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Jury Compensation of Front Pay under the Age Discrimination in Employment Act

Brian S. Felton

Note

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Congress enacted the Age Discrimination in Employment Act (ADEA)[1] to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[2] Within the last decade, all federal circuit courts addressing the issue have held that the Act permits awards for future income that the employee would have earned were it not for the employer's discrimination.[3] These courts do not agree, however, on whether the judge or the jury should calculate the amount of these "front pay" damages.[4] The reso-

1. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1988)).

2. 29 U.S.C. § 621(b) (1988). For a general survey of the history, coverage, enforcement, and administration of the ADEA, see JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW (1986).

3. *See* Duke v. Uniroyal, Inc., 928 F.2d 1413, 1423 (4th Cir.), *cert. denied*, 112 S. Ct. 429 (1991); Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989); McNeil v. Economics Lab., Inc., 800 F.2d 111, 118 (7th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985); Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1172-73 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985); Goldstein v. Manhattan Indus., 758 F.2d 1435, 1448-49 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984); Davis v. Combustion Eng'g, 742 F.2d 916, 923 (6th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982); Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982).

4. *Compare, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991) *with* Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 892-93 (6th Cir. 1988).

Courts have defined front pay in various ways. *See, e.g.*, McKnight v. General Motors Corp., 908 F.2d 104, 116 (7th Cir. 1990) ("the discounted present value of the difference between the earnings [the plaintiff] would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis inferior, employment"), *cert. denied*, 111 S. Ct. 1306 (1991); Hybert v. Hearst Corp., 900 F.2d 1050, 1055 (7th

lution of this conflict may significantly affect the amount of front pay awards granted under the Act.[5]

This Note argues that the ADEA permits jury computation of front pay awards. Part I discusses the remedial scheme of the Act and its jury trial provisions. Part II outlines the Supreme Court's approach to the right to a jury trial granted by the Seventh Amendment to the United States Constitution. This Part also discusses two exceptions to the right to a jury trial that courts have employed in denying a jury trial on front

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Cir. 1990) ("present value of the future income that the . . . plaintiff would have earned if he/she would have remained in the defendant's employ for the rest of his/her working life"); *Hansard*, 865 F.2d at 1469 ("future lost earnings"); Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 892 n.14 (6th Cir. 1988) ("any salary and benefits [the plaintiff] would have received in the future"); *Maxfield*, 766 F.2d at 796 ("award for future earnings . . . as an alternative remedy to reinstatement"); Stafford v. Electric Data Sys. Corp., 741 F. Supp. 664, 665 n.3 (E.D. Mich. 1990) ("an employee's loss of future income for a period *after* the date of trial").

Front pay awards include lost future wages, *see, e.g.*, Reneau v. Wayne Griffin & Sons, 945 F.2d 869, 870 (5th Cir. 1991), and may include lost pension benefits, *see, e.g.*, Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1212 (7th Cir. 1989); Blum v. Witco Chem. Corp., 829 F.2d 367, 373 (3d Cir. 1987). Some courts have taken a broader view of front pay and have included the entire employment benefit package in the remedy. *See, e.g.*, Nordquist v. Uddeholm Corp., 615 F. Supp. 1191, 1204 (D. Conn. 1985). *But see* Berndt v. Kaiser Aluminum & Chem. Sales, Inc., 604 F. Supp. 962, 966 (E.D. Pa. 1985) (excluding fringe benefits from front pay award because of their speculative nature).

Front pay provides prospective relief from the date of judgment. In contrast, back pay returns to plaintiffs the value of the compensation they would have earned had they remained in the defendants' employ from the date of discharge to the trial date after subtracting the value of their compensation at other jobs for the same period. O'Donnell v. Georgia Osteopathic Hosp., 574 F. Supp. 214, 220 (N.D. Ga. 1983), *aff'd in part & rev'd in part*, 748 F.2d 1543 (11th Cir. 1984).

Although commentators have discussed and advocated front pay as an alternative to reinstatement under the ADEA, they have failed to discuss in any depth whether the judge or jury should compute front pay under the Act. Most simply assume that the judge should compute the award. *See* Timothy E. Hawks, *Future Damages in ADEA Cases*, 69 MARQ. L. REV. 357 (1986); J. Hardin Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 MD. L. REV. 298, 331-38 (1986); Peter Janovsky, Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 FORDHAM L. REV. 579 (1984); Michele K. Kemler, Note, *Front Pay as an Appropriate Remedy Under the Age Discrimination in Employment Act*, 32 WAYNE L. REV. 115 (1985).

5. At least one empirical study has demonstrated that, on average, juries give larger awards than judges. *See* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 31 J. AM. TRIAL LAW. ASS'N 589, 597-98 (1965); *see also* JOHN GUINTHER, THE JURY IN AMERICA 169-72 (1988) (arguing that although juries may be likely to give larger awards than judges, this is so because judges tend to undercompensate plaintiffs).

pay damages in non-ADEA contexts. Part III examines the approaches courts have taken in determining whether the ADEA grants plaintiffs the right to have a jury compute their front pay. Part IV concludes that because Congress intended to comply with current Seventh Amendment jurisprudence, courts should interpret the ADEA as providing the right to jury computation of front pay. This Note argues that the reasons courts typically cite in denying a plaintiff a jury trial on the amount of front pay damages run contrary to Seventh Amendment doctrine and threaten to undermine that "right so fundamental and sacred to the citizen,"[6] the constitutional right to a jury trial.

I. FRONT PAY UNDER THE ADEA

The ADEA provides remedies for individuals who have suffered age-based discrimination in the workplace.[7] As a remedy for a violation of the Act, plaintiffs may use the enforcement provisions of the Fair Labor Standards Act (FLSA) to recover lost wages and job-related benefits.[8] Also, when employers wilfully violate the Act, plaintiffs may recover liquidated damages equal to their pecuniary loss.[9] Finally, in ADEA actions, the court may grant additional legal or equitable relief to carry out the purposes of the Act.[10] Despite initial uncer-

6. Jacob v. New York City, 315 U.S. 752, 752 (1942).

7. 29 U.S.C. § 623(a) (1988); *see* Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991); Trans World Airlines v. Thurston, 469 U.S. 111, 120 (1985); Lorillard v. Pons, 434 U.S. 575, 577 (1978). The Act applies to employers, employment agencies, and labor organizations. 29 U.S.C. § 623 (1988).

8. The ADEA provides: "Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of [the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 216, 217)]." 29 U.S.C. § 626(b) (1988).

The FLSA provides:

> Any employer who violates the provisions of section 206 or section 207 of this title [29 U.S.C. §§ 206 or 207, minimum wage and maximum hours standards] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

29 U.S.C. § 216(b) (1988).

9. 29 U.S.C. § 626(b) (1988); *see Lorillard*, 434 U.S. at 581; *see also* Rebecca Marshall, Comment, *Bootstrapping a Malice Requirement into ADEA Liquidated Damage Awards*—Dreyer v. ARCO Chemical, 62 WASH. L. REV. 551, 556-57 (1987) (discussing judicial efforts to define "wilful violation" under the ADEA).

10. 29 U.S.C. § 626(b) (1988). The Act provides that:

tainty,[11] all of the federal circuits have now concluded that this remedial scheme permits a plaintiff to recover front pay in certain circumstances.[12]

As enacted in 1967, the ADEA did not expressly provide for the right to a trial by jury in age discrimination suits. In 1978 the Supreme Court held, in *Lorillard v. Pons*, that litigants pursuing private civil actions for lost wages under the ADEA are entitled to jury trials.[13] Congress codified the holding of *Lorillard* in 1978.[14] The amendment authorizes a jury trial on "any issue of fact in any such action for recovery of

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> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

Id.

Congress gave courts the power to grant this additional relief because it intended the remedial scheme of the ADEA to be compensatory, not punitive. H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 535. Courts have heeded Congress's intent, finding that its purpose in fashioning ADEA remedies was to make plaintiffs whole. *E.g.*, Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469, *cert. denied*, 493 U.S. 842 (1989). For a discussion of the legal and equitable remedies available under the ADEA, see KALET, *supra* note 2, at 89-137.

11. *Compare* Grecco v. Spang & Co., 566 F. Supp. 413, 415 (W.D. Pa. 1983) (holding that the ADEA remedial scheme does not permit awards of front pay), *aff'd without op.*, 779 F.2d 42 (3d Cir. 1985), *cert. denied*, 475 U.S. 1036 (1986) *with* Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983) (holding that the ADEA grants sufficient power to authorize awards of front pay).

12. *See supra* note 3 (collecting cases).

13. 435 U.S. 575, 585 (1978). In *Lorillard*, in addition to reinstatement, the plaintiff sought lost wages, liquidated damages, costs, and attorneys' fees. *Id.* at 576. The trial court granted the defendant's motion to strike the demand for jury trial on the claim for lost wages. The Supreme Court upheld the court of appeals' decision to vacate the trial court's order, concluding that the structure of the ADEA revealed that Congress intended to provide the right to a jury trial on legal issues in private actions. *Id.* at 585. The Court noted that Congress had selectively incorporated provisions of the FLSA into the ADEA, inferring that where Congress did not expressly modify the provisions of the FLSA, it intended to incorporate fully the FLSA's remedies and procedures. *Id.* at 582. Because the courts had uniformly recognized the right to a jury trial under the FLSA, Congress's incorporation of the FLSA enforcement techniques in the ADEA provided for the right to a jury trial under the Act. *Id.* at 582-83. *But see* Karen L. Peck, *Union Liability Under the Age Discrimination in Employment Act*, 56 U. CHI. L. REV. 1087, 1094 (1989) (arguing that Congress did not intend such a broad incorporation of the remedial provisions of the FLSA).

