives would not be popular with many older workers. The American Asso-

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186 E.g., Karlen v. City Colleges of Chicago, 837 F.2d 314, 316 (7th Cir. 1988); Paolillo v. Dresser Indus. (*Paolillo II*), 821 F.2d 81, 84 (2nd Cir. 1987).

187 Judge Posner's opinion in *Karlen* is an exception. See supra note 132.

188 See supra text accompanying notes 35-51.

189 As noted above, this proposition is itself subject to considerable debate because of the inherent disparate impact on older workers. See supra note 51.

ciation of Retired Persons ("AARP"), the primary lobbyist for passage of the OWBPA, accepted the OWBPA's endorsement of the *Henn/Paolillo* prior law on conditional exit incentives that are offered only to workers who have reached some minimum age.[190] The AARP, like the Congress it lobbied, was instead primarily concerned with *Cipriano*-type challenges to early retirement plans.[191]

The AARP, and the OWBPA congressional advocates that followed its lead, may have been concerned that prohibiting age-based conditional exit incentives could lead to a significant reduction in the aggregate retirement benefits offered by American employers. In particular, it may have been concerned that the prohibition of conditional age-based exit incentives could cause employers to allot fewer resources to easing the pain of layoffs for older workers. Without the option of conditional retirement incentives, employers might remove fewer older workers from work during reductions in force, but those who were removed, whether young or old, would receive fewer severance benefits. For the AARP, this may be especially troubling because many of the older workers who accept conditional retirement incentives probably do prefer retirement at the promised standard to continued work with the future prospect of retirement at that standard. Prohibiting conditional incentives would prevent such workers from achieving a retirement that they would prefer to even a guaranteed job. It is therefore not surprising that conditional age-based exit incentives would be acceptable to the AARP, which must be primarily concerned with the income of the retired persons that dominate its membership, rather than the rights of working older persons to be protected from discriminatory treatment in their jobs.

This explanation of Congress's failure to treat the offer of age-based conditional exit incentives as tantamount to discharges does not, however, change the fact that this failure significantly compromises the antidiscrimination purposes of the ADEA. For even if the fuller regulation of conditional exit incentives would result in the reduction of retirement benefits for many workers, it is also clear that the present

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[190] See Joint Hearing, supra note 124, at 467, 471 (providing answers of Horace B. Deets, Executive Director of AARP, to questions from Senators Pryor and Metzenbaum regarding early retirement incentives); see also id. at 300-02 (providing prepared statement of Christopher Mackaronis, former Manager of Advocacy Programs in the AARP Worker Equity Department).

[191] See id. at 174-75 (providing prepared statement of Horace B. Deets, Executive Director of AARP); id. at 303-02 (providing prepared statement of Christopher Mackaronis).

regulation as approved by Congress enables employers on the basis of age-based generalizations to induce the termination of older workers who would prefer to continue to work.

As stressed in Part I, antidiscrimination law has never accepted this sort of advantage for some protected status group members as a justification for the disparate treatment of others.[192] The applicable analogy of the prospective waiver of antidiscrimination rights proved instructive in Part I. The OWBPA confirms that employers cannot purchase the right to implement discriminatory programs, regardless of the generosity of the purchase price and the number of protected employees who are anxious to receive it.[193] The goals of antidiscrimination law are not simply private; they also include the public goal of preventing employment decisions from being made on the basis of status-based generalizations that are unfair to many individuals, even when they help many others. This is particularly true of the ADEA, which was based on an understanding that the employment problems of older workers derive substantially from age-based generalizations that are not usually based on animus.[194]

Employers might argue that even though age-based conditional exit incentive offers disadvantage some older offerees, antidiscrimination principles do not demand that they be treated like age-based terminations, because the former are not necessarily based on generalizations

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[192] See supra note 52 and accompanying text.

[193] See supra text accompanying note 179.

