5-1997

ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda

Michael C. Harper
Boston University School of Law

ADEA DOCTRINAL IMPEDIMENTS TO THE FULFILLMENT OF THE WIRTZ REPORT AGENDA

*Michael C. Harper**

Ideally, this symposium marking the three-decade anniversary of the Age Discrimination in Employment Act (ADEA) would present an opportunity to assess how well the ADEA has achieved its plausible goals. However, I recognize that any definitive assessment of the success of a statute like the ADEA, which requires the modification of the behavior of social actors, must depend on the kind of sophisticated empirical study for which I have neither the time, resources or capability. I also recognize that defending my identification of the goals of the ADEA might itself require an entire essay.

Therefore, I will present a more modest project, albeit one that reflects the characteristic hubris of law professors. I will take as given the ultimate goals set for national legislation on age discrimination in employment by the Congressionally directed report that is commonly viewed as leading to the passage of the ADEA, generally cited as the Wirtz Report after Secretary of Labor W. Willard Wirtz, under whose signature it was issued.[1] I will then argue that our ability to achieve these ultimate goals through the ADEA, as interpreted and applied by the courts, is sharply limited. Fulfilling the agenda of the Wirtz Report for age discrimination legislation would require a major transformation of the operation of the ADEA, a transformation whose costs our society may not be willing to pay.

After a brief review of the Wirtz Report and the ambitions it set for age discrimination legislation, I will focus on two sets of

---

* Professor of Law, Boston University School of Law. I wish to thank my current research assistant, Sandra K. Davis, for her capable assistance.

1. *See* W. WILLARD WIRTZ, U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965), *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACTS (1981) [hereinafter WIRTZ REPORT].

developments in the judicial interpretation of the ADEA. First, I will consider how the courts have addressed, or rather failed to address, the difficulty in proving whether the agents of an employer have covertly taken age into account in making an employment decision. Second, I will consider the implications of the Supreme Court's decision in *Hazen Paper Co. v. Biggins*[2] for the capacity of the ADEA to fulfill the potential of an age discrimination law to remove the institutional barriers to the employment of older Americans.

I. THE AGENDA OF THE WIRTZ REPORT

Responding to the direction of Congress to study and report on "factors which might result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected," the Wirtz Report considered what it viewed as four types of discrimination which might result in the unemployment or underemployment of older workers.[3] The Report found no significant presence of the first of these categories, discrimination based on dislike or intolerant feelings about older workers unrelated to their ability to do work.[4] The Report thereby contrasted the problem of age discrimination in employment with the race and other employment discrimination problems that Congress had already attempted to address in Title VII of the Civil Rights Act of 1964.

The Report, however, did find a pervasive presence of a second form of age discrimination in employment, the setting of age limits beyond which employers will not consider workers for job openings. The Report considered such limitations to be based on general assumptions about the ability of older workers to perform effectively, "without consideration of a particular applicant's individual qualifications."[5] Having rejected dislike and intolerance as an explanation for these assumptions, the Report did not draw definitive conclusions about the actual explanations. Nonetheless, it did note a number of explanations

---

2. 507 U.S. 604 (1993).

3. WIRTZ REPORT, *supra* note 1, at 1 (quoting the Civil Rights Act of 1964 § 715, 42 U.S.C. § 2000e-14 (1994)).

4. *See* WIRTZ REPORT, *supra* note 1, at 2, 5-6.

5. *See id.* at 6.

given by employers, including their ability to hire most younger workers for less money and the limited work expectancy of older workers relative to their training costs.[6] The Report also concluded that there was strong reason to believe that the assumptions were arbitrary in most cases, both because of evidence that the average work performance of older workers in a broad range of jobs is at least equal to that of younger workers, and also because of the willingness of many employers to consider and hire older workers on their individual merits.[7]

The Report's analysis of this second form of age discrimination in employment implicitly described what economists have termed "statistical discrimination," the rejection of all members of a status group because of certain characteristics of a large proportion of the group relative to those outside the group.[8] Statistical discrimination on the basis of age, especially at the hiring stage highlighted by the Wirtz Report,[9] might be economically rational for employers for several reasons.

First, the process of assessing individual applicants for employment can be very expensive. At least in a relatively loose labor market, it may be efficient for employers to screen workers on the basis of easily identifiable characteristics, such as age, which have some correlation with future productivity relative to cost before making individual assessments. This may be true even where many workers in the excluded class would perform at an above-average level.

Second, as suggested by employers' stated concern with the limited future work expectancy of older workers and training costs, employers may want to exclude all older workers from consideration for new jobs because of the likely average future tenure of an older worker relative to the average future tenure of a younger worker. This motivation may be economically rational because of normal retirement and life cycle patterns, and because, as acknowledged in the Wirtz Report, at some age

---

6. *See id.* at 8.

7. *See id.* at 8-9.

8. *See, e.g.*, Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

9. *See* WIRTZ REPORT, *supra* note 1, at 7.

level work efficiency will decline in most jobs.[10] Note, however, that many older workers excluded by such rational generalizations might have worked longer in the jobs from which they were excluded than many of the younger workers that were at least given individual consideration for these jobs.

Third, as is suggested by the employers' stated concern with the higher wage expectations of older workers, employers may believe that the average older worker will impose greater labor costs on their business than would an average younger worker of equal productivity. As will be explained below,[11] such beliefs about the higher wage expectations of older workers are supported both by empirical studies and plausible economic theories. These studies and theories also suggest that employers may not be able adequately to assuage any concerns about the higher wage expectations of older workers by setting an entry level wage, regardless of age, for all applicants for a particular job. Workers whose wage expectations are frustrated may have lower morale and perform at a lower percentage of their capacity. Again, however, the result of employers' rational beliefs about the effects of the higher wage expectations of older workers may be the exclusion of the consideration of all older workers for particular jobs, regardless of the willingness of many of these workers to fill these jobs at the same pay as younger workers.

This theory of economically rational statistical discrimination explains why the Wirtz Report found that arbitrary age limits on hiring were pervasive in the American economy at the time, even in the absence of age-based intolerance and animus. It also justifies the Report's concern with these age limits, given the Congressional charge to address consequences of age discrimination to the American economy and directly affected individuals. For even if economically rational for individual employers, arbitrary age-based generalizations may be harmful to the aggregate economy if they result in the forced retirement, unemployment, and underemployment of many potentially productive older Americans, as well as the aggravation of the burden of public support for the elderly. Furthermore, to the extent

10. *See id.* at 9.

11. *See infra* notes 85-90 and accompanying text.

that age-based generalizations result in the loss of employment opportunities that many older workers could in fact fulfill, they result in the unnecessary denial to these workers of that which can best provide dignity to most of us: meaningful and productive work. The Wirtz Report, thus, understandably focused on employers' age-based generalizations, whatever their economic rationale, as the prime evidence of what it found to be "the Nation's waste . . . of a wealth of human resources . . . and the needless denial . . . of opportunity for that useful activity which constitutes much of life's meaning."[12]

Concern with effects on the national economy and on unemployed and underemployed older workers also underlies the Report's consideration of the other two categories of discrimination that it identifies. In both of these categories the Report gives examples of employment practices that treat employees or applicants for employment on the basis of some factor other than age, but that have the effect of making it more difficult for older workers to be hired or to remain employed. In the first of these last two categories, the Report considers a number of ostensibly neutral factors, including health, educational attainment, adaptation to new technology, and aptitude testing, which may impede the employment of older workers. In the final category, the Report considers other "institutional arrangements" which are "designed to protect the employment of older workers while they remain in the work force, and to provide support when they leave it or are ill."[13] Some of these arrangements, including promotion-from-within policies and departmental, rather than employer-wide, seniority, while formally neutral with respect to age, may affect older workers disproportionately. Others, such as private pension and health insurance plans, may provide employers, concerned with the higher costs of the

12. WIRTZ REPORT, *supra* note 1, at 5. The Report estimated that "a million man-years of productive time are unused each year because of unemployment of workers over age 45; and vastly greater numbers are lost because of forced, compulsory, or automatic retirement." *Id.* at 18. It also estimated that the nation's economy loses "several billion dollars" each year because of involuntary retirement. *See id.* The Report further concluded that the "consequences of discrimination on the individuals affected . . . show up in widespread uncertainty concerning the role of vigorous older persons in our society, and in personal frustrations and anxieties." *Id.* at 19.

13. *Id.* at 2, 15-17.

provision of such plans to an older workforce, further economic incentives for age-based hiring and terminations.

