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The Future of Disparate Impact Analysis for Age Discrimination in a Post-Have Paper World

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COMMENTS

THE FUTURE OF DISPARATE IMPACT ANALYSIS FOR AGE DISCRIMINATION IN A POST-HAZEN PAPER WORLD

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TABLE OF CONTENTS

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I. INTRODUCTION

The Age Discrimination in Employment Act ("ADEA")[1] outlaws employment actions that discriminate against workers over forty years of age.[2] Since its enactment in 1967, courts have struggled to define the theories by which a plaintiff could prove his or her case of alleged age discrimination. Until 1993, courts accepted the use of either a disparate treatment or a disparate impact analysis. That is, a plaintiff over forty years of age could allege that his or her employer, motivated by the plaintiff's age, treated him or her less favorably than younger workers (disparate treatment)[3] or that his or her employer's facially-neutral policies impacted them more harshly than they did younger workers (disparate impact).[4]

In 1993, the Supreme Court, in *Hazen Paper Co. v. Biggins*,[5] while analyzing a disparate treatment case, added in dicta what some circuit courts have since interpreted as ruling out disparate impact as a legitimate method of analysis for ADEA cases.[6] Accordingly, since *Hazen Paper*, circuits have split on whether a plaintiff may proceed with an ADEA claim based on a disparate impact analysis.[7] While no one can know for certain how the Supreme Court will finally resolve this split over the availability of disparate impact analysis for ADEA plaintiffs, *Hazen Paper* seems to indicate that the Court is moving to a more restrictive reading of the text, purpose, and intent of the ADEA. If the Supreme Court eventually rules that disparate impact is no longer available as an analytical tool in age discrimination litigation, it will be making policy choices with far-reaching consequences. Indeed, this Comment argues that the Court will be undermining the important policy choices Congress made over thirty years ago when it chose to outlaw age discrimination. By so doing, it would

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1 *See* 29 U.S.C. §§ 621-34 (1994 & Supp. I 1995).

2 *Id.* § 623(a).

3 *See infra* notes 42-50 and accompanying text.

4 *See infra* notes 51-64 and accompanying text.

5 507 U.S. 604 (1993).

6 *Id.* at 610; *see also id.* at 618 (Kennedy, J., dissenting).

7 *See infra* notes 79-84 and accompanying text.

usurp Congress' role as the policy-making branch of government. The Supreme Court should therefore continue to permit the use of a disparate impact analysis as an essential tool in effectuating Congress' broad efforts to eliminate age discrimination until such time as Congress chooses to reassess its policy choices.

Part II of this Comment describes the provisions and history of the ADEA.[8] It then describes the difference between disparate treatment and disparate impact analysis[9] and concludes with a summary of the major issues, arguments, and dicta presented by the Court in *Hazen Paper*.[10] Part III analyzes the major arguments for and against the continued application of disparate impact to ADEA cases, including textual arguments, arguments based on prior and subsequent legislative history indicating Congress' intent and purpose, and arguments focusing on policy concerns. It concludes by maintaining that while there are strong arguments on both sides, important policy considerations tip the balance in favor of allowing the use of a disparate impact analysis.[11] Because courts have developed sufficient safeguards to ensure that employers can implement necessary business policies, even if they impact older workers more harshly, disparate impact presents little threat to efforts of companies to remain economically competitive. If Congress sees such a threat and considers this threat more important than the policy choice of forbidding age discrimination, Congress needs to reconsider its legislation. Until then, it is the court's role to enforce the policy choices Congress made when it enacted the ADEA over three decades ago.

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[8] *See infra* notes 12-41 and accompanying text.

[9] *See infra* notes 42-64 and accompanying text.

[10] *See infra* notes 65-78 and accompanying text.

[11] *See infra* notes 79-232 and accompanying text.