[194] See 29 U.S.C. §§ 621(a)(2), (b); Wirtz Report, supra note 13, at 6. Congress's primary concern in the ADEA was that older workers be given a fair opportunity to be free from the stigmatization created by age-based decisionmaking, as opposed to the goal of improving the aggregate economic position of older Americans as a group through encouraging more lucrative pensions. For instance, the legislative findings and purposes set forth in section 2 of the Act stress the impact of the "setting of arbitrary age limits" and "arbitrary age discrimination" on the "employment" of older workers "with resultant deterioration of skill, morale, and employer acceptability." 29 U.S.C §§ 621(a(1)-(3), (b). Furthermore, the comments of supporters of the ADEA are replete with expressions of concern about the impact of unemployment on older workers who could be productive. See, e.g., 113 Cong. Rec. 35,056 (1967) (statement of Sen. Randolph); 113 Cong. Rec. 34,743 (1967) (statement of Rep. Kelly). The legislative history of the 1978 and 1986 amendments to the ADEA reflect the same primary congressional goals. See, e.g., H.R. Rep. No. 756, 99th Cong., 2d Sess. 5-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5628, 5631-33 (stressing the need to retain productive workers and the declining health that can result from premature retirement); S. Rep. No. 493, 95th Cong., 1st Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 504, 507 (focusing on the same consideration). The ultimate primary goals of the ADEA are thus in tension with *any* indulgence of age-based plans to induce the termination of those who would prefer work to retirement, regardless of the aggregate impact of these plans on pensions.

about older workers. As noted above, however, employment discrimination law generally has not excused the disparate treatment of protected status groups that results in disparate effects simply because the disparate treatment may have a benign motivation.[195] The possibility of benign motivation does not make a strong case for rejecting the basic prohibition of the kind of age-based conditional exit incentive offers that have pervaded the economy in the last decade.

C. Qualifications to Prohibition

The plausibility of benign motivation, however, does suggest two possible qualifications to the approach to prohibition suggested above. The first qualification would clarify that the offer of age-based retirement incentives to those who voluntarily resign is not a constructive discharge simply because the employer conditions the grant of exit incentives to involuntarily terminated employees on their acceptance of a valid waiver of their rights to sue. This qualification would permit employers to protect themselves from costly litigation after the acceptance of a retirement bonus, without compromising the protection of ADEA goals. The qualification is based on a recognition that employees who resign with special retirement benefits are less likely, and less able, to sue than employees who are discharged, even if the resigning employees do not formally waive their rights to sue. This fact explains why an employer would not want to provide the same retirement benefits to a discharged employee who could practically and legally threaten to sue the employer for the discharge as to an employee who could not. It does not, however, prevent the employer from offering the special retirement benefits as a settlement of any unfair dismissal claim to any employee who it discharged. Requiring this offer of a settlement would insure that an employee offered a bonus for voluntary retirement would not feel compelled to accept the bonus to avoid a later, less desirable forced retirement. The employee would know that the enhanced retirement would be available even if he were discharged. He simply might have to make a hard choice on settlement of any unfair discharge claim at that time.

This qualification admittedly would not satisfy employers who claimed an unwillingness to give additional retirement benefits to workers who, by refusing resignation, forced the expenditure of funds

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[195] See supra text accompanying note 37.

on evaluations of their individual contributions to firm productivity. This claim, however, is much less compelling than the reluctance to give additional benefits to those who have the capability of suing for their termination. Recall again that one of the central purposes of the ADEA is to encourage consideration of the individual merit of older workers and to prevent reliance on generalizations about the decline of productivity with age. A desire to avoid the costs of individual evaluations may not be equivalent to a desire to reduce the age of the workforce, but it is nonetheless ultimately in tension with the broad goals of the ADEA.

A second possible qualification on the prohibition of age-based conditional exit incentives is suggested by the plausibility of benign motivations underlying such incentives during reductions in force. Employers can claim that there are good reasons why their calculations of the costs and benefits of generous retirement allotments may be different during such periods than during periods when they discharge only unproductive workers. During reductions in force, the costs of losing productive older workers are less, whereas the internal public relations benefits of providing more comfortable retirements may be greater. Employers therefore may be unwilling to offer retirement incentives to older workers during periods of retrenchment if the employers are told they will be vulnerable to constructive discharge suits if they do not promise the older offerees that they can obtain the same benefits if they retire later in a period of expansion.

This concern could be addressed by requiring employers to promise only that they will offer the same retirement benefits to any employee who resigns or is discharged during a reduction in force. An employer who did not offer the same retirement benefits to a discharged employee that it previously had offered the employee would have to establish that the prior offer was part of a reduction in force program and that the employee had been later discharged not as part of a cutback in employment, but rather because of her individual performance.