The Report does not recommend that all the practices it lists in the last two categories be condemned by an age discrimination law. Indeed, it treats the factors in the third category as often demonstrating "a relationship" between age and ability to perform a job.[14] However, the Report's discussion of these factors demonstrates a recognition that addressing the aggregate economic and personal impact of the unemployment and underemployment of older workers will require more than the elimination of overt age-based hiring limits. Not surprisingly, the Report recommends not only action to eliminate arbitrary age discrimination in employment, but also action to adjust institutional arrangements which work to the disadvantage of older workers.[15]

As stated above, the Wirtz Report provided the initiative for Congressional passage of the Age Discrimination in Employment Act of 1967. The goals that the Report identified for age discrimination legislation, the reduction of wasted human resources in the involuntary unemployment and underemployment of older American workers and the enhancement of human dignity for older Americans, were reflected in Congressional statements in support of the Act[16] and in the Act's statement of findings and purpose.[17]

But can the ADEA, as drafted and interpreted by the courts, fulfill the Report's agenda for an age discrimination law—the assurance that employment opportunities not be denied older workers, based on unfair or arbitrary, rather than productivity-related considerations? Unfortunately, a review of the ADEA's interpretation and application over the last three decades must yield a negative answer to this question. In my view, the Act fails to provide that which an anti-discrimination regulatory statute would have to provide to achieve the Wirtz Report's

---

14. *See id.* at 2.

15. *See id.* at 21-22. Admittedly, however, the Report does not consider how an anti-discrimination law might address the institutional barriers to the employment of older workers that the Report identifies.

16. *See, e.g.*, S. REP. NO. 90-723, at 4 (1967) (setting forth views of leading ADEA sponsor Senator Javits); 113 CONG. REC. 34,742 (1967) (statement of Rep. Matsunaga).

17. *See* 29 U.S.C. § 621(b) (1994).

ultimate goals of maximum use of the potential of older Americans and the maintenance of their dignity as workers.

II. PROVING DISCRIMINATORY INTENT

The ADEA undoubtedly has eradicated the formal upper age limits on hiring upon which the Wirtz Report first focused.[18] Older workers no longer are advised by advertisements and other recruitment literature not to apply for open positions. They no longer are told that they cannot be hired because of their age. Such practices of course are condemned by the Act,[19] they can be readily demonstrated in court, and their proof renders discriminating employers liable not only for the wages the older workers would have earned, but also an additional equal amount as "liquidated damages."[20]

Moreover, after several amendments, the ADEA also now has eliminated at least formal age-based mandatory retirement. The Supreme Court interpreted the ADEA as originally enacted to permit mandatory retirement provisions in bona fide employee retirement plans.[21] Within a year, however, Congress reacted to what it apparently viewed as the Court's distortion of its intent by clarifying that "no employee benefit plan shall require or permit the involuntary retirement of any individual" protected by the Act,[22] and in 1986 removed the remaining seventy-year-old cap on the class of forty-year-old and older workers protected by the statute.[23]

---

18. *See* WIRTZ REPORT, *supra* note 1, at 6-7.

19. 29 U.S.C. § 623(a)(1) (1994).

20. 29 U.S.C. §§ 216(b), 626(b) (1994). Section 216 is incorporated into the ADEA from the Fair Labor Standards Act. The proviso to section 626(b) states that under the ADEA, "liquidated damages shall be payable only in cases of willful violations." The Supreme Court has twice held that establishing a "willful" violation requires proof that the defendant acted in knowing or reckless disregard of the ADEA. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 614 (1993); Trans World Airlines v. Thurston, 469 U.S. 111, 126 (1985). A demonstration of a formal age cap on hiring presumably establishes such willfulness.

21. *See* United Air Lines v. McMann, 434 U.S. 192 (1977).

22. PUB. L. NO. 95-256, § 2(a), 92 Stat. 189 (1978).

23. *See* Pub. L. No. 99-592, 100 Stat. 3342 (1986) (codified at 29 U.S.C. § 631(a) (1994)). The ADEA's original age sixty-five-year-old cap was first raised to age seventy in 1978. Pub. L. 95-256, §3(a), 92 Stat. 189 (1978).

However, the ADEA's prohibition of overt age-based forced discharges of incumbent workers remains much less effective than its prohibition of overt age-based hiring policies, because the Act has been interpreted to allow employers to remove older workers who would prefer continued employment by inducing their resignation through a combination of threats and special early retirement benefits. As I have explained in an earlier article,[24] the 1990 amendments to the ADEA in the Older Workers Benefit Protection Act (OWBPA)[25] seem to confirm circuit court decisions that allow employers to use threats, as well as bribes, to induce resignation from particular workers identified by age, as long as the threats alone do not make the workers' position so intolerable as to constitute constructive discharge.[26] Indeed, a post-OWBPA Fourth Circuit decision even held that an employee was not constructively discharged when told that his position would be eliminated by the end of the calendar year if he did not resign and take some extra benefits by July 1.[27] Although this particular decision seems to misapply the constructive discharge approach accepted by the OWBPA, since the employee was directly told that he did not have the option of continuing to work in his old position,[28] the legislative history of the OWBPA makes clear that Congress intended to permit employers to encourage older employees to accept early retirement offers by stressing the prospect of being laid off for other than age-based reasons.[29] This indulgence of schemes to remove older workers from jobs in which they would

---

24. *See* Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271, 1321 (1993).

25. Pub. L. No. 101-433, § 101, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. § 621 (1994)).

26. The leading case is *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir. 1987). *Cf.* Paolillo v. Dresser Indus., 865 F.2d 37 (2d Cir. 1987) *modified*, 884 F.2d 707 (2d Cir. 1989) ("[I]t is relevant to the determination of voluntariness [of acceptance of early retirement] whether the employees received sufficient time to make a decision"); *see also, e.g.*, EEOC v. Westinghouse Elec. Co., 925 F.2d 619, 634 (3d Cir. 1991); Schuler v. Polaroid Corp., 848 F.2d 276, 277 (1st Cir. 1988); Bodnar v. Synpol, Inc., 843 F.2d 190, 193 (5th Cir. 1988).

27. *See* Blistein v. St. John's College, 74 F.3d 1459, 1463, 1468-69 (4th Cir. 1996).

28. *See id.* at 1463. Other post-OWBPA decisions have not been as indulgent of such employer tactics. *See* Kalvinskas v. California Inst. of Tech., 96 F.3d 1305, 1308 (9th Cir. 1996); Smith v. World Ins., 38 F.3d 1456, 1461 (8th Cir. 1994).

29. *See* Harper, *supra* note 24, at 1309-21.

prefer to continue to work significantly compromises the capacity of the ADEA to avert the human costs of unnecessary unemployment, underemployment, and loss of dignity for older Americans.

Yet the ADEA could still at least effectively address what the Wirtz Report identified as the primary cause of these human costs, the infection of American personnel decision-making with generalized assumptions about the future productivity of older workers, if it could prevent such decision-making being covertly tainted by such assumptions, as well as being overtly and formally based on age. Early retirement incentives do not provide an alternative method to avoid hiring older workers, and they will often prove too expensive a tool for the removal of many older workers. However, there is little reason to believe that the ADEA as currently interpreted can substantially eliminate covert, as well as overt, age discrimination.

I base this last conclusion on two reasonable factual assumptions and on an analysis of the doctrine developed by the courts to define how plaintiffs must prove covert age discrimination. The first assumption is that employers often confront significant economic incentives to evade the commands of the ADEA by considering age in personnel decision-making. As explained above,[30] age-based stereotypes often have enough basis in truth to be economically efficient to apply. Especially when making hiring decisions, employers rationally may use age to predict future productivity and job tenure. Employers may also rationally want to consider age when deciding on promotions to new jobs, at least where the costs of training are less likely to be recouped for older workers. Employers may also have rational concerns about the age balance of their workforce;[31] they do not want most of their workers to retire within a small time period and thus make retraining more difficult. This concern provides incentives to consider age when determining who will be laid off in a reduction-in-force.

---

30. *See supra* notes 7-11 and accompanying text.

31. *See generally* H.R. REP. No. 90-805, at 6-7 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219-20 (recognizing that employers may have good reason to want to maintain an age balance in their workforce).

My second assumption is that it is very difficult to prove the covert consideration of age in personnel decision-making. Covert motivation is generally difficult to establish, especially where the law provides incentives to decision-makers to avoid making their full motivations manifest. Decisions on whether to hire or retain employees usually require the consideration of numerous factors, and the record of some of these factors, such as work evaluations and the subjective standards of management decision-makers, are within the control of employers. We can assume that employers and their counsel have become more and more sophisticated in constructing justifications *ex ante*, as well as *ex post*, for potentially challengeable adverse employment decisions. In many cases these justifications may not completely eclipse evidence that firm decision-makers are influenced by considerations of age, but the explanations may still be too plausible to be totally discounted. Applicants for employment who have not been within the firm, and, therefore, have no access to information about its decision-making processes and the comparative treatment of other workers presumably are especially vulnerable to the construction of plausible, pretextual reasons for their failure to secure a desired position.

I therefore conclude that in order for the ADEA to substantially eliminate the covert consideration of age in employment decision-making, plaintiffs must have the benefit of doctrine that enables them to counteract employer evasion. First, given the unlikelihood that sophisticated managers will in any way directly acknowledge considering a worker's age, such doctrine must assist plaintiffs proving the existence of covert consideration of age indirectly by proof that an employer's justifications are at least not fully credible. Second, and probably more importantly, given employers' control over personnel records and their consequent ability to fashion plausible justifications for personnel decisions, the doctrine must also enable plaintiffs to impose a deterrent penalty on employers by proving that age played some role in an employment decision, regardless of whether the plaintiffs can prove that age determined or caused the decision.