II. BACKGROUND

A. Provisions and History of the ADEA

When Congress enacted Title VII of the Civil Rights Act of 1964 ("Title VII"),[12] it debated whether to add age to the list of protected classes of individuals.[13] Believing the issue needed a more thorough examination, Congress postponed its decision on age as a protected category until the Secretary of Labor could complete a detailed study of the issue.[14] In a report submitted to Congress in 1965, Secretary of Labor W. Willard Wirtz detailed widespread discrimination against older workers and its damaging effects on both unemployed older workers and the national economy.[15] While this age discrimination "rarely was based on the sort of animus motivating some other forms of discrimination," it was based on irrational "stereotypes unsupported by objective fact, and . . . often defended on grounds different from its actual causes."[16] Specifically, while Wirtz found little if any discrimination against older workers arising from "dislike or intolerance,"[17] he did find many instances of "arbitrary discrimination" based on age.[18] Employers often refused to hire workers because of policies "established without any determination of their actual relevance to job requirements," and then defended these policies on irrational, undocumented grounds.[19] Among such irrational reasons employers used for such arbitrary policies was their "[a]bility to hire younger workers for less money, and [the] concern that older workers' earnings expectations are 'too high.'"[20] After analyzing the productivity of older workers, Wirtz

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[12] *See* 42 U.S.C. § 2000e-16 (1994 & Supp. I 1995). Title VII prohibits discrimination in employment because of race, sex, color, religion, or national origin. *Id.*

[13] *See* EEOC v. Wyoming, 460 U.S. 226, 229 (1983); *see also* LAWRENCE M. FRIEDMAN, YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT 13-14 (1984) (arguing that some who advocated adding age might have been conservative Southerners trying to defeat or delay the Civil Rights Act).

[14] *See* H.R. REP. NO. 805, at 658 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214.

[15] U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter "Secretary's Report"].

[16] *EEOC v. Wyoming*, 460 U.S. at 231 (summarizing the SECRETARY'S REPORT).

[17] SECRETARY'S REPORT, *supra* note 15 at 5-6.

[18] *Id.* at 6-11.

[19] *Id.* at 7.

[20] *Id.* at 8.

argued that most evidence demonstrated that employer reasoning was not supported by fact.[21]

In addition to these "arbitrary" policies, Wirtz identified numerous "[i]nstitutional [a]rrangements" that "operate . . . against older workers" even though those policies were developed for other purposes, such as efficiency and order or to improve workers' fringe benefits.[22] These institutional arrangements included seniority systems, pension and health insurance plans that cost older workers more, and other arbitrary rules and hiring practices.[23] The net result was that discrimination against older workers, whether based on "arbitrary" factors[24] or "institutional arrangements,"[25] cost the economy billions of dollars and produced negative effects on older workers.[26] To eliminate discrimination against employing older workers, Wirtz concluded that it would be necessary "not only to deal with overt acts of discriminition [sic], but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring."[27]

After receiving the Secretary's Report, Congress conducted extensive hearings which confirmed Wirtz's findings.[28] Based on these hearings, the Secretary's Report, and "extensive factfinding undertaken by the Executive Branch," Congress resolved that age discrimination was a "grave" and "growing" problem,[29] causing "profoundly harmful" effects on both the national economy and on individual American citizens.[30] Specifically, Congress first found that age discrimination "deprived the national economy of the productive labor of millions" of qualified workers, imposing burdensome costs on the government and depriving the Treasury of tax dollars.[31] Second, it maintained that such discrimination "inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations."[32] Thus, older workers, unable to find new work

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21 *Id.* at 8-9.

22 *Id.* at 6-14, 15-17.

23 *Id.* at 15-17.

24 *Id.* at 6-11.

25 *Id.* at 15-17.

26 *Id.* at 18-19.

27 *Id.* at 22.

28 EEOC v. Wyoming, 460 U.S. 226, 231 (1983).

29 29 U.S.C. § 621(a)(3) (1994).

30 *EEOC v. Wyoming*, 460 U.S. at 231.