This qualification on the prohibition of conditional age-based exit incentive offers, unlike the first qualification, would compromise to some extent the purposes of the ADEA. Employees offered retirement incentives as part of an employment cutback could not be pressured into acceptance by the fear that the cutback would result in a layoff without enhanced retirement. On the other hand, such offerees

would still have to calculate the chances that they would be forced by their employer, or by their own condition, to retire later without the enhanced benefits. Some employees who would prefer to continue to work would therefore still choose retirement because of the conditional nature of the incentive. In light of Congress's apparent concern about not discouraging retirement incentive offers that could soften the effects of reductions in force, however, this qualification seems a plausible and perhaps necessary compromise of antidiscrimination goals. It certainly is sensible to treat exit incentives offered during reductions in force more leniently than those offered, as in *Henn*, simply to facilitate a change in personnel. There is no plausible reason why an employer that is willing to give benefits to older workers if they retire and are replaced by younger personnel should not be willing to offer the same benefits to these older employees if they decline retirement and are later discharged.[196]

Other possible qualifications of the prohibition approach suggested here might be based primarily not on benign employer motives for age-based conditional exit incentives, but rather on the intuition of many in Congress and the judiciary that such incentives may only be undesirable to the extent they carry a threat of involuntary discharge. This intuition is in part what underlies the embracing of the *Henn* approach by both branches.

One qualification this suggests is that the required promise of future offers of enhanced benefits need apply only to future involuntary discharges, not to future voluntary resignations. The argument for this qualification is relatively straightforward. Employees can only be

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[196] An employer, however, conceivably might have a plausible reason for the intermittent offer of window plans during periods when it was not reducing its force. The employer might take the position that it wants to give its most senior managerial employees the option of retiring early with generous benefits, but does not want to do so on a continuing basis because of its need to plan rationally for the future. Such an employer might tell offerees of its intermittent window plans that they need not fear any increased chance of discharge if they decline any offer. This plausible scenario might warrant a further compromise on the basic principle espoused in the text. Employers might be allowed to offer time-conditioned, age-based incentives during periods when they are not reducing their force, if they make commitments that there will not be more stringent evaluations of those who decline the offer and those commitments are consistent with their past practice.

However, such a qualification would still compromise antidiscrimination goals because some workers would remain fearful that they could be forced to retire during a period without a window incentive. Furthermore, the difficulty of gathering information about past practices would make this qualification difficult to implement.

coerced into accepting a retirement incentive by an explicit or implicit threat of a later involuntary termination without the incentive. They cannot be coerced by the possibility that their preference for continued work over retirement might change at a point when they no longer have the option of enhanced benefits. We need not be concerned about employees choosing retirement because of the latter possibility, even though they may still prefer continued work now. Such choices simply reflect some hard intrapersonal balancing between present preferences and likely future preferences.

There are two problems with this qualification, one with the feasibility of its implementation, and one with its theoretical basis. The practical problem—the difficulty of distinguishing between voluntary resignations and forced discharges—should be sufficient reason to reject the compromise for the type of age-based conditional window plan utilized in *Henn* and *Paolillo*. If the compromise were adopted for such plans, employees who wanted to retire and claim previously offered retirement incentives could provoke a discharge by purposefully working less productively. To avoid such strategic behavior, the courts would have to try to develop some kind of "constructive resignation" doctrine, which probably would do more to generate litigation than to accurately distinguish cases.

The theoretical basis underlying this qualification is also problematic, in that it could support a fully practical insulation of conditional exit incentive plans of the kind involved in *Cipriano* and *Karlen*. In those cases, the employer offered additional retirement benefits to employees who retired while they passed through a particular age band, between the ages of fifty-five and sixty in *Cipriano* and between fifty-five and sixty-four in *Karlen*. This type of age-based conditional exit incentive encourages the retirement of older workers within the favored age band, not by threatening them with discharge after passing through the upper limit of the band, but rather by making clear that any retirement after this limit will be at a lower level. If it were true that antidiscrimination law should be concerned only with acceptances induced by fear of discharge after nonacceptance, we should not be troubled by the effects of offering retirement incentives to workers only while they are passing through particular age ranges.

This theory, however, is not correct. As Judge Posner recognized in *Karlen*,[197] retirement offers limited to certain age bands are in tension with the purposes of the ADEA because they enable employers to achieve a design that the Act condemns: the elimination of older workers who would prefer to continue to work. The fact that this is achieved by denying a benefit to workers beyond a certain age at retirement that is made available to certain younger workers, rather than by termination threats, does not change the fact that an age-based plan can be used to reduce the age of a workforce because of age-based generalizations about the present or future productivity of older workers.

Further, it is not clear that a compromise that would allow a *Cipriano*-type plan, although condemning a *Henn*-type plan, would actually be more politically acceptable. As noted above, the AARP has been clearly more hostile to *Cipriano*-type plans, if only because they discriminate against nonofferee older workers. Though the AARP seems not to have met its goal,[198] it apparently would have liked to prohibit any retirement benefit plan that favored younger retirees within a preferred age band over older retirees beyond the age band.[199]

There are, however, practically feasible and politically attractive qualifications of the full prohibition of conditional age-based exit incentives that are supported by this theoretically flawed but intuitively attractive notion that the ADEA should only be concerned with acceptances that are induced by some fear of subsequent discharge. These compromises would allow employees to escape the worst effects of age-based exit incentives and yet would allow such incentives to remain relatively attractive to employers.