Doctrine developed by the courts under the ADEA now offers plaintiffs neither of these advantages. Plaintiffs seemed to be offered the first kind of assistance by the Supreme Court's

initial development, in *McDonnell Douglas Corp. v. Green*,[32] and *Texas Department of Community Affairs v. Burdine*,[33] of an indirect disparate treatment methodology of proof for Title VII cases. By presenting a relatively easy prima facie case,[34] plaintiffs could compel an employer-defendant to articulate a nondiscriminatory justification for a challenged personnel action. Moreover, the Court seemed to suggest that a plaintiff who proved that the defendant's articulated justification was pretextual would also prove a violation of Title VII's proscription of certain kinds of discriminatory motivations. In *Burdine*, the Court explained that the plaintiff's ultimate burden of persuasion on the question of discriminatory motivation merges with proving "that the proffered reason was not the true reason for the employment decision."[35] Plaintiffs may succeed, said the Court, "either directly by persuading . . . that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[36]

After some initial resistance,[37] the *McDonnell Douglas-Burdine* methodology of proof was applied by the circuit courts to the ADEA.[38] The Supreme Court has also assumed its applicability.[39] Furthermore, at least at one time, it promised to be even more valuable to ADEA plaintiffs than to Title VII

---

32. 411 U.S. 792 (1973).

33. 450 U.S. 248 (1981).

34. The first formulation of a plaintiff's prima facie case in *McDonnell Douglas* was: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802.

35. *Burdine*, 450 U.S. at 256.

36. *Id.*

37. *See, e.g.*, Laugeson v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (dictum).

38. *See, e.g.*, O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995), *rev'd and remanded on other grounds*, 116 S. Ct. 1307 (1996); Roper v. Peabody Coal Co., 47 F.3d 925, 926-27 (7th Cir. 1995); Lindsey v. Prive Corp., 987 F.2d 324, 326 n.5 (5th Cir. 1993); Cuddy v. Carmen, 694 F.2d 853, 856-57 (D.C. Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981); Loeb. v. Textron, Inc., 600 F.2d 1003, 1014-16 (1st Cir. 1979).

39. *See* O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1309 (1996); Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993) (citing *McDonnell Douglas* as "creating proof framework applicable to ADEA").

plaintiffs because jury trials have been available in age discrimination cases since 1978,[40] while they have been offered in Title VII litigation only since the passage of the Civil Rights Act of 1991.[41] Inasmuch as the credibility of an employer's agent in articulating a nondiscriminatory justification would seem to present a question of fact, *McDonnell Douglas-Burdine* could be read to guarantee ADEA plaintiffs who could satisfy a light prima facie burden jury consideration of their claims. Moreover, whatever the worth of jury trials to race and other Title VII plaintiffs, it seems clear that the average juror will be more sympathetic to a disadvantaged older worker than will privileged, tenured members of the elite federal judiciary.[42]

Despite this, any promise of special assistance in the proof of covert motivation that *McDonnell Douglas-Burdine* offered to ADEA plaintiffs, as well as Title VII plaintiffs, has been shattered. First, most circuit courts have not accepted proof of the *McDonnell Douglas* prima facie case and a questioning of the veracity of the employer's proffered justification as adequate for a jury to find age discrimination motivation; they require some additional proof that the justification was pretextual.[43] Second, despite the language from *Burdine* quoted above, a number of circuit courts held that plaintiffs could not establish liability under the *McDonnell Douglas* methodology by proving that the defendant's justification was pretextual without proving that it was a pretext for a discriminatory motive.[44] In *St. Mary's Honor Center v. Hicks*, the Supreme Court confirmed this second line of cases by clarifying that it did not intend "to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and

40. *See* 29 U.S.C. § 626(c)(2) (1994).

41. Pub. L. No. 102-166 § 102, 105 Stat. 1072 (1991) (codified as amended at 42 U.S.C. § 1981a(c) (1994)).

42. One study found that plaintiffs were successful in employment discrimination cases twice as often before juries as before judges. *See* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1175 (1992).

43. *See, e.g.*, EEOC v. Clay Printing Co., 955 F.2d 936, 943 (4th Cir. 1992); Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216, 1221, 1223 (7th Cir. 1991).

44. *See, e.g.*, EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992); Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991).

much lesser) finding that the employer's explanation of its action was not believable."[45]

The circuit courts have not totally agreed on the meaning of *Hicks*, especially on the issue of whether evidence that is sufficient to prove that the employer's articulated justification is pretextual is also always sufficient to warrant the finder of fact to conclude that there was a discriminatory motive. Some have asserted that although *Hicks* holds that evidence sufficient to establish pretext does not compel a verdict for the plaintiff, it also contemplates that proof of pretext would always permit such a verdict.[46] Others have held that whether evidence sufficient to prove pretext is also sufficient to prove discrimination should turn on the normal standards for directed verdicts in civil cases. For these circuits, proof of pretext will be sufficient in some cases, but in other cases, where the evidence suggests other possible nondiscriminatory motives, plaintiffs will have to present additional direct proof of discriminatory motive to permit a positive verdict from the factfinder.[47]

Regardless of how this split in the circuits is resolved, however, it now seems clear that the *McDonnell Douglas-Burdine* methodology does not significantly facilitate proof of covert discriminatory motive. If adequate proof of pretext does not ensure that a plaintiff's case will be decided by a jury, it is hard to see how plaintiffs are assisted at all by the methodology. Establishing a prima facie case does force the defendant to articulate a justification, or justifications, upon which the plaintiff can focus his or her challenge. However, plaintiffs generally should be able to induce such an articulation through pretrial discovery in any event. Even if proof that is adequate to establish pretext ensures that a jury can find that discriminatory motive existed, plaintiffs are unlikely to benefit in many ADEA cases, as long as judges demand strong evidence of pretext

---

45. 509 U.S. 502, 514-15 (1993).

46. *See, e.g.*, Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 330-31 (3d Cir. 1995); Sirvidas v. Commonwealth Edison Co., 60 F.3d 375, 378 (7th Cir. 1995); Binder v. Long Island Lighting Co., 57 F.3d 193, 199-200 (2d Cir. 1995).

47. *See, e.g.*, Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 441 (11th Cir. 1996); Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996); Woods v. Friction Materials, 30 F.3d 255, 260 n.3 (1st Cir. 1994).

before allowing cases to be decided by juries that they may feel are overly sympathetic to older workers.[48]

Indeed, it may be that plaintiffs are actually sometimes impeded by the *McDonnell Douglas-Burdine* system. Some lower court decisions have added significant weight to a plaintiff's light *McDonnell Douglas* burden of proving a prima facie case. For instance, the Fourth Circuit has held that in reduction-in-force cases where the employer claims that relative performance was the standard for selecting those to be terminated, to establish a prima facie case the plaintiff must prove both that he was performing at a level substantially equivalent to the lowest level of those retained, and that the process of selection produced a retained work force with some persons outside plaintiff's protected class who were performing at a level lower than that at which the plaintiff was performing.[49] Clearly, the challenge of proving covert motivation is aggravated, rather than alleviated, if plaintiffs must clear significant hurdles such as these before they can offer proof that an employer's justification is pretextual as relevant to their ultimate burden of proving discriminatory motivation.[50]

Even more important to the ADEA's relative impotency against covert discrimination has been the interpretation of the Act to require ADEA plaintiffs to prove not only that a covert discriminatory motive existed, but also that the motive was a

---

48. *See, e.g.*, Bergan v. Standard Duplicating Mach., 1996 WL 422876, at *2 (9th Cir. 1996) (evidence insufficient to show pretext and survive motion for summary judgment).

49. *See* Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1315 (4th Cir. 1993); Duke v. Uniroyal Inc., 928 F.2d 1413, 1418 (4th Cir.), *cert. denied*, 502 U.S. 963 (1991). As this example suggests, the courts often anticipate an employer's justifications in formulating prima facie case requirements.

50. From an exhaustive study of Title VII and ADEA cases, Professor Malamud indeed concludes that "to the extent that *McDonnell Douglas-Burdine* does shape decision-making, its effects are often detrimental to plaintiffs—the very people it supposedly helps—because *McDonnell Douglas-Burdine* renders courts less able to recognize forms of discrimination that do not straightforwardly match the proof structure's template." Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2279-80 (1995). Professor Malamud acknowledges, however, that many lower courts in fact try to avoid the restrictions of the *McDonnell Douglas-Burdine* system for plaintiffs by considering evidence of pretext as relevant to the prima facie case and by avoiding grants of summary judgment, on the basis of inadequacies in the prima facie case, without consideration of pretext evidence. *See id.* at 2289-90, 2298-2301.