31 *Id.*

32 *Id.*

after being dismissed, often arbitrarily, faced long periods of "unemployment with resultant deterioration of skill [and] morale."[33]

Based on these findings, Congress enacted the ADEA in 1967.[34] The ADEA's stated purpose was "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."[35] Specifically, section 623 of the ADEA prohibited employers from refusing to hire, from firing, or from "otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[36] The ADEA further declared it unlawful for an employer "to limit, segregate, or classify his [or her] employees in any way which would deprive . . . [them] of employment opportunities or otherwise adversely affect" their status as workers because of age.[37]

However, aware of the need to allow companies the flexibility required to remain economically competitive, Congress outlined four exceptions to the above provisions. Employers could take action (1) "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" ("BFOQ");[38] (2) "where the differentiation is based on reasonable factors other than age" ("RFOA");[39] (3) where necessary "to observe the terms of a bona fide seniority system" or any "bona fide employee benefit plan" such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act,

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[33] 29 U.S.C. § 621(a)(3).

[34] *Id.* §§ 621-34 (1994).

[35] *Id.* § 621(b).

[36] *Id.* § 623(a)(1).

[37] *Id.* § 623(a)(2).

[38] *Id.* § 623(f)(1). A similar exception appears in Title VII regarding discrimination based on sex. *See* 42 U.S.C. § 2000e-2(e)(1) (1982). This exception reflects the view that, under some circumstances, age or gender can be a legitimate basis for one's ability to perform a specific job. However, because the ADEA is "built on the premise that age alone is a poor predictor of individual performance and that employees should be judged on individual merit," the Supreme Court has imposed "stringent standards" on this exception both for Title VII and for ADEA cases. *See generally* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 240-54 (quotations at 246-247) (1990); Western Air Lines v. Criswell, 472 U.S. 400 (1985) (applying the same standards for the BFOQ exception in ADEA cases as those established in Title VII gender cases and holding that airlines were unjustified in imposing a mandatory retirement age of sixty on flight engineers). *But cf.* EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984) (upholding an age thirty-two hiring limit and an age sixty mandatory retirement age for the Highway Patrol).

[39] *See infra* notes 109-27 and accompanying text.

except that this exception may not be used as an excuse not to hire an older worker;[40] and (4) "for good cause."[41]

B. Disparate Treatment Analysis: Objectives and Procedures

To enforce the provisions of the ADEA, courts have applied the same methodology they first developed for Title VII claims, that is both disparate treatment and disparate impact analyses.[42] Disparate treatment, more easily understood and more straight-forward than disparate impact, occurs when "the employer simply treats some people less favorably than others" because of age.[43] To prevail under a disparate treatment analysis, a plaintiff must demonstrate that his or her employer acted from a "discriminatory motive." [44] To prove that the employer was actually motivated to take action because of the employee's age, the older worker can either present to the court "a formal, facially discriminatory policy requiring adverse treatment of employees" based on age[45] or, where the policy is not explicitly discriminatory, the employee can use the shifting-burden test first articulated in *McDonnell Douglas Corp. v. Green*.[46]

Under the *McDonnell Douglas* shifting-burden test, a plaintiff must first establish a prima facie case by proving that he or she is over forty years of age, that he or she is performing his or her work satisfactorily or is qualified for employment or promotion, and that the employer took discriminatory action against him or her in favor of younger workers.[47]

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[40] 29 U.S.C. § 623(f)(2).

[41] *Id.* § 623(f).

[42] *See, e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 699 (1st Cir. 1999) (citing numerous decisions where courts held that the ADEA permitted disparate impact claims based on the similarity of language in Title VII and the ADEA); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 724 n.5 (3d Cir. 1995) (citing cases that gave "parallel construction" to the ADEA and Title VII "due to their similarities in purpose and structure") (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 n.4 (3d Cir. 1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994) (citing cases applying the *McDonnell Douglas* shifting-burden test established in Title VII litigation to ADEA cases); EEOC v. Borden's Inc., 724 F.2d 1390, 1394-95 (9th Cir. 1984) (citing precedents for applying both disparate impact and disparate treatment theories to ADEA cases because of the similarity in "language, structure, and purpose" between Title VII and the ADEA).

[43] Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

[44] *Id.* While the plaintiff must prove that the employer's actions were based on discriminatory intent, in some cases that discriminatory motive may "be inferred from the mere fact of differences in treatment." *Id.* (quoting Teamsters v. United States, 431 U.S. 324, 335-36, n.15 (1977)).