14. Pub. L. No. 95-256, § 4(a), 92 Stat. 190 (1978) (codified as amended at 29 U.S.C. § 626(c)(2) (1988)).

amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."[15]

The 1978 amendment to the ADEA does not expressly provide plaintiffs the right to have a jury compute their front pay claims.[16] The legislative history, however, indicates that Congress intended to provide for a jury trial on legal issues arising under the Act. For instance, the House Conference Report stated that "it is manifest that a party is entitled to have the factual issues underlying . . . a claim [for legal relief] decided by a jury."[17] When Senator Kennedy proposed the original Senate amendment, he stated: "The amendment guarantees the availability of a jury trial of legal issues in private actions brought under the Age Act."[18] Like the jury trial provision itself, the legislative history of the 1978 amendment addresses the distinction between legal and equitable issues in providing for the right to a jury trial. Neither the amendment nor the legislative history, however, provides conclusive proof of whether Congress intended for juries to compute front pay.

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15. *Id.* The Conference Committee Report on the 1978 amendments defines "amounts owing" to the victims of a discriminatory discharge in violation of the ADEA as follows: "First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA." H.R. CONF. REP. NO. 950, *supra* note 10, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 535.

Congress also amended the Act in 1974 to cover the employment practices of federal, state, and local governments. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55, 74-76 (codified as amended at 29 U.S.C. §§ 630(b), 633a (1988)). Jury trials are nonetheless unavailable to plaintiffs suing the federal government. Lehman v. Nakshian, 453 U.S. 156, 168-69 (1981). *See generally* Gina V. Ferguson, Case Development, 25 HOW. L.J. 323 (1982) (discussing the unavailability of a jury trial, under the doctrine of sovereign immunity, in suits against the federal government).

16. Congress may not have contemplated the remedy of front pay when it amended the ADEA to provide the right to a jury trial, as few cases involving front pay under the ADEA had arisen at the time of the 1978 amendments. Not until after the seminal case of Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983), in which the court granted an employee the salary he would have earned to the date of retirement, were courts faced with a significant volume of claims for front pay in ADEA actions.

17. H.R. CONF. REP. NO. 950, *supra* note 10, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 535.

18. 123 CONG. REC. 34,317 (1977). The original Senate amendment provided that "a person shall be entitled to a trial by jury in any action involving monetary damages (including an action for back pay) regardless of whether equitable relief is sought by a party in the same action." *Id.*

II. THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

A. THE TWO-PRONG TEST

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[19] The Supreme Court has determined that the phrase "Suits at common law" refers to suits in which legal, as opposed to equitable, rights and remedies are determined and administered.[20] The Court uses a two-part inquiry to determine whether the Seventh Amendment provides the right to a trial by jury in any given civil action.[21]

The first prong of the Court's test carries out the Seventh

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19. U.S. CONST. amend. VII.

20. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989) (citing Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830)). Justice Story, in *Parsons v. Bedford*, articulated the prevailing interpretation of the phrase, "Suits at common law," stating:

> The phrase "common law" found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By *common law*, [the framers of the amendment] meant what the constitution denominated in the third article "law"; not merely suits, . . . but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

Parsons, 28 U.S. (3 Pet.) at 446-47.

21. The Court, in Ross v. Bernhard, 396 U.S. 531 (1970), proposed a third element of the Seventh Amendment inquiry. In a controversial footnote, the Court wrote: "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* at 538 n.10. The third prong of the *Ross* test generated much academic criticism. *See, e.g.*, Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 526 (1975); Note, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737, 746 n.73 (1983) ("The Ross test . . . is neither constitutionally compelled nor analytically useful."). The Court later limited the scope of this element of the test, describing the element as an inquiry "into whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme." *Granfinanciera*, 492 U.S. at 42 n.4. Nonetheless, lower courts occasionally inject a "complexity" exception into the Seventh Amendment analysis. *See infra* notes 43-45 and accompanying text.

For a discussion of the evolution of current Seventh Amendment jurisprudence, see JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §§ 11.5-11.8 (1985);

Amendment's preservation of the common law right to a jury trial on legal issues. Under this prong the Court determines whether the contemporary action more closely resembles cases historically tried in the courts of law or in the courts of equity or admiralty.[22] In conducting its analysis under this prong, the

Redish, *supra*, at 490-502; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639-49 (1973).

22. *See* Chauffeurs Local No. 391 v. Terry, 110 S. Ct. 1339, 1345-47 (1990) (engaging in a historical inquiry to determine the existence of the right to a jury trial); Tull v. United States, 481 U.S. 412, 417-18 (1987) (comparing a modern statutory action to actions historically tried at law and equity).

The Court has never expressly stated what does and does not constitute a "resemblance" between modern and historical causes of action. Sometimes the Court has emphasized the specific nature of the right sued upon, *see, e.g.*, *Granfinanciera*, 492 U.S. at 40-41 (finding an analogy to a suit to recover allegedly fraudulent money transfers because actions to recover fraudulent transfers were brought at law in the 18th century), and sometimes it has emphasized the general nature of the modern action, *see, e.g.*, Curtis v. Loether, 415 U.S. 189, 195 (1974) (finding a legal analogy to an action for damages for breach of statutory duty because such an action "sounds basically in tort").

In examining "resemblance," however, the Court appears generally to focus on the elements of the modern and 18th-century actions being compared, and on the nature of the relations between the parties. For instance, in *Terry*, the Court compared a modern duty of fair representation action with an 18th-century action by a trust beneficiary against a trustee for breach of fiduciary duty. 110 S. Ct. at 1346. The Court found the actions analogous because, in each, the plaintiff could sue only upon showing that the trustee or union failed to act properly on the plaintiff's behalf. *Id.* In finding the actions analogous, the Court also relied on the similarity between the duties owed by a trustee to a beneficiary and those owed by a union to the employees it represents. *Id.* In contrast, the Court found that the duty of fair representation action did not resemble an attorney malpractice action historically considered to be legal. The Court emphasized basic differences in the "underlying relationship[s] between the parties" that distinguished a malpractice action from one for breach of the duty of fair representation. *Id.* at 1347. For instance, while clients control important decisions concerning their representation, employees represented by a union have no such control. *Id.* at 1346-47.

The Court also has struggled with the treatment of a modern suit that is analogous to 18th-century actions at both law and equity. For instance, in *Tull*, the petitioner demanded a jury trial in a suit by the government for a civil penalty under the Clean Water Act. The Court agreed with the petitioner that the modern suit was analogous to an 18th-century debt action in the English courts of law. 481 U.S. at 420. The Court also concluded, however, that the respondent properly analogized the modern suit to an equitable action to abate a public nuisance. *Id.* Unable to state whether the modern suit more closely resembled an action at law or equity, the Court relied solely on the second prong, the nature of the remedy sought, to conclude that because a civil penalty was a legal remedy, the Seventh Amendment gave the plaintiff the right to a jury trial. *Id.* at 421. Similarly, in *Terry*, the first prong of the Seventh Amendment inquiry left the Court "in equipoise." 110 S. Ct. at 1347. The Court found analogous actions in both historically legal and equitable actions. Nonetheless, because the plaintiffs sought a traditionally legal remedy—com-

Court compares the modern suit to eighteenth-century actions brought in the English common law courts. In actions available in the courts of law in 1791, or in analogous actions,[23] the Seventh Amendment provides the right to a jury trial.[24]

The second element of the Seventh Amendment test is the determination of whether the remedy sought is "legal" or "equitable."[25] The Supreme Court has stated that courts should consider "the general types of relief provided by courts of law and equity" but that they should *not* replicate the historical inquiry of the first prong.[26] Although the meaning of this lan-

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pensatory damages representing back pay and benefits—the Court relied almost entirely on the second prong of the test to find a Seventh Amendment right to a jury trial. *Id.* at 1349. Justice Brennan concurred in the judgment, proposing that the Court abandon the historical test and focus solely on the character of the relief sought. *Id.* at 1349-53.

23. The contemporary action and its common law analogue need not be identical so long as the modern action embraces or resembles a common law form of action. *See Curtis,* 415 U.S. at 193-194; Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

24. *See, e.g., Granfinanciera,* 492 U.S. at 41 (stating that the Seventh Amendment seeks, in part, to preserve the right to a jury trial as it existed in 1791 and citing *Parsons,* 28 U.S. (3 Pet.) at 447); *Tull,* 481 U.S. at 417 (holding that the constitutional right to a jury trial existed in a statutory action for civil penalty because civil penalties historically could only be enforced in courts of law); Pernell v. Southall Realty, 416 U.S. 363, 374-76 (1974) (finding the constitutional right to a jury trial in a statutory landlord-tenant action that resembled the common law action of ejectment); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962) (finding the constitutional right to a jury trial in an action for monetary damages).

25. *See Terry,* 110 S. Ct. at 1345.

26. *Id.* at 1348 n.8. Historically, "legal" remedies were those available from courts of law, while "equitable" remedies were those granted by a court of equity. Prior to the merger of law and equity, the jurisdiction of these two bodies was primarily a matter of remedy. Courts of law guaranteed the right to a jury trial while courts of equity did not. A purely historical analysis could therefore rely on the forum in which a particular remedy was sought to determine whether there was a right to a jury trial.

Even at common law, however, the line between law and equity was not always neatly drawn. Each jurisdiction borrowed functions from the other, creating a large overlap of functions between law and equity. Fleming James, Jr., *Right to a Jury Trial in Civil Actions,* 72 YALE L.J. 655, 658-59 (1963). Moreover, the characterization of a case as equitable or legal often varied between one locale and another. Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment,* 80 COLUM. L. REV. 43, 101-04 (1980); *see also* FRIEDENTHAL ET AL., *supra* note 21, § 11.4 (discussing the narrowing of differences between courts of law and equity late in the 17th century).