One possible compromise would be to allow employers to secure agreements from union representatives to offer conditional age-based exit incentives to represented employees protected from arbitrary discharge by "just cause" and seniority clauses in collective bargaining agreements. A unionized employee who challenged his acceptance of such a negotiated exit incentive might be forced to show that his collective bargaining agreement did not offer him secure protection from the fear of discharge without the incentive. This would appeal to

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[197] See supra note 132.

[198] See supra text accompanying note 142.

[199] See supra note 191.

unions anxious to negotiate extra retirement benefits that would be attractive to a majority of their membership. It nonetheless would remain a compromise because organized employees who would prefer continuing to work would still be potentially pressured to accept conditional incentives even if they felt fully protected by their collective agreement: they not only could fear a total shutdown of their operation, they also could anticipate not being able to work productively at a later time when the incentive was not made available.

Another politically attractive compromise would be to allow employers to reduce the retirement benefits offered under permanent or "threshold," rather than window, plans. In a threshold plan, once an employee achieves eligibility for a certain level of retirement benefits, she retains that eligibility as long as she is employed. However, the compromise would allow permanent reductions in benefits offered under such plans, not only for employees who had not yet achieved eligibility for the higher benefits but also for employees who had achieved eligibility. This allowance would be a compromise because employees might be forced to decide to retire today because of the ever-present possibility that their employer will announce a reduction in retirement benefits tomorrow.

It remains politically attractive for two reasons. First, in most circumstances, the possible change in a permanent plan, rather than the closure of a temporary window plan, would not induce fear of involuntary discharge. Second, the compromise would avert the chance that employers would be discouraged from offering generous retirement benefits because of a fear that currently healthy business and pension accounts will turn sickly sometime in the future. This compromise is thus also supported by a plausible benign employer motivation for the immediate reduction of retirement benefits offered in threshold, rather than in window plans.

Any such compromise, however, should be limited to insure that employers do not manipulate threshold plans for the purpose of reducing the age of their workforce. The law might be drafted to prohibit any pattern of changes in threshold plans that have the effect of inducing employees to retire in some limited time period while benefits are high. For instance, employers should not be permitted to establish a pattern of alternative reductions and enhancements in retirement benefits that would unnecessarily augment employees' anxiety about the need to retire quickly. In addition, employers should

not be allowed to announce a future reduction in retirement benefits that makes eligible employees feel pressured to retire while benefits are still high.[200] Of course, in some cases employees will be able to predict a possible reduction in retirement benefits because of the financial condition of their employer. For instance, employees might fear that an economically strapped employer asking for concessions from their union during a round of collective bargaining would not continue its pension commitments after the term of the present collective agreement expires.[201] The law need only ask that an employer not intentionally aggravate such fears with unnecessary comments about the likelihood of cutbacks, or even with strategic silence when it knows pension cutbacks will not be negotiated.[202]

CONCLUSION

The primary argument of this Article has not been that conditional age-based exit incentives should be prohibited because such incentives do more harm than good. This Article has argued not from first moral or ethical principles, but rather from the principles of antidiscrimination law expressed in the ADEA and other status discrimination laws as interpreted by the courts. The main argument has been that the law's current treatment of conditional age-based exit incentives is disturbingly inconsistent with these principles.

The normative goals of particular laws, including antidiscrimination laws, of course may be compromised to serve other social goals. Nevertheless, when compromises between conflicting social goals in one aspect of the law are inconsistent with the majority of similar

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[200] See, e.g., Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir. 1990); see also supra note 84 (explaining the facts and analyzing the approach in *Mitchell*).

[201] See Bartman v. Allis-Chalmers Corp., 799 F.2d 311, 314 (7th Cir. 1986) (holding that retirements during period of collective bargaining that might have resulted in pension cutbacks were not constructive discharges).

[202] The court in *Bartman* thus may have been too quick to conclude that the pressured early retirements in that case could not be treated as constructive discharges because the employer committed no "act" to induce the retirements, but rather simply declined to rescue its employees from a difficult choice. Id. at 315. The employer in fact may not have been able to rescue the employees without compromising the collective bargaining that it had a right to conduct under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988). However, the *Bartman* court never determined whether pensions were even a subject of bargaining or whether the employer instead simply took advantage of employee fears to induce an extraordinary number of early retirements.

compromises that pervade that same area of the law, this discongruity raises serious questions which must be addressed.