"but for" cause of the adverse personnel action being challenged. This interpretation derives from reactions to the Supreme Court's 1989 *Price Waterhouse v. Hopkins*[51] decision. In cases predating *Price Waterhouse*, most circuit courts, though differing in how proof burdens should be distributed, had held that employers do not violate the employment discrimination laws by making a personnel decision while considering some proscribed factor such as race or age unless the decision actually would have been different but for consideration of the proscribed factor.[52] In *Price Waterhouse*, a Title VII sex discrimination case, the Court resolved the circuits' split on the allocation of proof burdens by holding that if a plaintiff proves that the illegitimate factor was a "substantial factor" in an adverse employment decision,[53] the burden of proof shifts to the defendant to demonstrate that it would have come to the same decision in the absence of the illegitimate consideration. However, the Court confirmed that a defendant who carries this burden can avoid a finding of a violation of Title VII.[54]

Congress rejected this holding of *Price Waterhouse* by passing section 107 of the Civil Rights Act of 1991.[55] This section adds a provision to Title VII which states that "an unlawful employment practice is established" when the plaintiff proves that an illegitimate factor was a "motivating factor for any employment

---

51. 490 U.S. 228 (1989).

52. As reported by the *Price Waterhouse* Court, the Third, Fourth, Fifth, and Seventh Circuits had required plaintiffs to prove that the decision would have been different but for consideration of the prohibited factor, while the First, Second, Sixth, Eleventh, and D.C. Circuits had required defendants to prove that their decision would not have been different but for consideration of the prohibited factor whenever plaintiffs prove that the factor was "substantial" or "motivating." *See id.* at 238 n.2. Only the Eighth and Ninth Circuits had held that the discrimination laws can be violated regardless of proof of determinative causation, and even these circuits had held that an employer could avoid most significant remedial relief by proving that the factor did not determine its ultimate decision. *See id.*

53. The "substantial factor" standard was asserted in separate concurring opinions filed by both Justice White and Justice O'Connor, one of whose votes was needed to give the four Justice plurality a majority. *See id.* at 259, 265. The plurality opinion had stated that the plaintiff only must prove that the illegitimate factor "played a motivating part in an employment decision" in order to shift the burden of proof to the defendant to establish the affirmative defense of a lack of "but for" causation. *Id.* at 258.

54. *See id.*

55. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (1994)).

practice, even though other factors also motivated the practice."[56] Section 107 also amends the remedial provision of Title VII, stating that a defendant can avoid certain remedies, including reinstatement, backpay, or damages, by proving that it would have taken the same action "in the absence of the impermissible motivating factor."[57] When defendants are able to make such proof, plaintiffs generally will only be able to obtain declaratory relief, attorneys' fees, and costs.[58]

Section 107, however, did not amend the ADEA, and since its passage the circuit courts have continued to hold that the ADEA is only violated when an adverse employment decision has been caused or determined by consideration of age.[59] The circuits are supported in these holdings by language in the Supreme Court's 1993 decision in *Hazen Paper Co. v. Biggins*,[60] stating that an ADEA disparate treatment claim cannot succeed unless age "had a determinative influence on the outcome."[61] Indeed, some circuits may require ADEA plain-

---

56. 42 U.S.C. § 2000e-2(m) (1994).

57. 42 U.S.C. § 2000e-5(g)(2)(B) (1994).

58. *See id.*

59. *See, e.g.*, Mills v. First Fed. Sav. & Loan Ass'n, 83 F.3d 833, 840 (7th Cir. 1996); Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir. 1995); Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325, 1333 (6th Cir. 1994).

The applicability of section 107 of the Civil Rights Act of 1991 to ADEA cases, however, seems not to have been addressed directly by the circuit courts. For potentially influential dicta, see *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1002-03 (5th Cir. 1996) (DeMoss, J., concurring and dissenting); and *Miller v. CIGNA Corp.*, 47 F.3d 586, 598-99 & n.10 (3d Cir. 1995). *But cf.* O'Day v. McDonnell Douglas Helicopter Corp., 79 F.3d 756, 761 (9th Cir. 1996) (using section 107 to inform court on ADEA after-acquired-evidence issue).

60. 507 U.S. 604 (1993).

61. *Id.* at 610. A case might be made that the ADEA doctrine fashioned by the federal judiciary, including the Supreme Court, should be influenced by section 107. Section 107 can be read as the most recent expression of how Congress wants discrimination proof approached. The fact that it does not mention the ADEA can be explained by the fact that it was a direct reaction to *Price Waterhouse*, a Title VII case. It understandably might not have been clear to Congress that ADEA courts would find *Price Waterhouse* controlling. Furthermore, there is no clear legislative history indicating that Congress intended that the two similar laws contain different proof standards. *See generally* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1158-72 (1993).

However, as Professor Eglit argues, the Congress that passed the Civil Rights Act of 1991 demonstrated that it could amend all civil rights statutes simultaneously, as evidenced by its response to another 1989 Supreme Court Title VII decision, *Martin v. Wilks*, 490 U.S. 755 (1989), in section 108 of the 1991 Act. *See id.* at 1192-93.

tiffs to prove "but for" causation without even the benefit of the burden shifting presumption established in *Price Waterhouse*.[62] In these circuits, plaintiffs must establish that age was a determinative cause of an adverse decision either through the *McDonnell Douglas-Burdine* system or by direct proof of covert discriminatory motive. Even in those circuits that have held that *Price Waterhouse* does apply to ADEA cases,[63] defendants can avoid not only ADEA compensatory remedies, but also any finding of liability, declaratory orders, and attorney fees, by demonstrating that they would have made the same decision in the absence of a discriminatory motive.

Furthermore, *Price Waterhouse* burden shifting has proven to be of limited utility for either ADEA or Title VII plaintiffs hoping to prove covert discriminatory motivation. The lower courts have insisted that it only be applied in the rare cases where an employer has been foolish enough to allow a covert, illegitimate motive to surface. Courts have done so by holding that plaintiffs must offer what the courts call "direct" proof of discrimination to obtain the benefit of *Price Waterhouse* burden shifting.[64] These holdings rely on language in Justice O'Connor's concurring opinion in *Price Waterhouse*.[65] Justice O'Connor asserted that "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[66] Justice O'Connor's opinion has been accepted as controlling even though neither the four-justice plurality opinion in *Price Waterhouse* nor Justice White's separate concurring opinion indicated agreement that only "direct" evidence of discriminatory intent could justify shifting the burden of proof on causation to a defendant.[67]

This Congress also clearly was aware of the particular independent existence of the ADEA, as evidenced by its amendment of ADEA limitations periods in section 115 of the 1991 Act. Congress's failure to mention the ADEA in section 107 thus cannot be easily dismissed.

62. *See, e.g.*, Pages-Cahue v. Iberia Lineas Aereas de Espana, 82 F.3d 533, 536 (1st Cir. 1996); Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir. 1995).

63. *See, e.g.*, Slathar v. Sather Trucking Corp., 78 F.3d 415, 418-19 (8th Cir. 1996); Miller v. CIGNA Corp., 47 F.3d 586, 588 (3d Cir. 1995); Cronin v. Aetna Life Ins., 46 F.3d 196, 203 (2d Cir. 1995).

64. *See infra* notes 68 and 69.

65. *See Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring).

66. *Id.* at 276 (O'Connor, J., concurring).

67. At least one circuit court decision has expressed doubt that Justice O'Connor's

The circuits have had difficulty determining what Justice O'Connor meant by "direct" evidence. Some courts profess to require plaintiffs to utilize only evidence that can be called "direct" rather than "circumstantial" under the traditional distinction of evidence that does not require inferential deductions from evidence that does require such inferences.[68]

This distinction, however, cannot explain Justice O'Connor's concurrence in *Price Waterhouse*, because the evidence in that case did require inferences that the sex-conscious attitudes toward the plaintiff, expressed by some of the decision-makers, influenced their decisions not to offer the plaintiff a partnership in their firm. Furthermore, even the circuits that profess to draw this evidentiary line do not seem fully to adhere to it. They allow the consideration of some evidence that requires inferences, but refuse to allow the consideration of other evidence.[69]

Other circuits profess to require that the evidence "directly tie" or make a direct "causal connection" between the challenged decision and the discriminatory attitude.[70] These circuits do not even pretend to reject all evidence requiring some inferences, but instead attempt to determine whether the evi-

---

opinion should be controlling. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183-87 (2d Cir. 1992).

The application of Justice O'Connor's concurrence to Title VII cases after the passage of the 1991 Civil Rights Act is especially troublesome, because neither section 107 of that Act nor its legislative history indicates that Congress intended to limit the kind of proof plaintiffs can offer to demonstrate a statutory violation without also proving pretext under the *McDonnell Douglas-Burdine* methodology. Section 107 simply provides that it is sufficient for plaintiffs to establish one of the Title VII categories as "a motivating factor for any employment practice, even though other factors also motivated the practice." 42 USC § 2000(e)(2)(m) (1994). Yet circuit courts continue to uphold jury instructions that ask whether "race was a determinative factor" in cases where plaintiff's evidence does not qualify under Justice O'Connor's "direct" evidence standard. *See, e.g.*, Fuller v. Phipps, 67 F.3d 1137, 1144 (4th Cir. 1995).