[45] *Hazen Paper*, 507 U.S. at 610.

[46] 411 U.S. 792 (1973).

[47] *See, e.g., Anderson*, 13 F.3d at 1122.

Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer who is offered the opportunity to present a "legitimate, nondiscriminatory reason" for his or her action.[48] If the employer presents such evidence, the burden of production shifts back to the employee to prove by a preponderance of the evidence that the proffered nondiscriminatory reason was a mere pretext for the true reason--discrimination based on the employee's age.[49] Indeed, recent case law has required a plaintiff to demonstrate not only that the proffered reason was a pretext, but also that the action was motivated by "animus based on age."[50]

C. Disparate Impact Analysis: Objectives and Procedures

The Supreme Court first articulated the disparate impact theory as an alternative means for workers to prove illegal discrimination under Title VII in *Griggs v. Duke Power*.[51] In that case, African-American employees alleged that their employer violated Title VII by requiring their employees either to have a high school education or to pass a standardized general intelligence test in order to be eligible for certain jobs.[52] Reversing the Fourth Circuit, which had held that the employees failed to prove their claim because they provided no proof of discriminatory motive, the Supreme Court looked to the broad purposes of Title VII.[53] Because Title VII was designed "to achieve equality of employment opportunities and

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[48] *Id.*

[49] *Id.* at 1122-23.

[50] Mullin v. Raytheon Co., 164 F.3d 696, 699 (1st Cir. 1999) (holding that an older executive, downgraded with salary reduction, failed to prove that his employer's reason was a pretext and that the action was motivated by animus based on age). As the *Mullin* court explained, federal law now requires a plaintiff using the *McDonnell Douglas* shifting-burden test to prove that the employer's proffered reason was more than "pretext only." *Id.* The plaintiff must prove pretext plus age animus. *Id.* "Pretext only" means that a plaintiff must only prove that the employer's proffered explanation was "unworthy of credence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). To prove pretext plus age animus, a plaintiff must essentially produce a "smoking-gun," that is, positive evidence of discriminatory animus. *Hazen Paper* emphasized that when an employee, proceeding under a disparate treatment theory, is a victim of an employment decision related to but analytically distinct from age, such as a pension plan vesting, that employee, to prevail under the ADEA, must prove not only that the employer's proffered reason was untrue, but also that the employer's real reason was age-discrimination animus. *Hazen Paper*, 507 U.S. at 612-13. See Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L. J. 57 (1991), for a discussion of the implications of the "pretext-plus" requirement in employment decisions.

[51] 401 U.S. 424 (1971). Just like disparate treatment analysis, disparate impact was first developed in a race discrimination case. But before *Hazen Paper*, all courts applied the *Griggs* analysis to ADEA cases. *See supra* note 42 and *infra* note 65, and accompanying text.

[52] *Griggs*, 401 U.S. at 425-26.

[53] *Id.* at 436 *passim*.

remove barriers that have operated . . . to favor" one group over another, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[54] However, the Court emphasized that employers could require legitimate tests, even if they had a discriminatory effect, if such tests or requirements were truly necessary for effective job performance.[55] What employers could not do was employ unreasonable requirements that discriminated unnecessarily against the protected group.[56]

Thus, while disparate treatment requires the aggrieved employee to prove that his or her employer was motivated by animus based on age or other protected factors, disparate impact does not require the employee to prove any discriminatory motive on the employer's part in order to prevail. Disparate impact analysis is designed to allow employees to demonstrate discrimination even when the employment practices are "facially neutral in their treatment of different groups" because such practices "fall more harshly on one group than another and cannot be justified by business necessity."[57]

To succeed under a disparate impact theory, the plaintiff must identify the specific practice challenged.[58] It is not sufficient for a plaintiff merely to provide statistics that "at the bottom line" show an "imbalance in the work force."[59] As an integral part of the plaintiff's prima facie case, the worker must clearly "demonstrate that it is the application of a specific or

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[54] *Id.* at 429-30.

[55] *Id.* at 431.

[56] *Id.* at 431, 436.

[57] *Hazen Paper*, 507 U.S. at 609.