In addition, equitable and legal issues often arose in the same transaction. For instance, one party may have sought an injunction in equity while the defendant in equity brought a related action at law for monetary damages. The chancellor in this situation had the discretion either to decide the legal issue

guage is unclear, courts consider both the historical and modern conceptions of "legal" and "equitable" remedies under the second prong. This broad inquiry permits courts to consider, for example, the expansion of adequate legal remedies brought about by the Federal Rules of Civil Procedure.[27]

The Supreme Court combines both prongs of the test to determine whether a party is entitled to a jury trial under the Seventh Amendment.[28] The Court views the nature of the remedy sought as the more important element of the Seventh Amendment inquiry,[29] and recently described the search for a common law analogue for the modern action as merely "preliminary."[30] Although the Court continues to apply both prongs of the Seventh Amendment test, its current approach to the first prong suggests that the absence of a common law analogue may not defeat the right to a jury trial.[31] When the Court identifies the remedy sought as a legal one, it invariably

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or stay the equitable action pending resolution of the legal issue in the court of law. *See* PATRICK DEVLIN, NOTE ON THE SUIT AT COMMON LAW IN ENGLAND AT THE TIME OF THE SEVENTH AMENDMENT (1791), at 19 (1979) [hereinafter SUIT AT COMMON LAW].

Generally speaking, however, an action for money damages was deemed legal and either party could obtain a jury on demand. *Terry*, 110 S. Ct. at 1347; *see also* Alan H. Schneider, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 201 (1991) (describing damages as the "distinctive feature" of jury trials). If the plaintiff sought an injunction or specific performance, however, the action was equitable and no right to a jury trial existed. FRIEDENTHAL ET AL., *supra* note 21, § 11.3.

One author has suggested the following reasons for equity's failure to use a jury: as an administrative officer, the chancellor was not concerned with facilitating the full trial of cases; the chancellor had become accustomed to relying on written interrogatories and depositions rather than supervising lengthy trials; the use of a jury would have required selecting jurors from the locality of the litigants, at great inconvenience to the jurors, or equity holding nisi prius sessions, at the chancellor's inconvenience, and; equity may have opposed the common law's view of the jury as a protector of individual liberties, given equity's close association with the crown. Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1180-81 (1961).

27. *See, e.g., Dairy Queen*, 369 U.S. at 477; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 507-08 (1959). Despite its attention to post-merger procedure, the "nature of the remedy" test remains in part a historical inquiry. The Court continues to adhere to the rule, for instance, that damages form a legal remedy. *See Terry*, 110 S. Ct. at 1347-48 (offering no justification for adhering to this rule other than the tradition at common law).

28. *Granfinanciera*, 492 U.S. at 41.

29. *Id.*; Curtis v. Loether, 415 U.S. 189, 196 (1974); *see also* Redish, *supra note* 21, at 490 (noting that in most cases at common law, the remedy sought determined whether the suit was equitable or legal).

30. *Terry*, 110 S. Ct. at 1347.

31. *See supra* note 22 (discussing recent cases in which the Court relied

concludes that the Seventh Amendment provides the right to a jury trial.

The twofold Seventh Amendment analysis extends to statutory causes of action.[32] If a statute involves rights and remedies typically enforceable at law, plaintiffs bringing claims under the statute have the right to a jury trial absent a functional justification for denying them a jury trial.[33]

B. EXCEPTIONS TO THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Under the "equitable clean-up doctrine" and the complex cases exception, courts of equity had jurisdiction to decide some issues without the aid of a jury. Despite the changes wrought by the merger of law and equity, courts continue to rely on a complexity exception and the equitable clean-up doctrine to justify keeping otherwise legal issues from the jury.

1. The Complexity Debate

Whether the complexity of a legal issue justifies an exception from the Seventh Amendment right to a jury trial has been debated at length.[34] At common law, equity courts had ju-

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solely on the nature of the remedy sought to find a Seventh Amendment right to a jury trial).

32. *See* United States v. Tull, 481 U.S. 412, 417 (1987); *Curtis*, 415 U.S. at 193.

33. *Curtis*, 415 U.S. at 193. A statute may deny such rights, for instance, if Congress has explicitly committed adjudication of a "public right" to an administrative agency. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51 (1989). The term "public rights" describes relations " 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.' " *Id.* at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)). In such a case, the Supreme Court has stated, trial by jury would conflict with the concept and purpose of administrative adjudication. *Curtis*, 415 U.S. at 194; *see also* FRIEDENTHAL ET AL., *supra* note 21, § 11.6; *cf.* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937) (finding a statutory proceeding not to be equivalent to a common law action for a money judgment and therefore not invoking the Seventh Amendment right to a trial by jury).

On the other hand, the Supreme Court has cautioned that the Seventh Amendment "requires trial by jury in actions unheard of at common law." Pernell v. Southall Realty, 416 U.S. 363, 375 (1974). Nevertheless, the Court has continued after *Pernell* to analyze Seventh Amendment rights in statutory actions according to the two-step inquiry discussed above. *Pernell* may simply indicate that "strangeness" to the common law does not result in an automatic denial of a jury trial.

34. *See, e.g.*, Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984); David M.

risdiction to enjoin legal proceedings where a court of law lacked an adequate remedy.[35] For instance, an equity court could step in to decide a monetary claim if the accounts between the parties were too complicated for the jury to understand.[36]

The promulgation of the Federal Rules of Civil Procedure and the resulting merger of law and equity rendered uncertain a court's authority to decide facts underlying legal issues because of their complexity. The Supreme Court addressed the issue in *Dairy Queen, Inc. v. Wood*.[37] The Court noted that a court of equity gained jurisdiction when there was no adequate legal remedy.[38] The Court observed, however, that in order for an equity court to hear a suit on a cause of action cognizable at law, the plaintiff must show that only a court of equity could possibly sort out the complicated accounts.[39] Considering the district court's new power to appoint masters to help juries in extraordinarily complicated cases, the Court reasoned that judges should rarely use equitable powers to impose legal remedies, even for complicated legal issues.[40] Although the plaintiff in *Dairy Queen* sought an accounting, the Supreme Court held that a properly instructed jury could readily determine the damages owed.[41]

The Court in *Dairy Queen* implied that the complexity of an issue will rarely, if ever, render jury verdicts inadequate as legal remedies. Although subsequent Supreme Court cases sup-

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Nocenti, *Complex Jury Trials, Due Process, and the Doctrine of Unconstitutional Complexity*, 18 COLUM. J.L. & SOC. PROBS. 1 (1983).

35. WILLIAM F. WALSH, A TREATISE ON EQUITY § 25 (1930). Equity developed as a means for attaining justice when the inflexible common law failed. WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY 5 (1956). Because there was no common law writ for an injunction or specific performance, equity alone could provide such a remedy. *Id.* In contrast, the common law courts permitted actions for money damages, and therefore equity usually had no need to step in where such damages were sought. *Id.*

36. SUIT AT COMMON LAW, *supra* note 26, at 24-32. *But see* Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 840 (1980) (arguing that the cases discussed by Lord Devlin do not support a complex case exception to common law jurisdiction). Outside of the action for an accounting, it has been argued that the relative abilities of judge and jury did not influence the characterization of a case as legal or equitable. *See* DE FUNIAK, *supra* note 35, § 103; Redish, *supra* note 21, at 524.

37. 369 U.S. 469 (1962).

38. *Id.* at 478.

39. *Id.*

40. *Id.*

41. *Id.* at 479.

port the result in *Dairy Queen*,[42] lower courts continue to apply a complexity exception to the Seventh Amendment right to a jury trial.[43] Courts most often apply this exception in multiparty, multi-issue lawsuits, such as antitrust suits[44] or other complex litigation.[45]

2. The Equitable Clean-Up Doctrine

In addition to expanding the availability of adequate legal remedies, the Federal Rules allow a party to assert legal and equitable claims in a single action.[46] Under the merged system, courts face the question of whether an action presenting both equitable and legal issues gives rise to the right to a jury trial. If such a right does arise, the courts need to decide to which issues it applies.

The equitable clean-up doctrine adds to the complications posed by a merged system of procedure.[47] The doctrine, also

42. Although the Court later seemed to reverse itself on the complexity question by injecting into its Seventh Amendment test an inquiry into the practical limitations of the jury, *see supra* note 21 (discussing the *Ross* test), the Court subsequently abandoned this proposed third prong. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) (setting forth the current Seventh Amendment analysis without the third prong of the *Ross* test). The Court has never expressly relied on the practical limitations of jurors to deny the right to a jury trial.

43. *See, e.g.*, *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1089 (3d Cir. 1980); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 444-49 (N.D. Cal. 1978), *aff'd on other grounds sub nom.* Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980). Several commentators have argued for such an exception. *See, e.g.*, King, *supra* note 34, at 606-14; Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

44. *See, e.g.*, *In re Japanese Prods.*, 631 F.2d at 1089. *Japanese Products* involved antitrust charges against a Japanese trading company and seven Japanese television manufacturers. The district court held that the Seventh Amendment guaranteed a jury trial regardless of the complexity of the issues. *Id.* at 1073. The court of appeals reversed, holding that a judge may deny the parties a jury trial when "a jury would be unable to understand the case and decide it rationally." *Id.* at 1089.

45. *See, e.g.*, *In re* United States Fin. Sec. Litig., 75 F.R.D. 702, 714 (S.D. Cal. 1977) (securities litigation involving the consideration of 18 separate cases and the certification of five separate classes), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

46. FED. R. CIV. P. 2, 18(a). Rule 2 provides that, "There shall be one form of action to be known as [a] civil action." Rule 18(a) provides that, "A party asserting a claim to relief . . . may join . . . as many claims, legal, equitable, or maritime, as the party has against an opposing party."