68. *See, e.g.*, Purrington v. University of Utah, 996 F.2d 1025, 1031-32 (10th cir. 1993); Brown v. East Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993); Burns v. Gadsden State Community College, 908 F.2d 1512, 1518 (11th Cir. 1990).

69. *See, e.g., Brown*, 989 F.2d at 861 (stating that the routine use of racial slurs could be direct evidence that racial animus motivated employment decisions, although acknowledging that the court had previously held that certain age-related comments were too vague).

70. *See, e.g.*, Hook v. Ernst & Young, 28 F.3d 366, 374 (3d Cir. 1994); Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir. 1993); Ostrowski v. Atlantic Mut. Ins., 968 F.2d 171, 182 (2d Cir. 1992).

dence reflects an attitude of a decision-maker about the particular decision concerning which discrimination is alleged. A good example is the Fourth Circuit, which has explained that "what is required . . . is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision."[71] Though somewhat more liberal than a strict circumstantial evidence standard, this standard can still prevent plaintiffs from shifting the burden of proof of causation to defendants through use of probative circumstantial evidence, such as egregious employment statistics and frequent general age-stereotyping comments from a decision-maker.[72]

No circuit seems to have adopted the most coherent meaning of Justice O'Connor's position, that direct evidence is evidence that proves a discriminatory motive, rather than evidence that proves the absence of a nondiscriminatory motive, as in a *McDonnell Douglas-Burdine* pretext case. This definition would permit consideration of statistical evidence and of evidence of general bias in the decision-maker as probative of the consideration of age as a substantial motivating factor. But even it would exclude, for purposes of burden shifting, consideration of evidence that undermines the credibility of the defendant's articulated legitimate motive, rather than directly proves the existence of an illegitimate motive.[73]

---

71. Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995).

72. For instance, in *Fuller*, 67 F.3d at 1143, the court stated that "statistical evidence by nature does not merit a mixed-motive charge" to a jury. In *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 508 n.6 (2d Cir. 1994), the court stated that evidence that an officer of the defendant stated that he wanted to replace older workers with "young tigers" was indirect because it did not refer specifically to the plaintiff.

73. As far as I can determine, no circuit now holds that plaintiff's proof that the defendant's articulated legitimate motive is at least partially pretextual can support burden shifting under *Price Waterhouse*. At least two circuits, however, at one time held that any kind of proof might suffice. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992); White v. Federal Express Corp., 939 F.2d 157 (4th Cir. 1991). *See generally* Michael A. Zubrensky, *Despite the Smoke, There is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 346 STAN. L. REV. 959 (1994). In addition, the position of the Ninth Circuit as to the kinds of circumstantial evidence that can support burden shifting is not clear at this point. *Compare* Board v. Children's Hosp., 1996 WL 540168, at *3 (9th Cir. 1996) (finding no "direct" evidence to support mixed motive claim) *with* Lam v. University of Hawaii, 40 F.3d 1551, 1566 (9th Cir. 1994) (considering the adequacy of strong circumstantial evidence to support a mixed motive claim).

The lower courts' embrace of Justice O'Connor's concurring opinion in *Price Waterhouse* might have even worse implications for ADEA plaintiffs. The lower courts might use this opinion to hold that in those cases where the "direct" evidence standard cannot be met (which probably includes the vast majority of meritorious cases), plaintiffs must proceed under the *McDonnell Douglas-Burdine* methodology, and must prove the complete absence of any nondiscriminatory motivation proffered by employers as a defense. They must, in other words, prove that age was the sole, not just a determinative, cause of the challenged action. This would find support in the original rationale for *McDonnell Douglas-Burdine* which allowed proof of a discriminatory motive through proof of the absence of a nondiscriminatory motive. But it would mean that the pretext methodology of proof would substantially aggravate, rather than help solve, plaintiffs' problems in proving covert discriminatory motives. It would require plaintiffs who use particular kinds of probative circumstantial evidence to prove a more complete causal connection than required by Congress or even by the Supreme Court.

Although there is good reason to think that the law will not develop to be this restrictive for ADEA plaintiffs, as *Hicks*, *Price Waterhouse*, and *Hazen Paper* are blended by the lower courts,[74] it is also clear that these cases, and their lower court applications, do not assist plaintiffs in proving covert discriminatory motive. Given the state of proof doctrine under the ADEA, an employer should feel confident that it can insulate itself from proof that its agents took age into account making an employment decision, by constructing a plausible pretext that cannot be completely disproved, and by taking care that its decision-making agents do not comment directly on the age of the adversely affected employee. If employer agents take care not to provide direct evidence of discriminatory intent, plaintiffs will have to prove that the agents would not have made the

74. In a thorough and well-reasoned decision directly confronting the issue, the Third Circuit held that ADEA plaintiffs who do not qualify for a *Price Waterhouse* burden shifting instruction, and who thus attempt to prove pretext under *McDonnell Douglas-Burdine*, must only prove that age was a determinative factor, rather than the sole cause of a challenged decision. *See* Miller v. CIGNA Corp., 47 F.3d 586, 598-99 (3d Cir. 1995) (en banc). *Miller* is likely to be influential. *See, e.g.*, *Fuller*, 67 F.3d at 1137, 1143 n.3 (citing *Miller*).

same decision based on some plausible pretext. Judges, skeptical of the existence of age discrimination and the policies underlying the ADEA, will be able to reject jury verdicts, based on their conclusions that "but for" causation has not been established.

It would be difficult to do direct empirical research to support my claim that the ADEA as interpreted cannot effectively control covert age discrimination. However, the statistics that we do have on the nature of employment discrimination litigation provide some support for this thesis. Professor Eglit's study of 1996 ADEA litigation reported in this Symposium, as well as the unpublished 1968-1986 study that he describes, indicate that more than two out of three ADEA cases have involved challenges to discharges.[75] This is several times the percentage of cases involving challenges for failure to hire. For instance, only 18 of the 222 federal district court rulings on ADEA claims in 1996, or less than 8%, addressed refusals to hire, while 158 of the 222, or 71%, concerned a challenge to some kind of termination.[76]

These are not the kind of statistics we would expect if older workers could anticipate being successful in uncovering a high proportion of instances of covert discrimination. For the reasons explained above,[77] the economic incentives to consider the age of relatively unknown workers when making hiring decisions are more pervasive than those to consider the age of incumbent workers when making termination decisions. Economic theory, consistent with the findings of the Wirtz Report,[78] predicts that there is much more age-based decision-making at hiring than at discharge.

On the other hand, these statistics can be explained as reflecting the greater likelihood that incumbent workers will have access to some evidence of covert age discrimination. Incumbent workers have been given past reports on their performance,

---

75. *See* Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 623-30 (1997).

76. *See id.* at 628.

77. *See supra* notes 8-11 and accompanying text.

78. *See* WIRTZ REPORT, *supra* note 1, at 6.

they know something of how co-workers have been treated and of their employer's general personnel policies, and they may even have friends within the firm to assist them in the collection of information. To the extent that covert discrimination is especially difficult to prove, we would expect these factors to be more important and more termination cases to be brought. In this light, it is also interesting that studies of trends in general employment discrimination reveal an increasing percentage of discharge cases relative to hiring cases, as overt, formal policies against the employment of blacks and women, as well as older workers, have been eliminated.[79]

My view of the employment discrimination litigation statistics which we have before us, thus, comports with my analysis of the worth of employment discrimination litigation doctrine for ADEA plaintiffs: The ADEA, as currently interpreted, does not provide an effective tool for the extirpation of covert consideration of age in employment decision-making. If this view is correct, it does not necessarily mean that the ADEA has been incorrectly interpreted, or even that it expresses flawed policy judgments. Our society rationally might not wish to pay the price of a statute that effectively addresses a form of covert discrimination that is often economically efficient for its perpetrators. We may want to allow employers to consider age in some limited number of cases, as long as they do not implement blanket, formal policies against the employment of all older workers. We may also want to avoid inducing employers to retain unproductive older workers whose lack of productivity cannot be easily established in litigation. However, we should be realistic about what we can accomplish under current doctrine, and should not allow ourselves to be deluded into think-

---

79. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 n.3, 1015-16 (1991) (presenting data on charges filed with the EEOC and on an American Bar Foundation litigation survey). Donohue and Siegelman do not provide any convincing explanation of this trend beyond their stress on the elimination of formal, blanket exclusions of women and minorities from certain more desirable jobs.

One plausible alternative explanation of the higher percentage of termination than hiring claims is the tendency of people to value more highly that which they have than that which they might obtain. *Cf.* Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769. Thus, a worker might feel more deprived by the loss of a particular job than he would feel deprived by his failure to obtain the same job. This would not explain any trend toward proportionately more termination litigation, however.

ing that we have accomplished even the Wirtz Report's modest goal of eliminating the use of age-based generalizations in employment decision-making, let alone its more fundamental goals of reducing the unemployment, underemployment, and loss of dignity of older workers.