For those who are convinced of the validity of the pervading compromises, highlighting such inconsistencies may make a compelling case for the reform of the anomalous legal doctrine. For instance, those who embrace the congressional judgment that mandatory retirement plans ought to be prohibited should hesitate to accept conditional age-based exit incentives, once it is established that such incentives have the same effect as mandatory retirement.[203] Similarly, those who accept the dominant legal doctrine that benign motivations should not excuse status-based employment decisions should hesitate to accept benign motivation as a justification for conditional age-based exit incentives.[204]

Furthermore, the fundamental consistency of law is an important social goal in itself—sufficiently important, indeed, to balance against the goals of substantive justice. Thus, if a critic of the prohibition of mandatory retirement, or even of age discrimination regulation in general, independently valued consistency or coherence as a goal of the legal system, that critic might be persuaded by this Article's argument that conditional age-based exit incentives ought to be further regulated.

There are numerous reasons why a critic's lack of allegiance to the ADEA's goals might be trumped by a commitment to the coherence of antidiscrimination legislation. Legal coherence may be valued highly for several reasons. Perhaps most importantly, it serves goals of equality, insuring that individuals in positions that are equal in all relevant respects are treated equally.[205] It insures, for instance, that

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[203] See supra text accompanying notes 53-55.

[204] See supra text accompanying note 37. Moreover, highlighting inconsistent compromises in the law may be especially compelling when the actual nature of an anomalous compromise is not obvious. Analysis may reveal that the framers of the anomalous compromise have disserved the society's dominant normative goals by a hidden sacrifice of those goals to other, less compelling, conflicting goals. Legislative rhetoric is often used to obscure such compromises and to suggest that all desirable goals are being served simultaneously. The OWBPA's acceptance of the *Henn/Paolillo* compromise of the ADEA's nondiscrimination principles is an excellent example because this compromise has been obscured by the rhetoric of not only the congressional debate on overturning *Betts*, but also by the judicial treatment of conditional age-based exit incentives.

[205] I recognize that the determination of what factors are "relevant" to a finding of equality of position requires the application of standards of substantive justice. This does not, however, undermine the basic argument in the text—that a critic of one legal doctrine might support the

individuals who are induced to sell their protection from future age discrimination for some exit incentive benefit are not given less legal solicitude than individuals who are induced to sell their protection from age discrimination to which they have already been subject.[206] Our legal culture places a high value on treating like cases alike, framing it in some contexts as a constitutional principle.[207]

Consistency of law serves other social goals as well. Among those goals are the control of favoritism or corruption, and nurturing the legitimacy of the law in the public's perception. The former may not be relevant to the present regulation of conditional age-based exit incentives, but the latter may well be. Cynicism, rather than respect for the law, may be engendered in individuals who are promised legal protection from a retirement they do not desire but who then find themselves defenseless from the dilemma created by conditional exit incentives.

Ronald Dworkin makes these and further claims for consistency in the law, or what he more broadly defines as "integrity."[208] These include its contribution to the efficient development of legal doctrine, free of the need for "detailed legislation or adjudication on each possible point of conflict."[209] He argues that the viability of coherent legal principles enables the law to be applied more fluently, without requiring some lawmaking body to articulate rigid particularistic compromises to map the rough terrain of incoherence.[210]

This Article does not argue that consistency or coherence is a necessary central attribute of legitimate law. It does not contend that Dworkin necessarily correctly identifies the reasons why consistency may be important to law, or even that legal consistency necessarily should be valued for itself.[211] This Article argues only that there are strong reasons, including the independent appeal of consistent antidiscrimination law, why the law's present anomalous treatment of condi-

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adoption of another legal doctrine with which he also disagrees, as long as the first doctrine is in effect.

206 See supra text accompanying notes 60-69.

207 See Michael C. Harper & Ira C. Lupu, Fair Representation as Equal Protection, 98 Harv. L. Rev. 1211, 1223-27 (1985).

208 See Ronald Dworkin, Law's Empire 186-224 (1986).

209 Id. at 188.

210 Id. at 190.

211 For many of the reasons expressed in the text, however, I certainly agree with Dworkin that it should be.

tional age-based exit incentives makes a compelling case for legal reform, even without making the case for age discrimination regulation in general. This Article explains how the OWBPA's treatment of exit incentives fails to fulfill the promises that Congress has repeatedly made to the older American worker since the passage of the ADEA. Those who applaud those promises should be troubled. Those who do not, but who still value legal consistency, should be as well.