47. For a more detailed discussion of the equitable clean-up doctrine and its historical development, see A. Leo Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951); John E. Sanchez, *Jury Trials in Hybrid and Non-Hybrid Actions: The Equitable Clean-Up Doctrine*

called "incidental" or "ancillary jurisdiction," historically allowed the chancellor who granted equitable relief to grant legal relief as well.[48] This foreclosed jury trials on legal issues that equity courts treated as incidental to an equitable claim. Under the clean-up doctrine, the courts of equity addressed legal issues only so far as their decisions were incidental or subordinate to the determination of some equitable question.[49] The doctrine served to economize litigation by obviating the need for two separate actions in the courts of law and equity.

Following the merger of law and equity, federal courts retained jurisdiction over equitable and legal issues raised in a single civil action,[50] eliminating the historical justification for the clean-up doctrine. Hence, post-merger Supreme Court opinions have disapproved of the doctrine. Addressing a counterclaim under a legal theory in *Beacon Theatres, Inc. v. Westover*, the Court held that when courts of law can provide an adequate legal remedy on any issue, a party has a constitutional right to a jury trial on that issue regardless of whether equitable issues arise in the same suit.[51] Then, in *Dairy Queen, Inc. v. Wood*,[52] the Court stated that "the [rule] that the right to trial by jury may be lost as to legal issues where those issues are characterized as 'incidental' to equitable issues . . . may [not] be applied in federal courts."[53] The Court's refusal to ap-

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in the Guise of Inseparability and Other Analytical Problems, 38 DEPAUL L. REV. 627, 641-48 (1989).

48. Under the clean-up doctrine, once equity "properly acquire[s] jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law." Greene v. Louisville & I.R.R., 244 U.S. 499, 520 (1917); *see* DE FUNIAK, *supra* note 35, § 99. For instance, an action for an injunction accompanied by a request for a money judgment presents both equitable and legal claims. Once equity acquired jurisdiction over the action to decide the injunction claim, the chancellor had discretion to decide factual questions related to the legal request for a money judgment, including the actual amount of the award. SUIT AT COMMON LAW, *supra* note 26, at 19.

49. FRIEDENTHAL ET AL., *supra* note 21, § 11.5; *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 38.25 (1988).

50. 5 MOORE ET AL., *supra* note 49, ¶ 38.03.

51. 359 U.S. 500, 508-09 (1959). In *Beacon*, the Court concluded that, under the new Federal Rules and the Declaratory Judgment Act, the plaintiff had an adequate remedy at law. Therefore, the defendant was entitled to a jury trial on the legal treble damages issue. *Id.* at 507.

52. 369 U.S. 469 (1962).

53. *Id.* at 470; *see also* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.6 (1973) (stating that under *Dairy Queen*, incidental jurisdiction theories would not support the denial of a jury trial); FRIEDENTHAL ET AL., *supra* note 21, § 11.5 ("The opinion in *Dairy Queen* made it clear that virtually no

ply the doctrine in recent cases reflects its desire to restrict the doctrine as an outdated procedural device.[54]

application of the clean-up doctrine was constitutionally acceptable."); Redish, *supra* note 21, at 497 (noting that the rejection in *Dairy Queen* of the clean-up doctrine contrasted sharply with historical practice).

54. *See* Chauffeurs Local No. 391 v. Terry, 110 S. Ct. 1339, 1348 (1990); Tull v. United States, 481 U.S. 412, 424-25 (1987). In *Tull*, the Government sought civil damages from a developer for violations of the Clean Water Act. The Supreme Court reversed the district court's denial of the developer's demand for a jury trial. The Court acknowledged that a court in equity had the power to provide monetary relief "incidental to or intertwined with injunctive relief." 481 U.S. at 424. The Court did not apply the clean-up doctrine in *Tull*, however, because it did not view the potential penalty of $22 million as incidental to the modest injunctive relief the plaintiff sought. *Id.* The defendant in *Tull* had already sold most of the property at issue in the case. Therefore, any relief enjoining the defendant's activities would be minimal. The government thus knew when it filed suit that relief would be limited primarily to civil penalties. *Id.* at 424-25. The Court also refused to apply the doctrine when the violated statute did not intertwine equitable relief and traditionally legal damages. *Id.* at 425. The Court applied a similar test in *Terry*, 110 S. Ct. at 1348 (holding that because employees in an action alleging the breach of duty of fair representation sought only money damages, without incidental injunctive relief, the remedy was legal).

It is unclear under what circumstances the Court will uphold application of the doctrine. At the very least, *Tull* requires that the claims for equitable relief and legal damages be truly intertwined, rather than simply related to one another, and that the legal claim be the minor, or subordinate, of the two remedies. 481 U.S. at 424-25. In addition, a court in equity may not enforce civil penalties as incidental to injunctive relief. *Id.* at 424. Also, under *Terry*, if no party raises an equitable claim, the doctrine cannot apply. 110 S. Ct. at 1339. Finally, the Court has endorsed a "necessity" rule, stating that when both legal and equitable issues are presented in the same case, "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).

Federal district and circuit courts have nonetheless proved unwilling to dispense with the equitable clean-up doctrine. Especially in statutory civil rights actions, several courts have denied jury trials on damages claims characterized as "an integral part of" or "incidental to" the equitable remedy of reinstatement. *See, e.g.*, Gurmankin v. Costanzo, 626 F.2d 1115, 1122 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979); Harkless v. Sweeny Indep. Sch. Dist., 427 F.2d 319, 324 (5th Cir. 1970) (treating a money claim for back pay for wrongfully discharged teachers as merely incidental to an equitable claim for reinstatement), *cert. denied*, 400 U.S. 991 (1971); *cf.* Duke v. Uniroyal, Inc., 928 F.2d 1413, 1424 (4th Cir.) (holding that the award and amount of front pay "as an adjunct or an alternative to reinstatement" rests in the court's discretion), *cert. denied*, 112 S. Ct. 429 (1991).

III. JUDICIAL INTERPRETATION OF THE RIGHT TO A JURY TRIAL ON FRONT PAY UNDER THE ADEA

Consistent with the Seventh Amendment, courts have uniformly interpreted the 1978 jury trial amendment to the ADEA as granting the right to a jury trial on legal issues arising under the ADEA but not on equitable issues.[55] Courts also agree that the judge should decide whether to grant reinstatement or front pay depending on the circumstances of each case.[56] They have disagreed, however, about whether the *calculation* of front pay presents a "legal" or an "equitable" issue, the crucial distinction for determinations under the Seventh Amendment.[57] As a result, while some courts have reserved the calculation of front pay for the judge sitting in equity,[58] others have delegated the question to the jury.[59]

Those courts that recognize the right to jury computation of front pay generally have not articulated the reasons for this approach. Some opinions conclude that the calculation of front pay is within the competence of the jury,[60] or that the presence

55. *See, e.g., Duke*, 928 F.2d at 1422; Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1257 (2d Cir. 1987); Ventura v. Federal Life Ins. Co., 571 F. Supp. 48, 51 (N.D. Ill. 1983).

56. Deloach v. Delchamps, Inc., 897 F.2d 815, 823 (5th Cir. 1990) ("All circuit courts that have considered the issue . . . agree that . . . the district court must determine whether an employee can be reinstated or is entitled to front pay.").

57. Several courts have distinguished the issue of the calculation of front pay from the issue of the propriety of reinstatement or front pay in a given case. *E.g., id.* ("[T]he circuits are split on the issue of whether a jury or the trial court is to determine the proper amount of ADEA front pay."); *see also* Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985) (distinguishing the decision about whether to award front pay from the computation of the award), *cert. denied*, 474 U.S. 1057 (1986); Eivins v. Adventist Health Sys., E. & Middle America, Inc., 660 F. Supp. 1255, 1261 (D. Kan. 1987) (stating that while the court decides whether to award front pay, the jury decides the amount of front pay).

58. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991); *Duke*, 928 F.2d at 1424.

59. *See, e.g.*, Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 892-93 (6th Cir. 1988).

60. *See, e.g.*, Cassino v. Reichold Chems., Inc., 817 F.2d 1338, 1347 (9th Cir. 1987) ("[T]he effect of inflation and interest rates on the value of money is within the common knowledge of jurors . . . and jurors are sufficiently intelligent to reduce an award to present value."), *cert. denied*, 489 U.S. 1047 (1988). In the context of Title VII, one trial court noted in dicta that the loss of future earnings constitutes the kind of damages regularly submitted to a jury for resolution. Beesley v. Hartford Fire Ins. Co., 723 F. Supp. 635, 647 (N.D. Ala. 1989).

of the front pay issue does not interfere with the jury's ability to return a fair verdict.[61] One circuit court noted that awards for future earnings resulting from a discriminatory discharge are no more speculative than similar awards routinely made by juries in personal injury cases.[62] Most courts permitting jury computation of front pay, however, state that the amount of damages is a question for the jury without explaining the reasons for their decision.[63] Some opinions simply cite a prior case in which the appellate court affirmed the *amount* of a jury verdict of front pay without addressing whether the judge or jury should calculate front pay awards.[64]

Courts that refuse to submit the issue of front pay to the jury or that submit it to the jury on an advisory basis only justify this approach on several grounds. Most of these courts identify front pay as a substitute for reinstatement under the ADEA.[65] These courts conclude that because reinstatement is an equitable remedy not giving rise to the right to a jury trial, the substitute or adjunctive remedy of front pay should similarly be determined by the court.[66] In the recent case of *For-*

61. *Eivins*, 660 F. Supp. at 1261.

62. Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986) (stating that the plaintiff's duty to mitigate damages in age discrimination cases should effectively limit unjustified damage awards).

63. *See, e.g.*, *Fite*, 861 F.2d at 893 ("[Defendant]'s contention that front pay is not a question for the jury is at odds with the authority of this circuit."); Coston v. Plitt Theatres, Inc., 831 F.2d 1321, 1333 n.4 (7th Cir. 1987) ("Authority and reason both suggest that . . . the amount of damages available is a jury question."), *cert. denied*, 485 U.S. 1007 (1988).