III. ELIMINATING THE BARRIER OF WAGE EXPECTATIONS

In fact, the fundamental goals of the Wirtz Report cannot be reached even by an ADEA strengthened to ease plaintiffs' proof burdens if the Act does not also eliminate as a justification for not hiring or retaining an older worker the higher labor costs of that worker under the employer's express or implied wage structure. As noted above, the Wirtz Report recognized that certain pervasive "institutional arrangements" designed to protect incumbent older workers often operate to discourage their hiring and retention.[80] The Report focused on benefit plans that become more expensive for an employer with an aging workforce and on seniority practices, such as promotion from within and departmental limitations, that restrict the ability of older workers to make career moves between employers or even departments. The effect of benefit plans was addressed by the Act as originally passed,[81] and after the Act was misinterpreted by the Supreme Court,[82] was readdressed by the Older Workers Benefit Protection Act (OWBPA).[83] The OWBPA made clear that Congress intended to remove disincentives to the hiring of older workers by only requiring employers to spend an equal amount on the benefit plans of older employees, rather than requiring employers to spend more to offer the same benefit.[84]

---

80. WIRTZ REPORT, *supra* note 1, at 15-17.

81. *See* 29 U.S.C. § 623(f)(2) (1994).

82. *See* Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989).

83. Pub. L. No. 101-433, 104 Stat. 978, 981 (1990).

84. Section 103 of the OWBPA amended section 4 of the ADEA to clarify that it shall not be an unlawful employment practice "to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package, 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 . . . ." 29 U.S.C. § 623(f)(2)(B)(i) (1994).

But the ADEA cases have revealed that a related "institutional arrangement" that pervades American labor markets may play an even larger role in the unemployment and underemployment of older workers. The Wirtz Report acknowledged this factor without recognizing its importance when it noted that some employers refuse to hire older workers because of their higher wages.[85] Empirical evidence confirms that internal labor markets typically include wage curves that rise with age or at least with the closely related factor of experience.[86] Rising wages and the expectations of rising wages of course provide incentives for employers not to hire and to terminate older workers to the extent that the wage increase is not justified by an increase in productivity. Both the ADEA cases and empirical evidence suggest that much of the wage increase associated with age cannot be explained by rising productivity.[87] This presents the question of why employers would implement pay scales that offer higher wages as age and experience increase without tying the increases to demonstrations of increased productivity.

One explanation is that employers pay higher wages to senior workers, relative to their productivity, as an incentive for workers to stay on the job, to work harder while they do so, and to be willing to acquire firm-specific skills that may not be fully transferable to other employers. Employers promise employees a total wage package over the course of the employees' careers that roughly reflects the employees' expected total productivity; but the employers promise that proportionately more wages will be paid late in the employees' careers to provide the desired incentives.[88]

---

85. *See* WIRTZ REPORT, *supra* note 1, at 8.

86. The evidence is gathered in an important recent article by Professor Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1818-21 (1996) [hereinafter *Hands-Tying*]. In this section of my essay I rely heavily on some of Professor Jolls' economic analysis. I do not, however, agree with all her conclusions. *See infra* note 116 and accompanying text.

87. *See id.* at 1820-21. The key studies are James L. Medoff & Katherine G. Abraham, *Are Those Paid More Really More Productive? The Case of Experience*, 16 J. HUM. RESOURCES 186, 204 (1981), and James L. Medoff & Katherine G. Abraham, *Experience, Performance, and Earnings*, 95 Q.J. ECON. 703 (1980).

88. *See, e.g.*, Robert M. Hutchens, *A Test of Lazear's Theory of Delayed Payment Contracts*, 5 J. LAB. ECON. S153 (1987); Robert M. Hutchens, *Do Job Opportunities Decline with Age?*, 42 INDUS. & LAB. REL. REV. 89 (1988); Edward P. Lazear, *Agency,*

Why would workers accept such promises? The traditional economic explanation is that an employer can pay a larger total wage package to employees because of the surplus generated by the proper incentives contained in the rising wage curve. Under this theory, employers induce employees to accept backloaded wages by sharing the surplus that such wages generate.[89] Another explanation is that workers are attracted to a rising wage curve because of the documented apparent psychological preference in at least our culture for increased economic well being and earnings over time.[90] My guess is that American workers want the dignity that comes with the confirmation that their prior experience has made them more valuable to society.

However, the rising wage promise may create two interrelated incentives that could generate unnecessary unemployment and underemployment of older American workers. First, employers have a strong incentive to breach their commitments to pay wages above marginal productivity late in employees' careers. Having reaped the benefits of the backloaded wage promise when the employees were young, employers can escape some of the pay back by discharging older workers.

Of course, discharging older workers who earn high wages can undermine an employer's credibility and reputation with younger workers, thus making it more difficult for the employer to induce the younger workers to work below their marginal revenue product wage.[91] However, the threat of reputation loss is unlikely to provide an adequate incentive for employer opportunism of this sort. First, American business is now in an almost constant state of flux, expansion, and retrenchment. During a retrenchment period, an employer need not worry much about its reputation with younger workers because it is not

---

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

89. *See, e.g.*, Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1923 (1996).

90. *See, e.g.*, George Loewenstein & Nachum Sicherman, *Do Workers Prefer Increasing Wage Profiles?*, 9 J. LAB. ECON. 67, 77-80 (1989). This explanation is pressed by Professor Jolls. *See Hands-Tying*, *supra* note 86, at 1826-28.

91. This point has been made repeatedly in the literature. *See, e.g.*, H. Lorne Carmichael, *Reputation in the Labor Market*, 74 AM. ECON. REV. 713 (184).

hiring and cares little if a portion of its workforce departs. Many, if not most, employers can save their opportunism for these periods of retrenchment.[92]

Second, employers can make their promises of rising wages credible by keeping only a fraction of their older workforce. Younger employees will be sensitive to whether the older workers present are making the promised higher wages, but they probably are not sensitive to the older workers who are out of sight and out of mind because they are no longer employed. Furthermore, given the documented tendency of most humans to underestimate the probability that they will be the victims of misfortune,[93] some selected terminations of older workers are not likely to convince younger workers that the promises of rising wages made to them will not be kept.

Employees theoretically could address the potential for employer opportunistic breach of backloaded or rising wage promises by securing enforceable contractual promises for job security and higher late career wages. However, employees may lack sufficient information and insight to understand why such promises would be worth demanding.[94] Moreover, as Walter Kamiat has recently argued, any job applicants who did demand such promises would mark themselves as potential "shirkers," "lemon" employees that employers would want to avoid.[95] In any event, a system to protect job security is a collective good that employees can only efficiently secure collectively. It is revealing that where employees do bargain collectively in unions, they almost invariably do secure job security protection.[96]

---

92. Professor Jolls makes a similar point in a more elegant fashion using game theory principles. *See Hands-Tying*, *supra* note 86, at 1836-37.

93. *See, e.g.*, PAUL C. WEILER, GOVERNING THE WORKPLACE 77 & n.53 (1990); Steven L. Wilborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101, 128 n.88 (1988).

94. *See* Wilborn, *supra* note 93, at 127-32.

95. *See* Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1958-59 (1996).

96. Some have argued that the prevalence of job security protections in collective agreements and the infrequent inclusion of such protections in individual employment contracts instead suggest that only employees who want such protections choose to be represented by unions. *See generally*, Rock and Wachter, *supra* note 89. However, employees may reject union representation for a variety of other reasons, including concerns that choosing a union will provoke employer retaliation, strikes, or other

The rising wage curve creates for employers another incentive that also must generate a great deal of unnecessary unemployment and underemployment of older workers. This second incentive is the incentive not to hire workers who have voluntarily or involuntarily left other jobs where they have built up expectations of having higher wages later in their career. The older the worker seeking employment, the less likely that the employer can reap benefits by paying below marginal productivity, and the more likely that the employer will have to pay above marginal productivity to meet expectations and to compensate for deflated early career wages.

In order to counter these strong disincentives to the employment of older workers, an anti-discrimination law must not allow an employer to use its own rising wage scale as a justification for terminating or for refusing to hire an older worker. However, in *Hazen Paper Co. v. Biggins*,[97] the Supreme Court seemed to reject a line of lower court decisions that interpreted the ADEA to have this effect.[98] *Hazen Paper* held that the ADEA condemns only age-based employment decision-making, but not decision-making on the basis of other factors, such as proximity to pension entitlement (at issue there) or presumably higher wages, that may be associated with age, at least without a showing that such decision-making has a disparate impact

---

pressure for wage increases that will cause the elimination of jobs. Indeed, a recent major survey of workers' attitudes found that a majority of workers in non-union companies believe that management opposition is the primary factor blocking unions where they work. *See* RICHARD B. FREEMAN & JOEL ROGERS, WORKER REPRESENTATION AND PARTICIPATION SURVEY: WAVE TWO, REPORT ON THE FINDINGS 35 (1995).

Moreover, whatever the primary causes of union decline in the United States, it seems clear that the National Labor Relations Act does not effectively deter employers' union avoidance tactics, including retaliation against union supporters. *See, e.g.*, Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262 (1987); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). In addition, union protection is not a legally protected option for many employees who can claim protection under the ADEA, including managers and supervisors. *See, e.g.*, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

97. 507 U.S. 604 (1993).