[58] Wards Cove Packing Co., Inc. v Atonio, 490 U.S. 642, 657 (1989) (holding that racial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact and emphasizing that plaintiff may not merely use a "bottom line"). *Wards Cove* requires employees to demonstrate that a specific employment practice created a disparate impact. *See infra* notes 119-127 and accompanying text. Prior to *Wards Cove*, a plaintiff did not have to identify the *specific* practice challenged; general statistics sufficed. Congress amended Title VII to reverse *Wards Cove* making it easier for a Title VII plaintiff to use disparate impact analysis. However, *Wards Cove* remains the standard for ADEA litigants using disparate impact analysis. *See infra* notes 130-39 and accompanying text. The impact of *Wards Cove* on age discrimination cases is illustrated by *Bramble v. American Postal Workers Union*, 135 F.3d 21, 26 (1st Cir. 1998) (arguing that because statistics comparing persons holding at-issue jobs with the composition of qualified job applicants is a basic component of a disparate impact claim, such a claim cannot be made when there is only one person affected).

[59] *Wards Cove*, 490 U.S. at 657.

particular employment practice that has created the disparate impact under attack."[60]

Once a plaintiff has presented sufficient evidence to make a prima facie case, the burden of production shifts to the employer to justify his or her practice.[61] Employers must offer evidence that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer."[62] If the employer carries his burden of production, the burden shifts back to the plaintiff, who always retains the ultimate burden of persuasion.[63] The plaintiff must either disprove the employer's evidence that his actions were "based solely on a legitimate neutral consideration" or demonstrate that the employer could have used other practices which did not have the undesirable discriminatory effects, while still serving "the employer's legitimate [hiring] interest[s]."[64]

D. Hazen Paper: A New Approach

After *Griggs*, courts applied disparate impact analysis equally to both Title VII and ADEA cases.[65] However, in 1993, the Supreme Court seemed to challenge this assumption in *Hazen Paper Company v. Biggins*, a case involving the firing of a sixty-two year old employee allegedly to prevent his pension benefits from vesting.[66] The jury agreed with the plaintiff that age had been the "determinative factor" in his employer's decision to fire him.[67] Indeed, it found that Hazen Paper had "willfully"

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[60] *Id.* at 656.

[61] *Id.* at 658-59.

[62] *Id.* at 659 (emphasizing that while the practice must serve legitimate business goals in a "significant" way, it need not be "essential" or "indispensable").

[63] *Id.*

[64] *Id.* at 660.

[65] *See, e.g.*, Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992); Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992); EEOC v. Borden's, Inc., 724 F.2d 1390, 1394-95 (9th Cir. 1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983). *See also supra* note 42 and accompanying text.

[66] *Hazen Paper*, 507 U.S. at 606-07. Hazen Paper hired Biggins in 1977 as its technical director. *Id.* at 606. In 1986, the company fired him, allegedly for doing business with competitors. *Id.* The jury, however, found that Biggins was fired to prevent his pension benefits from vesting. *Id.* At 606-07. But Biggins lost his ADEA claim on appeal when the Supreme Court held that discharging an employee to prevent his pension benefits from vesting did not violate the ADEA unless the employee could prove that the employer's motivation was animus against older workers. *Id.* at 613. Biggins, however, did prevail on his Employee Retirement Income Security Act of 1974 ("ERISA") claim since ERISA specifically prohibits the firing of an employee to prevent pension benefits from vesting. *Id.* at 607.

[67] *Id.* at 606.

violated the ADEA.[68] In affirming the jury's findings, the United States Court of Appeals for the First Circuit relied heavily on Biggins' evidence that Hazen Paper, after firing him, had offered to retain him as a consultant, a job which would not entitle him to his pension benefits.[69] Overturning the First Circuit, the Supreme Court declared that employees cannot prevail under a disparate treatment analysis under the ADEA "when the factor motivating the employer is some feature other than the employee's age."[70] Concluding that pension vesting, while often associated with age, is dependent on factors independent of age, the Court held that Biggins had not met his burden of proving that his employer was motivated to fire him because of his age.[71]