64. *E.g.*, *Fite*, 861 F.2d at 892-93 (citing Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923 (6th Cir. 1984)); *Eivins*, 660 F. Supp. at 1261 (citing *Davis*, 742 F.2d at 922 & n.5).

65. *E.g.*, Deloach v. Delchamps, Inc., 897 F.2d 815, 824 (5th Cir. 1990); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1173 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985); Stafford v. Electronic Data Sys. Corp., 741 F. Supp. 664, 666 (E.D. Mich. 1990). For a thorough discussion of front pay as a substitute for reinstatement, see Janovsky, *supra* note 4. One rationale for allowing front pay only as a substitute for reinstatement is that, while the ADEA does not explicitly mention front pay, the Act does authorize courts to order reinstatement. Fortino v. Quasar Co., 751 F. Supp. 1306, 1317 (N.D. Ill. 1990), *rev'd on other grounds*, 950 F.2d 389 (7th Cir. 1991). For this reason, and because where practicable reinstatement is more likely to effectuate the "make-whole" purpose of the Act, the courts have preferred reinstatement to front pay. *See, e.g.*, Reneau v. Wayne Griffin & Sons, 945 F.2d 869, 870 (5th Cir. 1991); Hybert v. Hearst Corp., 900 F.2d 1050, 1055 (7th Cir. 1990); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984). This view also finds support in the Act itself, which seeks to "*promote employment* of older persons based on their ability rather than age." 29 U.S.C. § 621(b) (1988) (emphasis added).

66. *See, e.g.*, *Stafford*, 741 F. Supp. at 666; *see also Deloach*, 897 F.2d at 824

tino v. Quasar Co.,[67] Judge Posner of the Seventh Circuit used this reasoning. Judge Posner relied on an equity court's power under the clean-up doctrine "to make an award of damages in substitution for an equitable remedy."[68] Another recent case implicitly applied the clean-up doctrine, citing dicta in Supreme Court opinions stating that courts may decide legal issues that are "incidental" or "adjunctive" to equitable remedies.[69]

Courts also follow the reasoning of the Second Circuit in *Dominic v. Consolidated Edison Co.*[70] Having earlier held that front pay is an equitable remedy because it is in lieu of reinstatement,[71] the Second Circuit stated in *Dominic* that permitting the judge to decide whether front pay is an appropriate remedy while allowing the jury to decide the amount of front pay could result in an inconsistent decision.[72] As an example, the court noted that, while the jury could find that the discharged employee would never find other work and thus return a large verdict for front pay, the judge could conclude that the employee would find work immediately and therefore that no award was appropriate.[73]

Some courts reserve the computation of front pay under the ADEA primarily because of the many factors that must be considered in determining the amount of the award.[74] In the only circuit court opinion to identify the Seventh Amendment as the basis of a party's demand for a jury trial, the Fourth Circuit stated in *Duke v. Uniroyal, Inc.* that the variety of possible factual circumstances rendered front pay an equitable rem-

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(concluding that front pay is an equitable remedy after noting that it is awarded in lieu of the equitable remedy of reinstatement).

67. 950 F.2d 389 (7th Cir. 1991).

68. *Id.* at 398.

69. Duke v. Uniroyal, Inc., 928 F.2d 1413, 1424 (4th Cir.) (stating that "as an adjunct or an alternative to reinstatement," the award and the amount of front pay rests in the discretion of the court), *cert. denied*, 112 S. Ct. 429 (1991).

70. 822 F.2d 1249 (2d Cir. 1987). Cases in which the court relied on the reasoning in *Dominic* include *Fortino*, 950 F.2d at 398; Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1426 (10th Cir. 1991); *Stafford*, 741 F. Supp. at 666-67.

71. *See* Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984).

72. *Dominic*, 822 F.2d at 1257.

73. *Id.*

74. *See* Duke v. Uniroyal, Inc., 928 F.2d 1413, 1424 (4th Cir.), *cert. denied*, 112 S. Ct. 429 (1991); *Stafford*, 741 F. Supp. at 667; Chace v. Champion Plug Co., 725 F. Supp. 868, 871 (D. Md. 1989); *cf.* Reneau v. Wayne Griffin & Sons, 945 F.2d 869, 870 (5th Cir. 1991) (stating that because calculations of front pay are speculative, "the courts must employ intelligent guesswork").

edy.[75] The court did not apply both prongs of the Seventh Amendment analysis. Its inquiry into the legal or equitable nature of front pay resembles the second prong of the Seventh Amendment test, but the court did not discuss the first prong. The court stated that the "difficult question" of providing relief for potential future losses "requires an analysis of all the circumstances existing at the time of trial."[76] The court concluded that the complex and discretionary nature of such a broad inquiry makes front pay similar to restitution. It therefore denied the right to a jury trial on front pay, relying on a Supreme Court statement that money damages as restitution may be a form of equitable relief.[77]

Uncertainty about whether the jury or the court should determine front pay damages makes it more difficult for ADEA litigants to evaluate the settlement value of their claims. In a larger sense, the uncertainty raises important questions about the priority of the "inviolate"[78] right to trial by jury.

IV. THE RIGHT TO JURY COMPUTATION OF FRONT PAY

Courts should interpret the ADEA to provide for jury computation of front pay because that is what Congress intended, and because the Seventh Amendment requires them to do so.

A. CONGRESSIONAL INTENT TO COMPLY WITH THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

In the legislative history of the 1978 jury trial amendment, Congress alluded to the distinction between legal and equitable remedies and the significance of that distinction for the right to a jury trial. The Conference Report stated that "[it is] manifest that a party is entitled to have the factual issues underlying . . . a claim [for legal relief] decided by a jury."[79] Senator Kennedy made a similar statement on the Senate floor.[80]

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75. *Duke*, 928 F.2d at 1424.

76. *Id.* at 1423.

77. *Id.* at 1424 (citing Chauffeurs Local No. 391 v. Terry, 110 S. Ct. 1339, 1348 (1990)).

78. FED. R. CIV. P. 38(a). "Inviolate" is synonymous with "unprofaned." Beesley v. Hartford Fire Ins. Co., 723 F. Supp. 635, 638 (N.D. Ala. 1989) (stating that the term's use in this context confers a degree of sanctity on the right to trial by jury).

79. H.R. CONF. REP. NO. 950, *supra* note 10, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 535.

80. *See* 123 CONG. REC. 34,317 (1977).

As the Supreme Court noted in *Lorillard v. Pons*, the word "legal" is a term of art referring to those claims on which the Seventh Amendment to the United States Constitution provides the right to a jury trial.[81] When Congress uses terms in a statute that have a specific meaning in the law, " 'they are presumed to have been used in that sense unless the context compels to the contrary.' "[82]

Although Congress's attention to the law-equity distinction is not conclusive concerning front pay, it at least suggests an intent to comply with the Seventh Amendment by providing the right to a jury trial on legal issues.[83] Courts addressing the issue of congressional intent have reached the same conclusion.[84] If computation of front pay is a legal issue according to the constitutional test, interpreting the ADEA as granting the right to a jury trial on front pay honors Congress's apparent intent with respect to the Seventh Amendment.

B. FRONT PAY AND THE SEVENTH AMENDMENT

Under Seventh Amendment analysis, computation of front pay presents a legal issue on which either party is entitled to a jury trial. As is required by the first prong of the Court's Sev-

81. 434 U.S. 575, 583 (1978).

82. *Id.* (quoting Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911)).

83. Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1257 (2d Cir. 1987).

84. *See* cases cited *supra* note 55. Some commentators have stated that the amendment entitles each party in a case arising under the Act to a jury trial on any factual question regardless of whether the type of relief is characterized as legal or equitable. *See, e.g.*, Edward T. O'Donnell et al., *The Federal Age Discrimination Statute: Basic Law, Areas of Controversy, and Suggestions for Compliance*, 15 WAKE FOREST L. REV. 1, 25 (1979). In *Dominic*, however, the court, citing the Conference Report's discussion of § 626(c)(2), concluded that the amendment simply effectuated congressional compliance with the Seventh Amendment right to a jury trial on factual issues underlying legal claims. 822 F.2d at 1257. The *Dominic* court's analysis accurately reflects the consensus that the Seventh Amendment preserves only the right to a jury trial on legal issues. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989). Although courts recognize no constitutional right to a jury trial on equitable issues, they will enforce a statutory right to a jury trial on equitable issues where Congress has so provided. *See* FRIEDENTHAL ET AL., *supra* note 21, § 11.6.

The House Conference Report also supports the *Dominic* court's analysis, describing the Senate version of the amendment as providing the "right to a jury trial if the action involves monetary damages, whether or not equitable relief is sought by any party in the same action." H.R. CONF. REP. NO. 950, *supra* note 10, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 535. This language suggests that the final version of the amendment provides the right to a jury trial on legal issues only. This interpretation of the amendment also follows from the Supreme Court's reasoning in Lorillard v. Pons, 434 U.S. 575 (1978).

enth Amendment test, there is a common law analogue for a claim for front pay under the ADEA. Moreover, front pay resembles the kind of remedy typically awarded in the courts of law. In addition, neither a complexity exception nor the equitable clean-up doctrine justify denying the Seventh Amendment right to a jury trial on front pay.