98. *See, e.g.*, Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico, 929 F.2d 814, 821-22 (1st Cir. 1991) (dictum); Abbott v. Federal Forge, Inc., 912 F.2d 867, 875 (6th Cir. 1990) (dictum); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1207 (7th Cir. 1987); Wolf v. Ferro Corp., 772 F. Supp. 139, 142 (W.D.N.Y. 1991); Whitten v. Farmland Indus., Inc., 759 F. Supp. 1522, 1537 (D. Kan. 1991).

against older workers that does not have a compelling business justification.[99]

The *Hazen Paper* Court's reservation of the issue of whether the ADEA can be used to attack employment policies that disproportionately disadvantage older workers without proof of discriminatory intent might seem to offer ADEA plaintiffs hope that they can still challenge the application of experience-based wage curves against them. In another pre-*Hazen* line of decisions, some circuit courts had approved ADEA disparate impact challenges to criteria such as years of experience,[100] retirement eligibility,[101] and tenure,[102] that employers wished to use to reduce their labor costs. ADEA plaintiffs should not have great difficulty in most cases establishing that older workers are disproportionately affected by an employer's use of higher salaries associated with experience or seniority as a reason not to hire or to discharge.[103]

ADEA plaintiffs, however, would be foolish to be optimistic about the use of the Title VII-developed disparate impact methodology against employers' salary-based defenses. In a concurring opinion for three Justices in *Hazen Paper*, Justice Kennedy asserted that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[104] Those arguments, including the inclusion of a "reasonable factors other than age" defense in the ADEA[105] and the failure of Congress to mention the ADEA when confirming the availability of disparate impact proof for Title VII in section 105 of the Civil Rights Act of 1991,[106] were forcefully advanced in a thorough post-*Hazen* opinion of the Tenth

99. *See Hazen Paper*, 507 U.S. at 611-12.

100. *See* Geller v. Markham, 635 F.2d 1027, 1032-33 (2d Cir. 1980).

101. *See* EEOC v. Borden's, Inc., 724 F.2d 1390, 1393 (9th Cir. 1984).

102. *See* Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983).

103. *See Geller*, 635 F.2d at 1027.

104. *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring); *see also* Markham v. Geller, 451 U.S. 945, 946-48 (1981) (Rehnquist, J., dissenting) (disagreeing with the Court's denial of certiorari).

105. 29 U.S.C. § 623(f)(1) (1994); *cf.* County of Washington v. Gunther, 452 U.S. 161, 170 (1981) (suggesting that incorporation of a "factors other than sex" defense into Title VII for sex-based wage discrimination cases may preclude disparate impact proof).

106. 42 U.S.C. § 2000e-2(k) (1994). *See generally*, Eglit, *supra* note 61, at 1179-91.

Circuit that may provide a template for a later Supreme Court resolution of the issue.[107]

More importantly, even if the disparate impact methodology of proof remains available, it is not sufficient to counter labor cost justifications for personnel decisions disfavoring older workers. There is no better business justification than the reduction of costs. Reducing labor costs for each unit an employee produces can be achieved either by hiring more productive employees or by hiring employees of the same productivity at lower wages. The two strategies are simply opposite sides of the same coin. The Supreme Court has never suggested that labor cost justifications do not provide defenses to disparate impact claims.[108]

Plaintiffs might argue that an employer should not be able to apply general policies against the employment of more experienced workers who could command more on the employer's wage scale, and that instead, employers should be required to give individual assessments to all workers to determine whether their particular experience enhances their productivity enough to justify a higher wage. However, even in the unlikely event that this argument persuades the Supreme Court to disallow a cost defense in at least certain types of ADEA disparate impact claims, it would not assist plaintiffs in cases like *Metz v. Transit Mix, Inc.*,[109] where the employer does give individual assessment to a more expensive older worker and decides that he is not worth the higher wage level to which he has progressed.

---

107. *See* Ellis v. United Airlines, 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996). Thus far, however, the *Ellis* decision has not swept the circuits. *See, e.g.*, Smith v. City of Des Moines, 99 F.3d 1466, 1469-70 (8th Cir. 1996); Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996).

108. In contrast, the Court pronounced in *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991), that the extra cost of employing members of a Title VII protected class does not provide a defense for intentional discrimination. When a finding of discrimination must depend on negative effects, rather than intent, positive effects such as cost savings must also be considered. Therefore, the EEOC regulation relied upon in *Geller*, found at 29 C.F.R. § 860.103(h) (1979), is inapplicable because it only rejects cost as a justification for classification formally based on age, rather than on criteria, such as salary, that are correlated with age.

109. 828 F.2d 1202 (7th Cir. 1987). The court in *Metz*, however, held that salary savings realized by replacing an older employee with a younger employee were not a permissible nondiscriminating justification for terminating the older employee. *See id.* at 1207.

Plaintiffs might also argue under the disparate impact methodology that employers should be forced to implement the less drastic alternative of offering lower wages before refusing to hire or firing someone because their experience would otherwise command higher wages on the employer's pay scale.[110] However, employers have a good reason for not offering reduced wages: an employee who has earned higher wages or who has reasonable expectations of earning higher wages because of his experience will not be satisfied with lower wages and therefore will present a morale problem for the workforce. This reason should probably suffice as a business justification in disparate impact cases and as a demonstration in an individual disparate treatment case that the cost defense is not a pretextual reason for not hiring an older worker. In fact, employers probably do not want to continue to employ more experienced workers earning reduced wages because such workers belie the promises of rising wages given to younger workers. But this is just another way of explaining why reducing the wages of the older worker will engender morale problems.

In sum, whether or not *Hazen Paper* adumbrates the demise of ADEA disparate impact cases, it seems clear that the ADEA as now interpreted cannot protect older workers from the loss of employment opportunities caused by the rising wage curves that characterize many employers' internal labor markets.[111] In my view, given the importance of this "institutional arrangement" to the unemployment and underemployment of older workers, the ADEA must be considered inadequate, for this reason as well, when judged against the ultimate goals of the Wirtz Report.

---

110. *See* Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico, 929 F.2d 814, 821-22 (1st Cir. 1991); Abbott v. Federal Forge, Inc., 912 F.2d 867, 876 (6th Cir. 1990).

111. Both theory and empirical evidence suggest that these curves are most likely to be present for jobs involving tasks that are difficult for employers to monitor, and thus encourage employers to provide special inducements to employees to work harder. *See* Robert M. Hutchens, *A Test of Lazear's Theory of Delayed Payment Contracts*, 5 J. LAB. ECON. S153, S161, S163 (1987).

IV. A MORE EFFECTIVE ADEA?

It is not difficult to suggest practical modifications to the ADEA that would address the two deficiencies that I have highlighted above. First, to eliminate the primary institutional barrier to the full employment of older workers, Congress could in part overrule *Hazen Paper* to provide that an employer cannot use the wage of an incumbent worker within the ADEA protected class as a justification for the discharge, constructive discharge, or demotion of that worker. The law also would have to provide that an employer cannot refuse to hire an older worker because that older worker has been earning more money in a prior job or because the employer would have to pay the older worker more under internal pay scales that promise higher wages with experience.[112]

There are strong grounds for prohibiting cost-based justifications for refusals to hire as well as for terminations. First, as a number of law and economics scholars have highlighted, making it more difficult to discharge workers in a protected class provides further incentives for employers not to hire such workers.[113] Employers concerned that the law will not allow them to terminate older workers because their wages have risen to exceed their marginal productivity will be less inclined to hire workers who are within or even close to the ADEA-protected over-forty-year-old class. Thus, the law must vigorously enforce hiring discrimination standards so that termination discrimination standards will not frustrate the kind of employment goals that the Wirtz Report set for an age discrimination statute.

---

112. The law should require the kind of jury instructions sought by the EEOC, but rejected by the Eighth Circuit, in *EEOC v. Atlantic Community School District*, 879 F.2d 434, 435 (8th Cir. 1989):

> It is illegal under federal law for an employer to discriminate against older workers because they are higher in the employer's pay scale as a result of their years of experience. If you find that the salary level Mrs. Parks would have been eligible for because of her years of experience was a determining factor in defendant's decision not to hire her, you should find for the plaintiff.

113. *See generally*, Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487 (1996); Donohue & Siegelman, *supra* note 79.

Second, as Professor Jolls argues, prohibiting cost-justifications for refusals to hire, as well as for terminations of older workers, enables an age discrimination law to mimic the kind of contracts that many workers, would like to form with multiple employers, contracts that promise rising wages with increased experience, regardless of which employer in an industry takes advantage of that experience.[114] In Jolls' view, such contracts would be efficient since they would enable employees and employers to make the commitment to exchange lower early career wages for higher late career wages more meaningful, because the commitment could not be broken by the voluntary or involuntary loss of jobs with early career employers. This would benefit employers because it would enable them to more readily use the promise of late career wages as an inducement for hard early career work. The law may have to intervene, Jolls argues, because interemployer contracting is not practical.