More significant than the particular holding in this case, however, was the Court's analysis. The Court argued that disparate treatment, as opposed to disparate impact, best "captures the essence of what Congress sought to prohibit in the ADEA."[72] For the Court, Congress' purpose in enacting the ADEA was to overcome the stereotypes that many employers hold that an employee's "productivity and competence decline with old age."[73] Congress enacted the ADEA to prevent employers from depriving "older workers . . . of employment on the basis of inaccurate and stigmatizing stereotypes."[74] Thus, "when the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears."[75]

While this case was litigated solely on the basis of disparate treatment, the Court, in dicta, added that while disparate treatment analysis is clearly called for by the language of the ADEA, the Court had "never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here."[76] Not satisfied with merely hinting that a disparate impact theory might exceed Congress' goals in enacting the ADEA, Justice Kennedy, joined by Justices Rehnquist and Thomas, wrote a separate concurring opinion, emphasizing that the Court had not decided

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[68] *Id.*

[69] *Id.* at 607.

[70] *Id.* at 609.

[71] *Id.* at 613.

[72] *Id.* at 610.

[73] *Id.*

[74] *Id.* at 610-11.

[75] *Id.* at 611.

[76] *Id.* at 609-10 (citations omitted).

anything on the availability of a disparate impact analysis.[77] Kennedy insisted:

> [N]othing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory. . . . [W]e have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.[78]

III. ANALYSIS

Since *Hazen Paper*, circuit courts increasingly have refused to allow plaintiffs to present a disparate impact analysis in ADEA cases.[79] Analyzing the text of the statute, its legislative history, the exceptions in the statute, subsequent legislative action, and policy considerations, the First, Seventh, and Tenth Circuits have completely rejected disparate impact analysis.[80] The Third Circuit, while not definitively concluding that it would not allow disparate impact analysis, has expressed doubts about its applicability to ADEA litigation.[81] In opposition, the Second and Eighth Circuits argue that disparate impact is still a viable theory for ADEA cases.[82] The Fifth Circuit, without explanation or evaluation of the various disputes, also continues to permit disparate impact analysis.[83] The D.C. Circuit and the Sixth and Ninth Circuits also still seem to accept disparate impact, but whether they will continue to do so is open to doubt.[84] This

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[77] *Id.* at 618.

[78] *Id.* (citing Judge Easterbrook's dissent in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1216-20 (7th Cir. 1987) and Justice Rehnquist's dissent from a denial of certiorari in *Markham v. Geller*, 451 U.S. 945 (1981)).

[79] *See infra* notes 80-81.

[80] *See* Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); Blackwell v. Cole Taylor Bank, 152 F.3d 666 (7th Cir. 1998); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994).

[81] DiBiase v. SmithKline Beecham Corp., 48 F.3d 719,730-34 (3d Cir. 1995).

[82] *See* District Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347 (2d Cir. 1997); Lewis v. Aerospace Community Credit Union, 114 F.3d 745 (8th Cir. 1997), *cert. denied*, Kelleher v. Aerospace Community Credt, 523 U.S. 1062 (1998); Smith v. Des Moines, 99 F.3d 1466 (8th Cir. 1996); Houghton v. SIPCO, Inc., 38 F.3d 953 (8th Cir. 1994).

[83] EEOC v. General Dynamics Corp., 999 F.2d 113 (5th Cir. 1993).

[84] Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996) (noting that, for this case, they were "assum[ing] without deciding that disparate impact analysis applies to age discrimination claims"); Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 (6th Cir. 1995) (failing to address whether disparate impact analysis applies to ADEA claims but arguing that "the ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions . . . , downsizing, [and] plant closings"); Mangold v. California Pub. Utilities Comm'n, 67

section analyzes the arguments both sides use to reach their respective positions, concluding that while each side has presented plausible arguments, those supporting the use of a disparate impact analysis in ADEA cases are more persuasive.