1. Breach of Contract as a Common Law Analogue to an ADEA Claim for Front Pay

A suit for front pay under the ADEA resembles the common law action of breach of contract for wrongful discharge. In breach of contract actions, the courts of law settled claims analogous to those brought by employees aggrieved under the Act.[85]

In wrongful discharge actions, discharged employees treated their contracts as continuing and sued their employers for the breach. The action permitted the employees to recover damages for lost wages caused by their employers' breach.[86] The employees, however, were required to mitigate damages to prevent a windfall.[87] In an action for wrongful discharge at common law, the plaintiff could sue for termination of employment before the end of the contract term.[88] The amount the employee would have earned had there been no breach, less any mitigation deduction, formed the measure of the employee's damages.[89] Juries typically calculated damages in breach of contract actions.[90]

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85. In Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991), Judge Posner, discussing the availability of a jury trial on front pay under the ADEA, noted that "front pay resembles common law damages for breach of an employment contract." A similar analogy has been drawn in actions under Title VII. *See* Ochoa v. American Oil Co., 338 F. Supp. 914, 919 (S.D. Tex. 1972).

86. *Ochoa*, 338 F. Supp. at 918.

87. *Id.*

88. 1 AUSTIN ABBOTT & CARLOS C. ALDEN, FORMS OF PLEADING IN ACTIONS FOR LEGAL OR EQUITABLE RELIEF 656-58 (2d ed. 1918); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 161 (1935). McCormick wrote:

> The plaintiff need not wait until the term of his employment has expired before suing for entire damages for wrongful discharge. According to the majority and sounder view, if the action is tried before the term of hiring has ended, the plaintiff may recover not only for the loss of earnings already accrued, but for the prospective loss for the unexpired period.

Id.

89. 11 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1358 (3d ed. 1968).

90. *Ochoa*, 338 F. Supp. at 918; *see* MCCORMICK, *supra* note 88, § 162

In an action for front pay under the ADEA, the employer's breach of duty gives rise to the employee's right to recover damages for wrongful discharge. As in the common law breach of contract action, an ADEA plaintiff's duty to mitigate damages may limit the amount of recovery.[91] The duty to mitigate is fundamental to the law of contracts and peculiar to legal, as opposed to equitable, actions.[92] Also, like the plaintiff in the common law action, an ADEA plaintiff claiming front pay seeks damages for lost wages past the date of discharge.[93]

A court of law in 1791 would likely have heard a claim for front pay for discriminatory discharge had such a cause of action then existed. Although an action for front pay may also resemble historically equitable actions, the Supreme Court indicated in *Tull v. United States* that the existence of a common law analogue sufficed for the purposes of the Seventh Amendment.[94] In *Tull*, the Court found appropriate analogies to the modern suit in eighteenth-century legal and equitable actions.[95] The Court stated that it "need not decide the question" of which action served as a better analogy, and proceeded to the second prong of its Seventh Amendment analysis.[96]

("[T]he *jury* should be instructed to give only the present worth . . . of the amounts to be awarded for the future loss of earnings." (emphasis added)).

91. *See, e.g.*, Hybert v. Hearst Corp., 900 F.2d 1050, 1055 (7th Cir. 1990); Anastasio v. Schering Corp., 838 F.2d 701, 708-09 (3d Cir. 1990).

92. KALET, *supra* note 2, at 101-04. McCormick described the plaintiffs' "duty to mitigate" in legal damages actions:

> Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.

MCCORMICK, *supra* note 88, § 33.

93. The only significant difference between the modern and common law actions is that the common law enforced express promises by the employer, whereas the ADEA enforces implied statutory obligations. Whether express or implied, however, the common contractual element of the employment relationship renders a claim for front pay after a discriminatory discharge sufficiently analogous to a legal breach of contract action. *See supra* note 22 (discussing the Seventh Amendment test's requirement of "resemblance" to satisfy the search for a common law analogue). The early case of United States v. Mundell, 27 F. Cas. 23 (C.C.D. Va. 1795) (No. 15,834), employed a similar analysis. In *Mundell*, the court drew an analogy between a statutory action for damages and the common law action for debt. The court noted that "Whatever . . . the laws order any one to pay, that instantly becomes a debt which he hath beforehand contracted to discharge." *Id.* at 28.

94. 481 U.S. 412, 420-21 (1987).

95. *Id.* at 420.

96. *Id.*

2. The Legal Remedy of Front Pay

Under the second prong of the Seventh Amendment test, courts consider the legal or equitable nature of the remedy sought. This inquiry does not merely replicate the historical inquiry of the first prong; courts may consider the general nature of legal and equitable relief, especially in light of the expansion of legal remedies after the adoption of the Federal Rules of Civil Procedure.

a. *Monetary Damages as Legal Relief*

Measured as the present value of future income the plaintiff would have earned in the defendant's employ less the mitigation deduction,[97] the amount of a front pay award reflects the monetary value of the harm resulting from the employer's discrimination. Common law courts characterized monetary damages measured by the harm to the plaintiff as a legal remedy.[98] The Supreme Court reaffirmed the legal character of money damages in *Dairy Queen, Inc. v. Wood*.[99] The plaintiffs in *Dairy Queen* sought to enjoin the defendant from using the Dairy Queen trademark and collecting money from stores carrying the corporate trademark after the defendant defaulted on a contract for a Dairy Queen franchise.[100] Dairy Queen's parent corporation also sought an accounting, a traditional remedy in equity,[101] to determine how much the defendant owed for breach of contract and trademark infringement.[102] Wood demanded a jury trial on the factual issues relating to those

97. *See* Hybert v. Hearst Corp., 900 F.2d 1050, 1055 (7th Cir. 1990) (employing this definition).

98. *See* Curtis v. Loether, 415 U.S. 189, 196 (1974) (stating that money damages were "the traditional form of relief offered in the courts of law"); *see also* Schneider, *supra* note 26, at 201 ("The distinctive feature of a 'legal issue' for seventh amendment purposes is its presence in a claim for money damages."). The term "damages" usually refers to a recovery measured by the plaintiff's losses. In contrast, "restitution" usually describes a recovery measured by the defendant's gains. DOBBS, *supra* note 53, § 4.5. Equity courts had independent jurisdiction to award money as restitution, but only to restore the status quo or to correct unjust enrichment. 5 MOORE ET AL., *supra* note 49, ¶ 38.24; *see also* Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946) (defining "restitution" as "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant").

99. 369 U.S. 469 (1962).

100. *Id.* at 475.

101. An "action for an accounting" involved a suit in which the complicated character of the accounts rendered the remedy at law inadequate and therefore gave rise to equity jurisdiction. DE FUNIAK, *supra* note 35, § 103 n.2.

102. 369 U.S. at 475.

claims.[103] The Court held that the plaintiffs' "unquestionably legal" claim for a money judgment gave rise to the right to a jury trial.[104] This holding led some commentators to conclude that after *Dairy Queen* any claim for a money judgment constitutes a legal claim triable to a jury.[105]

In the recent case of *Chauffeurs Local No. 391 v. Terry*,[106] the Court clarified, in dicta, the holding of *Dairy Queen*. The Court stated that a judge may, without a jury, grant monetary relief as restitution to disgorge improper profits.[107] The *Terry* Court also stated that a court may grant money damages that are " 'incidental to or intertwined with injunctive relief.' "[108] *Terry* emphasized that these situations are limited exceptions to the rule that monetary damages are " 'the traditional form of relief offered in the courts of law.' "[109] The Court found that neither of the exceptions applied on the facts of *Terry*,[110] indicating that the Court prefers trial by jury of issues relating to monetary awards.

Under the rule of *Dairy Queen*, a monetary award such as front pay is a legal remedy on which either party is entitled to a jury trial.[111] Some lower courts, however, have concluded that the restitutionary and discretionary nature of front pay makes the remedy an equitable one.[112] Others have contended that because the computation of front pay is complex, and be-

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103. *Id.* at 476.

104. *Id.* at 476-77 ("As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character.").

105. *See, e.g.*, DOBBS, *supra* note 53, § 2.6; Erica B. Clements, United States v. Tull: *The Right to Jury Trial Under the Clean Water Act—The Jury is Still Out*, 41 U. MIAMI L. REV. 665, 676 (1987).

106. 110 S. Ct. 1339 (1990).

107. *Id.* at 1348.

108. *Id.* (quoting Tull v. United States, 481 U.S. 412, 424 (1987)).

109. *Id.* at 1347 (quoting Curtis v. Loether, 415 U.S. 189, 196 (1974)). In *Curtis*, the plaintiff sued for violations of the fair housing provision of the Civil Rights Act of 1968. The jury awarded punitive damages under the Act, and on appeal the Supreme Court held in an action for damages under the Act that the Seventh Amendment entitled either party to a jury trial on demand. 415 U.S. at 195. The Court's holding rested in part upon the conclusion that monetary damages constituted a traditionally legal remedy. *Id.* at 196.

110. *Terry*, 110 S. Ct. at 1348-49.

111. *Curtis*, 415 U.S. at 196.

112. *See* Duke v. Uniroyal, Inc., 928 F.2d 1413, 1424 (4th Cir.), *cert. denied*, 112 S. Ct. 429 (1991); *cf.* Stafford v. Electronic Data Sys. Corp., 741 F. Supp. 664, 666 (E.D. Mich. 1990) (" 'An award of front pay *must be governed by the sound discretion of the trial court* and may not be appropriate in all cases . . . .' " (quoting Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 892 (6th Cir. 1988))).

cause front pay is "incidental" to the remedy of reinstatement, courts are better suited to decide the amount of front pay awards.[113]

b. *Front Pay is Not a Form of Restitution*

Courts that have identified front pay as a form of restitution, and therefore an equitable remedy, have mischaracterized the nature of front pay. Restitution seeks to "disgorge funds wrongfully withheld"[114] and thus correct unjust enrichment.[115] Restitution is typically measured by the defendant's unjust gain rather than by the plaintiff's harm.[116] Instead of disgorging employers' unjust enrichment, however, front pay awards compensate employees for salary they would have earned but for their employers' discrimination. In other words, a front pay award represents damages measured by the plaintiff's harm rather than by the defendant's gain. The employee's duty to mitigate underscores this distinction. A discriminatory discharge will not result in future unjust enrichment because the employer has lost the value of the employee's services. When courts grant a monetary award such as front pay in the absence of or in an amount greater than any unjust enrichment, the remedy is not restitutionary.