Jolls' efficient market mimicking analysis is somewhat vulnerable to challenge. One of the reasons employers may offer rising wage promises, in addition to the encouragement of hard early career effort, is to discourage turnover. Obviously this employer goal would not be served by interemployer commitments to pay rising wages. Furthermore, Jolls' emphasis on achieving the efficiency of a perfect labor market leads her to suggest that employers should be committed not only to hire new older workers without using cost-based defenses, but also to hire them at the higher wages that were promised them by former employers.[115] Thus, she suggests that courts might have to look to other firms or even to other industries to set "age-wage benchmarks."[116] This judicial control of employer pay scales does not seem more practical here than it would be for any attempt to achieve the goals of comparable worth theory.

However, to avoid the forced unemployment and underemployment of older workers, the law would not have to prohibit employers from reducing the wages of incumbent older workers to the level earned by comparably productive younger workers

114. *See Hands-Tying*, *supra* note 86, at 1830-39.
115. *See id.* at 1837-38.
116. *Id.* at 1843.

in comparable positions. As explained above,[117] employers who have promised rising wages normally will not want to suffer the impact on employee morale that would be produced by breaking that promise for workers who remain employed. When an employer is willing to significantly cut an older worker's wages, it usually will have good reason for doing so. In any event, the goals of an age discrimination statute do not require the government to oversee employee wages so long as older workers are not treated more poorly than comparable younger workers.

Similarly, an employer should be able to offer older applicants for employment the lower wages paid younger, less experienced workers in comparable positions, if the employer is willing to bear the costs to the integrity of its internal labor market and to the promises of rising wages that it makes in that market. Employers simply should not be able to use the dilemma between paying more for an older worker and suffering reputational costs as an excuse for not hiring the older worker.

On the other hand, it must be acknowledged that if employers are not restrained in setting the wages of new, as well as incumbent, older workers when wages are at least as high relative to productivity as the wages of younger workers, a prohibition on the use of a cost-based defense to refusing to hire will probably result in a decline in the rising wages offered to more experienced workers by most employers. The reason is that employers who offer a higher wage premium to more experienced workers would be flooded with applications from such workers. Employers might address this phenomenon by not offering above marginal productivity wages to workers with experience gained with other employers or by flattening the incline on their age-wage curve. Since there would still be incentives to offer some age or experience premium, it is difficult to predict where an equilibrium age-wage incline would be set for any group of employers, but it seems clear that the equilibrium that results from legal regulation would not be identical to that set by a perfectly working market.

---

117. *See supra* note 91 and accompanying text.

Nonetheless, if the Wirtz Report's goals of enhanced human dignity and fuller use of human resources through the encouragement of the full employment of older workers are stressed, rather than merely mimicking "perfect" labor markets, we can conclude that we should prohibit the use of high labor costs as a justification for the refusal to hire, as well as for the termination of, older workers. To the extent that our goals are ones of fuller employment, we need not be concerned about any incentives on employers to qualify their promises of higher wages for older and more experienced workers, just as we are not concerned that the OWBPA now makes clear that employers do not have to offer the same health insurance benefits to older workers, as long as they do not use the cost of health insurance as a justification for not employing these workers.[118]

The elimination of most covert age discrimination in employment could also be made feasible through a few modifications to the ADEA. Most clearly, employment discrimination plaintiffs should be able to establish liability under the ADEA the same way that Section 107 of the Civil Rights Act of 1991 permits plaintiffs to establish liability under Title VII, by proving that a protected status was considered in an employment decision, without also having to prove that the consideration was a but-for cause of that decision.[119] Moreover, plaintiffs should be free to use any probative evidence to prove the consideration of protected status. The *McDonnell Douglas-Burdine* and *Price Waterhouse* proof methodologies should not be combined in a way that constrains consideration of all a plaintiff's proof.[120] Congress could clarify that the "motivating factor" standard of Section 107 of the Civil Rights Act of 1991 is available to all ADEA, as well as Title VII, plaintiffs, regardless of the circumstantial or "indirect" nature of the proof that they offer. Such a clarification would make meaningful a condemnation of all consideration of protected status in employment decision-making, as well as significantly reduce the difficulty of proving covert discrimination.

---

118. *See supra* notes 80-84 and accompanying text.
119. *See supra* notes 55-58 and accompanying text.
120. *See supra* notes 64-72 and accompanying text.

Congress might also supplement the remedies made available to ADEA (and Title VII) plaintiffs who establish that consideration of a protected status contributed to an adverse employment decision, even where the employer convinces the trier of fact that it would have made the same decision without consideration of the status. In order for the statute to effectively deter what might be an economically rational consideration of age, these remedies should not be limited to declaratory orders and attorney's fees, as they are under current Title VII law.[121] While remedies available after proof of contributing cause need not include the ADEA's liquidated damages, reinstatement, or front pay, they should at least include back pay for the period during which an employer continues to litigate and deny liability.

Finally, Congress might validate the mandatory presumption of indirect proof of discrimination based on proof of employer pretext that plaintiffs' advocates thought they had achieved through the *McDonnell Douglas-Burdine* methodology before the pretext-plus response of the lower courts and the Supreme Court's *Hicks* decision.[122] Such a mandatory presumption admittedly would bear the cost of many meritless discrimination claims being found valid. As Justice Scalia explained for the Court in *Hicks*, employers may want to hide even some nondiscriminatory motives and sometimes may not be able to isolate a legal covert motivation.[123] Furthermore, such a mandatory presumption in favor of lawsuits brought by plaintiffs in at least Title VII-protected classes could be attacked as affirmative action and thus would be politically unpopular.[124]

On the other hand, most Americans might support defining as illegal any employment decision against an older American that the older American could prove was not explainable by any justification offered by the employer. That support indeed might be because of, rather than in spite of, the fact that such a broad proscription, combined with a prohibition on the use of higher labor costs as a justification for the termination or non-

121. *See supra* note 57 and accompanying text.
122. *See supra* notes 32-48 and accompanying text.
123. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 508-09 (1993).
124. *See* Malamud, *supra* note 50, at 2314-15.

hiring of an ADEA-protected worker, would transform the ADEA into not only a federal wrongful termination statute for older workers, but a wrongful failure to hire statute as well. The modifications to the ADEA suggested here would cause employers to make sure that older workers were not denied new or continued employment without certainty that there was good cause for such denial, other than the wages that are normally paid workers of greater experience.

It may be, however, that even if the statutory modifications necessary to make the ADEA effective in achieving the goals of the Wirtz Report were popular with the average voter, they could not be enacted because of the resistance of American business. That resistance could be expressed as opposition to a radical expansion of federal regulation of the employment relationship. It would derive from age discrimination often being economically rational for employers and from an appreciation of the costs that effective measures to eliminate its more subtle and covert forms would impose.

Perhaps to make the costs of these measures more palatable to employers, their enactment could be combined with two other amendments to the ADEA. The first would reinstate an age cap on the ADEA-protected class. I believe that the age of seventy-two would be realistic. If employers knew that their commitment to older workers could be terminated by mandatory retirement at a reasonable age, their incentives not to hire older workers would be substantially reduced. Furthermore, allowing mandatory retirement at some reasonable age such as seventy-two would also provide greater incentives for employers to offer higher wages with age and experience. Employers would know that their commitment to pay wages above marginal productivity was temporally bounded. This would partially compensate for any incentive not to offer increased wages with age that would be created by prohibiting employers using higher wages as a justification for keeping their workforce younger.

Second, if the ADEA were made sufficiently effective to serve as a protection against all arbitrary treatment of older workers by American employers, it reasonably could include a preemption provision that would preclude state law also providing workers certain additional protections from arbitrary discharge. Such a preemption provision should not preclude state anti-

retaliation, whistleblowing, or other public policy actions, but it could preclude a broader statute like that of Montana,[125] as well as any other state common-law developments that would protect workers from wrongful discharge in the absence of any actual contractual commitment from employers.[126] My guess is that most Americans would be fully satisfied protecting workers in the ADEA-protected class from arbitrary discharge, knowing that younger workers have better opportunities to secure retraining and new jobs.

These two provisions might at least sufficiently qualify employer resistance to the strengthening of the ADEA to make such strengthening politically feasible. It may be that our society is ready to calculate that the increased labor costs that inevitably would be imposed by the protection of older workers from arbitrary treatment are outweighed by the benefits of an age discrimination law identified by the Wirtz Report: the enhancement of dignity for older Americans, and the reduction of the waste of human resources in the unwanted and avoidable unemployment and underemployment of older workers.

In any event, it is clear to me that if we are to achieve the goals set forth over thirty years ago in the Wirtz Report, we must not be satisfied with current law. The economic incentives for employers to avoid the hiring, promotion, and retention of older workers are too great to expect achievement of these goals through what now operates effectively as only a prohibition of overt consideration of age, without appreciation of the economic reality of the higher wages commanded by the more experienced.

125. *See* MONT. CODE ANN. §§ 39-2-901 to -914 (1995).

126. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (acknowledging an implied contract based on course of dealings and employer's personnel manual).