A. Arguments For and Against the Use of Disparate Impact Analysis Based on the Similarity of Statutory Language in Title VII and the ADEA

1. Discrimination "Because of" Age and the Doctrine of *In Pari Materia*

Before *Hazen Paper*, most courts applied the same analyses they had developed in Title VII cases to ADEA litigation,[85] primarily because the statutory language of § 623(a) of the ADEA is virtually identical to that used in Title VII's § 2000e-2(a). Each Act has two sections, the first of which makes it unlawful "to fail or refuse to hire or to . . . otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's" "age" under the ADEA or "race, color, religion, sex, or national origin" under Title VII.[86] Each Act's second section makes it unlawful for employers "to limit, segregate, or classify . . . employees in any way which would deprive . . . any individual of employment opportunities" "because of" either such individual's "age" or such individual's "race, color, religion, sex, or national origin."[87] In fact, the only difference in the language of the two statutes is in the second section of Title VII, where employers, when dealing with "applicants for employment" as well as with current employees, are forbidden to "limit, segregate, or classify" by race, gender, religion, and the like.[88] The ADEA does not protect job "applicants."[89]

Circuits which have recently rejected the availability of a disparate impact analysis in ADEA cases admit that the statutory language of the

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F.3d 1470, 1474 (9th Cir. 1995) (accepting disparate impact because of precedent, but explaining that they "need not address here whether disparate impact is a proper theory under the ADEA because the jury found intentional discrimination under a disparate treatment theory" as well).

[85] *See supra* note 65 and accompanying text.

[86] *Compare* 29 U.S.C. § 623(a)(1) *to* 42 U.S.C. § 2000e-2(a)(1).

[87] *Compare* 29 U.S.C. § 623(a)(2) *to* 42 U.S.C. § 2000e-2(a)(2).

[88] *Id.*

[89] *Id.*

ADEA and Title VII is virtually identical.[90] However, they argue that, on its face, the statutory language making it unlawful to discriminate because of one's age, race, or gender, seems to require evidence of intentional discrimination.[91] The circuit courts contend that the Supreme Court's decision in *Griggs*, in developing a disparate impact theory, broadened the apparent plain meaning of the words "because of."[92] But, the circuit courts argue, the *Griggs* Court did so to further Title VII's specific and unique goals of removing barriers that had operated to prevent equal opportunities for the protected groups.[93] They claim that since *Griggs*, courts have, without analysis, applied disparate impact to ADEA cases simply because the ADEA and Title VII use identical language.[94] Such an application, they contend, is inappropriate; rather, the statutory language in the ADEA should be read strictly to prohibit only intentional discrimination because the ADEA has a very different purpose from Title VII.[95] This different purpose can be seen when one analyzes the complete text of the two statutes, their legislative history, and subsequent congressional action.[96]

Arguing that courts should employ different analytical approaches to two statutes with intentionally identical language undermines the "well established" doctrine of *in pari materia*.[97] That doctrine states that the interpretation of one statute "may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships."[98] *In pari materia* is particularly well suited for the ADEA and Title VII since the ADEA grew out of the debates on Title VII. Furthermore, Congress carefully chose identical language for its statutes dealing with both discrimination against older workers and

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[90] *See, e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1006-07 and 1007 nn.12 & 13 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994).

[91] *See, e.g.*, *Mullin*, 164 F.3d at 700.

[92] *Id.*; *see supra* notes 51-54 and accompanying text.

[93] *See, e.g.*, *Mullin*, 164 F.3d at 701; *Ellis*, 73 F.3d at 1006-07, 1007-08 n.13.

[94] *See, e.g.*, *Mullin*, 164 F.3d at 701.

[95] *See, e.g.*, *Ellis*, 73 F.3d at 1006-07, 1007-08 n.13.

[96] *Id.*

[97] National Fed'n of Fed. Employees v. Department of Interior, 119 S. Ct. 1003, 1013 (1999) (defining the doctrine of *in pari materia*, citing several cases where the Court applied the doctrine to aid in its construction of a variety of statutes, and arguing that the doctrine was now "well established"), *on remand*, 174 F.3d 393 (4th Cir. 1999).