Similarly, contrary to the Fourth Circuit's reasoning in *Duke v. Uniroyal, Inc.*,[117] the discretionary nature of front pay does not render the remedy restitutionary. The *Duke* court equated "discretionary" and "restitutionary," apparently be-

113. *E.g.*, *Duke*, 928 F.2d at 1423 (stating that the many factors that go into calculating the amount of a front pay award make it appropriate for a judge to determine the amount); Deloach v. Delchamps, Inc., 897 F.2d 815, 824 (5th Cir. 1990) (concluding that front pay is an equitable remedy because it is in lieu of reinstatement).

114. *Curtis*, 415 U.S. at 197.

115. *See* RESTATEMENT OF RESTITUTION § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."). The *Restatement* describes the forms of equitable restitution as limited to constructive trusts, equitable liens, and subrogation. *Id.* § 160. As the *Restatement* indicates, because an order for restitution can involve equitable enforcement, restitution in some forms is properly considered an equitable remedy. Restitution, however, developed at both law and equity. GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.1 (1978).

116. *See* RESTATEMENT OF RESTITUTION § 1 cmt. a (1937) ("Ordinarily, the measure of restitution is the amount of enrichment received . . . ."); DOBBS, *supra* note 53, § 2.6 n.42 (defining "restitution" as a "recovery measured by the defendant's gains" and "damages" as a "recovery measured by the plaintiff's losses").

117. 928 F.2d 1413, 1424 (4th Cir.), *cert. denied*, 112 S. Ct. 429 (1991).

cause trial judges have broad discretion in providing equitable remedies such as restitution.[118] While restitution may lie in the court's discretion, for a remedy to be characterized as "restitution" it must be more than merely within the judge's discretion. If the remedy fails to disgorge unjust enrichment or restore the status quo, no amount of discretion will make the remedy restitutionary.

Moreover, even if front pay were restitutionary, it would not necessarily be an equitable remedy. Restitution developed both at law and equity; the primary difference was the remedy's form.[119] Hence, the conclusion that if front pay is restitutionary it is necessarily an equitable remedy conflicts with the historical concept of restitution. This reasoning obscures the Seventh Amendment test's inquiry into the nature of the remedy.

c. *Discretion Does Not Render Front Pay an Equitable Remedy*

Some courts imply that front pay is an equitable remedy because the decision to award front pay in lieu of reinstatement rests in the trial court's discretion.[120] The view that discretionary matters arise solely in equity probably derives from the principle that a court sitting in equity has traditionally had great discretion over equitable remedies.[121] Historically, however, the discretionary nature of a remedy had no bearing on its characterization as legal or equitable. In various instances at

118. The *Duke* court cited as authority for its approach the reasoning of the courts of appeals concerning awards of back pay under Title VII of the Civil Rights Act of 1964. *Id.* The court erred in importing the reasoning applied to back pay awards under Title VII. The Supreme Court expressly noted, in Lorillard v. Pons, 434 U.S. 575, 584 (1978), that the remedial and procedural provisions of Title VII and the ADEA differ significantly with respect to the statutory right to a jury trial. These differences led the Court to find the defendant's analogy between the two acts on the jury trial issue "unavailing." *Id.*

119. Common law courts addressed unjust enrichment through the action of quasi-contract, which called for legal restitution in the form of a simple money judgment. PALMER, *supra* note 115, § 1.2. Equity enforced restitution through constructive trusts, equitable liens, and subrogation. RESTATEMENT OF RESTITUTION § 160 (1937).

120. *See* Deloach v. Delchamps, Inc., 897 F.2d 815, 824 (5th Cir. 1990); Stafford v. Electronic Data Sys. Corp., 741 F. Supp. 664, 666 (E.D. Mich. 1990).

121. WALSH, *supra* note 35, § 8. As Walsh notes, early decisions at equity relied less on precedent than on the chancellor's personal view of right and wrong. This lack of fixed principles led to the cynical suggestion that the proper measure of justice at equity could be found in the length of the chancellor's foot. *Id.*

common law, juries had considerable discretion in granting damage awards. For example, a jury could choose whether to award punitive damages[122] and whether to allow interest on a damage award.[123] At least in the case of punitive damages, modern courts continue to interpret statutes as vesting juries with discretion to decide whether to make monetary awards and in what amount.[124] Therefore, while all equitable remedies may be discretionary, not all discretionary remedies are equitable. Specifically, the discretionary nature of front pay does not necessarily make front pay an equitable remedy.

The remedial language of the ADEA also refutes the argument that discretionary relief must be equitable. The Act grants the judge discretion to afford appropriate legal or equitable relief to carry out the ADEA's purposes.[125] To treat all discretionary relief as equitable therefore frustrates the statute's plain meaning. Unless the language permitting a judge to grant "appropriate . . . legal relief" has no meaning, Congress's grant of discretion to courts to choose between various legal and equitable remedies must indicate that not all discretionary remedies are equitable. In deciding whether to allow the jury to award front pay in any given case, the judge simply exercises the authority to decide matters of law. The question of law before the court is whether an award of front pay, as computed by the jury, would "effectuate the purposes of [the Act]."[126]

Unlike restitution, front pay does not disgorge the defendant's unjust enrichment, but instead remedies the plaintiff's fu-

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122. MCCORMICK, *supra* note 88, § 84.

123. *Id.* § 56.

124. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that juries may award punitive damages under 42 U.S.C. § 1983); Davis v. Mason County, 927 F.2d 1473, 1485 (9th Cir.) (same), *cert. denied*, 112 S. Ct. 275 (1991) . *But see* Schneider, *supra* note 26, at 160-84 (discussing a court trend to shift discretionary control over damages from the jury to the judge).

125. 29 U.S.C. § 626(b) (1988). Under the statute's literal language, the judge may determine the propriety of front pay depending on the facts of a given case. Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 922-23 (6th Cir. 1984); *cf.* Cassino v. Reichhold Chems., Inc., 817 F.2d 1338, 1347 (9th Cir. 1987) (stating that trial courts have discretion on whether to award front pay in lieu of reinstatement), *cert. denied*, 484 U.S. 1047 (1988). For example, judges have the discretion to deny an award of front pay when they order a plaintiff reinstated. To permit an award of front pay in addition to reinstatement would allow a double recovery. Similarly, a judge could deny an award of front pay where the remedy would be so speculative as to render any monetary award indeterminate. *See* Shore v. Federal Express Corp., 777 F.2d 1155, 1159-60 (6th Cir. 1985). This judicial gatekeeping function ensures that juries award front pay only when to do so would serve the purposes of the ADEA.

126. 29 U.S.C. § 626(b) (1988).

ture injury. According to the Supreme Court, damages measured by the plaintiff's harm are a typical form of legal relief. Moreover, the discretion courts have in awarding front pay does not render the remedy equitable, because the ADEA expressly gives judges discretion to grant or deny legal relief. Under the nature of the remedy prong of the Seventh Amendment test, courts should characterize front pay as a legal remedy.

3. Complexity and the Practical Limitations of the Jury

Reliance on a complexity exception to the Seventh Amendment to deny a jury trial on the amount of front pay comports neither with Supreme Court precedent nor with common sense. The courts' assertion that the multiple factors involved in computing front pay render it too complex for a jury directly conflicts with the Supreme Court's holding in *Dairy Queen, Inc. v. Wood*.[127] According to *Dairy Queen*, the jury should decide even complex legal issues, with assistance from a court-appointed master when necessary. The "complexity" of calculating lost future wages or applying discount tables to ADEA front pay awards cannot justify dispensing with the jury on these issues.[128]

Moreover, an award of front pay represents the kind of

127. 369 U.S. 469 (1962).

128. In Tull v. United States, 481 U.S. 412 (1987), the Supreme Court discussed whether the Seventh Amendment provided the right to a jury assessment of civil penalties under the Clean Water Act. The Court stated, "In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges." *Id.* at 427 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring)). The Court reasoned, however, that Congress intended trial judges to perform the calculations in actions under the Clean Water Act. *Id.* at 425; *see also* 123 CONG. REC. 39,190-91 (1977) (citing a letter from EPA assistant administrators of enforcement which discussed "penalties assessed by judges"). The Court concluded that Congress can, consistent with the Seventh Amendment, authorize judges to assess civil penalties. The assessment of civil penalties, the Court noted, is not one of the "most fundamental elements" of the institution of the jury trial, especially because an action for civil penalties usually seeks the amount fixed by Congress. *Tull*, 481 U.S. at 427.

In contrast, with respect to the ADEA, Congress evinced no intent to authorize judges to calculate front pay awards. Furthermore, the purpose of the civil penalty differs significantly from the purpose of an award of front pay. The Court's holding in *Tull* should not be read to extinguish the established right to a jury trial on legal damages issues in civil trials. For a thorough analysis of jury assessment of damages and a critique of *Tull's* "fundamental element" approach, see Schneider, *supra* note 26.

damages that juries regularly compute. For instance, juries routinely determine lost future wages and benefits in personal injury actions.[129] Issues of lost wages, life expectancy, and future earning ability differ little between tort cases and employment discrimination cases. Similarly, juries regularly compute future damages in breach of contract actions,[130] which, as noted above, are analogous to claims for front pay under the ADEA. The long-standing tradition of reliance on juries to determine future damages refutes the claim that juries are not competent to calculate front pay in actions for discriminatory discharge.

Some courts suggest that the speculative nature of front pay makes computation too complex for the jury.[131] In most cases of age discrimination, however, the short period covered by the award of front pay simplifies its calculation.[132] In cases involving younger plaintiffs, the court may instruct jurors on the plaintiffs' duty to mitigate damages. To reduce the uncertainty about what the plaintiffs' future wages and benefits would have been had the discrimination not occurred, personnel experts can testify about the likelihood of promotion, layoff, termination, and other changes that would affect the front pay award.[133] In addition, if the speculative nature of the employee's injury would render any award of front pay absolutely indeterminate, the trial judge has discretion not to grant an

129. MCCORMICK, *supra* note 88, § 86 ("In cases of serious injuries, the award for impairment of future earning capacity is usually the major part of the recovery and is the source of the most difficulty in proof by the plaintiff and in evaluation *by the jury*." (emphasis added)).

130. *See* Roger J. McClow, *Labor Law and Unemployment Compensation*, 35 WAYNE L. REV. 769, 782 (1989).

131. *See, e.g.*, Duke v. Uniroyal, Inc., 928 F.2d 1413, 1423 (4th Cir.) (stating that "the appropriate method for addressing the difficult question . . . requires an analysis of all the circumstances existing at the time of trial"), *cert. denied*, 112 S. Ct. 429 (1991).

132. Fortino v. Quasar Co., 751 F. Supp. 1306, 1318-19 (N.D. Ill. 1990), *rev'd on other grounds*, 950 F.2d 389 (7th Cir. 1991). An award of front pay will cover only the years the employee would have continued working for the employer. Therefore, the closer to retirement the average ADEA plaintiff is, the shorter the average duration of front pay awards will be. An analysis of ADEA cases reported in 1982 and 1983 revealed that the average age of an employee bringing suit in those years was 55.8. *Average Employee Claiming Age Bias is Profiled*, Daily Rep. for Executives (BNA), Jan. 13, 1984, at A18, A18.

133. *See* Eivins v. Adventist Health Sys., E. & Middle America, Inc., 660 F. Supp. 1255, 1261 (D. Kan. 1987). In *Eivins*, the defendant moved for a new trial on the grounds that the trial court had impermissibly admitted expert testimony on future lost wages and benefits. *Id.* The trial court denied the defendant's motion, finding that the expert testimony was appropriate. *Id.*

award.[134]

The nature of front pay may cause concern about speculative damage awards. Nonetheless, careful instructions to a jury that has received helpful testimony can reduce speculative verdicts while leaving intact the Seventh Amendment right to a jury trial.

4. Front Pay and the Equitable Clean-Up Doctrine

In several ADEA cases, courts have held that because front pay is available only "in lieu of reinstatement," the remedy is equitable and therefore that calculation of the award should be left to the court.[135] Courts that have denied a jury trial on front pay issues because front pay is an alternative to reinstatement have applied faulty reasoning. Under the clean-up doctrine, a legal issue was not transformed into an equitable one merely because the court of equity considered it as an incident to an equitable issue.[136] That nexus merely permitted a court of equity to decide incidental issues despite their classification as legal. Whether or not front pay is "incidental" to the remedy of reinstatement, front pay itself remains a legal issue.

Courts that have mistakenly used the clean-up doctrine to label front pay as an equitable remedy have avoided the tension inherent in keeping an admittedly legal issue from the jury's reach. They have skirted the critical issues that each modern application of the clean-up doctrine should raise, that is, whether the equitable clean-up doctrine still serves the functions it served before the merger of law and equity, and under what circumstances the Seventh Amendment permits continued application of the clean-up doctrine.

There remains little justification for the use of the equitable clean-up doctrine after the merger of law and equity. Because a single civil action provides the forum for both legal and equitable issues, modern procedure adequately addresses the concerns of efficiency and fairness that once justified the doc-

134. *Fortino*, 751 F. Supp. at 1318. Courts may also alleviate the speculative nature of front pay awards by ensuring that the jury considers such factors as the employee's duty to mitigate, the availability of alternative employment, the employee's life and work expectancies, and the tables discounting an award to present value. EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1173 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985).

135. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991).

136. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 52 (1989) (" '[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity.' " (quoting Ross v. Bernhard, 396 U.S. 531, 538 (1970))).

trine. The Supreme Court recognizes that the clean-up doctrine has at most a limited place in a merged system.[137] *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood* indicate the Court's preference for having juries resolve legal issues rather than having courts decide them through incidental jurisdiction. Even in recent cases in which the Court purported to acknowledge the continuing validity of the doctrine, it refused to apply it.[138] Where, in an ADEA action, the judge and jury can discharge their respective duties without serious inefficiency or unfairness, they should do so in deference to the Seventh Amendment preference for the jury trial on legal issues.[139]

Moreover, courts should not apply the clean-up doctrine for purposes other than those that historically justified its use. Equity's discretionary jurisdiction over incidental legal claims economized litigation by permitting one court to resolve legal and equitable issues presented in the same action. Clean-up jurisdiction did not, in 1791, arise out of a concern that the awards of judges and juries might conflict or that juries might make speculative damage awards. Nonetheless, courts that have relied on the clean-up doctrine in ADEA cases have justified their reliance on these grounds.[140] This broad extension of incidental jurisdiction is not justified in light of the Supreme Court's apparent disdain for the equitable clean-up doctrine.

Neither the clean-up doctrine nor a complexity exception can justify taking from the jury what the Seventh Amendment analysis indicates is a legal issue. Permitting juries to compute front pay damages under the ADEA preserves the constitutional right to a jury trial on legal issues.

C. FRONT PAY AS "AMOUNTS OWING" UNDER THE ADEA

Even if the legal or equitable nature of front pay were uncertain, to construe the ADEA as granting the right to a jury trial on front pay serves an established rule of statutory con-

137. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471 (1962).

138. Chauffeurs Local No. 391 v. Terry, 110 S. Ct. 1339 (1990); Tull v. United States, 481 U.S. 412 (1987).

139. *See Terry*, 110 S. Ct. at 1344-45 (" 'Maintenance of the jury as a fact-finding body is of such importance . . . that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' " (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959))).

140. *E.g.*, Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1426 (10th Cir. 1991); Duke v. Uniroyal, Inc., 928 F.2d 1413, 1424 (4th Cir.), *cert. denied*, 112 S. Ct. 429 (1991).

struction. The Supreme Court has affirmed the "cardinal principle" that courts should " 'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' "[141] By finding the right to a jury trial on front pay in the statute itself, courts may avoid facing the question of whether the Seventh Amendment provides such a right.

The ADEA readily permits such an interpretation. In 1978, Congress amended the ADEA to provide for a jury trial "of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action."[142] The Conference Committee Report on the 1978 Amendments defined "amounts owing" to the victims of a discriminatory discharge in violation of the ADEA as "includ[ing] items of pecuniary or economic loss such as wages, fringe, and other job-related benefits."[143] The elements described as comprising "amounts owing" under the Act coincide exactly with those that make up an award of front pay.

Many courts have read "amounts owing" to exclude prospective damages.[144] This interpretation of the term "owing" finds little support in the law of damages. In a tort or breach of contract action, for example, courts deem awards representing damages past the date of trial as nonetheless presently owing.[145] The analogy between an ADEA action for front pay and a breach of contract action for wrongful discharge supports interpreting "amounts owing" under the ADEA to include awards of front pay. Moreover, neither the Act nor the Conference Report expressly excludes prospective damages from "amounts owing."[146] Because the computation of front pay

141. *Terry*, 110 S. Ct. at 1344 n.3 (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971)).

142. Pub. L. No. 95-256, § 4(a), 92 Stat. 190 (1978) (codified as amended at 29 U.S.C. § 626(c)(2) (1988)).

143. H.R. CONF. REP. NO. 950, *supra* note 10, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 535.

144. *See, e.g.*, Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1210 (7th Cir. 1989); Fortino v. Quasar Co., 751 F. Supp. 1306, 1317 (N.D. Ill. 1990), *rev'd on other grounds*, 950 F.2d 389 (7th Cir. 1991). Without directly addressing the issue, other courts have implicitly excluded front pay from "amounts owing" by concluding that there is no statutory or constitutional right to a jury trial on front pay. If these courts had found that "amounts owing" included front pay awards, they necessarily would have found a statutory right to a jury trial on front pay.

145. *See* MCCORMICK, *supra* note 88, § 161.

146. The Second Circuit, in Dominic v. Consolidated Edison Co., 822 F.2d

under the Act presents a legal issue according to the Seventh Amendment test, courts should include such damages in "amounts owing" to be determined by a jury.

CONCLUSION

When possible, courts should interpret remedial statutes to grant the right to a jury trial on legal issues in compliance with the Seventh Amendment. This is especially so when Congress has expressed its intent to conform with the constitutional right to a jury trial, as it did in the ADEA. Front pay under the ADEA presents a legal issue. Computation of front pay in age discrimination suits would have come before a court of law in 1791 had such a cause of action then existed. Juries routinely calculate future damages in other types of actions and may have the assistance of a court-appointed master in unusually complex cases arising under the Act. Although equity may have historically enjoined a legal claim for front pay through clean-up jurisdiction, evolving Seventh Amendment jurisprudence has undermined the viability of the equitable clean-up doctrine. Furthermore, the ADEA readily lends itself to an interpretation granting the right to jury computation of front pay. To acknowledge the right of either party to a jury trial on a claim for front pay under the ADEA conforms with congressional intent, and more importantly, with the mandate of the Seventh Amendment.

1249 (2d Cir. 1987), concluded otherwise. The *Dominic* opinion suggested that "amounts owing" does not include an award of front pay. *See id.* at 1257. In *Dominic*, however, the court began with the assumption that front pay is a form of equitable relief. The Court went on to state, quite accurately in light of the legislative history of the jury trial provision, that "Congress . . . intended to provide a right to a jury trial on all claims that it considered to be 'legal' in nature." *Id.* Under the *Dominic* court's reasoning, if front pay is a form of legal relief, as this Note argues, then the ADEA provides the right to a jury trial on front pay.