[98] *Id.* (quoting 2 B.N. Singer, Sutherland on Statutory Construction § 53.03, at 233 (rev. 5th ed. 1992). The Third Circuit, expressing its doubt as to the continuing viability of disparate impact analysis under the ADEA while not explicitly rejecting it, employed a complicated textual analysis based on syntax and the placement of commas. DiBiase v. SmithKline Beecham Corp. 48 F.3d 719, 733-34 (3d Cir. 1995). Whether such an analysis makes any sense must be left to an expert in the structure of language, but such an analysis still does not address the *in pari materia* issue.

discrimination against those because of race or gender.[99] Recognizing the close connection in language and purpose between the two statutes, courts, from the time the ADEA was enacted until the Supreme Court hinted otherwise in *Hazen Paper*, have held the two statutes to be *in pari materia*. The legislative history of the ADEA demonstrates that, like Title VII, Congress and Secretary of Labor Wirtz wished to eliminate not only explicitly discriminatory policies, but also those "established without any determination of their actual relevance to job requirements" and defended by employers on irrational grounds.[100] Wirtz specifically indicated that the ADEA was not only to cover "overt acts of discrimination," but also to eliminate "practices which quite unintentionally lead" to discrimination.[101]

Moreover, the basic argument that the text of the ADEA seems to prohibit only intentional discrimination, while plausible, is not convincing. The more generous reading, which had been accepted unanimously by the courts prior to *Hazen Paper*, is a more logical approach.[102] There is nothing apparent in the words "because of" age or race that mandates the conclusion that only intentional discrimination is outlawed. As the Court in *Griggs* articulated, it has long been recognized that discrimination comes in many forms.[103] A facially-neutral policy can unconsciously, because of stereotypes and preconceptions about people, lead to discrimination that has as devastating an effect on the employees impacted by it as an intentionally discriminatory act.

In his 1965 Report, Secretary of Labor Wirtz detailed the irrational stereotypes that employers held that led them to fire or refuse to hire older workers.[104] Among the most devastating of these stereotypes was the belief that older workers demanded too much money while their productivity was declining.[105] Such stereotypes, Wirtz pointed out, were generally not motivated by the type of animus that underly racial biases.[106] Rather, they were arbitrary assumptions not based on facts.[107] In today's sophisticated society, if one is going to fight the assumptions Wirtz outlined, more is needed then a test that requires proof of intentional age animus. After

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[99] *See supra* notes 12-15, 34-37, 85-87 and accompanying text.

[100] SECRETARY'S REPORT, *supra* note 15 at 7, 22.

[101] *Id. See also supra* notes 15-37 and accompanying text. See *infra* notes 170-87 and accompanying text for an analysis of the arguments on subsequent legislative history.

[102] *See supra* note 65 and accompanying text.

[103] *See supra* notes 51-56 and accompanying text.

[104] *See supra* notes 15-21 and accompanying text.

[105] *See supra* notes 20-21 and accompanying text.

[106] *See supra* note 16 and accompanying text.

[107] *See supra* notes 19-21 and accompanying text.

years of anti-discriminatory legislation, most employers are no longer insensitive enough to adopt intentionally discriminatory policies. Moreover, because age discrimination is rarely based on animus, disparate treatment is even harder to establish in ADEA cases than it might be in Title VII litigation. Rarely will employers be so injudicious as to tell someone they are too old to be productive.[108] Examining the effects of policies and practices, which a disparate impact analysis does, may be the only effective way to determine if a policy may illegally discriminate. The employer, however, always has the opportunity to demonstrate that what might look to be a policy with a discriminatory impact is, in fact, legitimate because of some important business necessity.

2. The "Reasonable Factors Other than Age" Exception

In addition to examining the "because of" discrimination based on age language of the ADEA, those courts opposing the use of disparate impact theory focus on one of the exceptions to age discrimination enacted in the ADEA.[109] Section 623(f)(1) of the ADEA proclaims that age discrimination is not unlawful where age "differentiation is based on reasonable factors other than age."[110] No such parallel exception exists in Title VII.[111] A similar provision, however, does exist in the Equal Pay Act which permits wage differentials between men and women if they are based on "any other factor other than sex."[112] These circuits, like the Tenth Circuit in *Ellis v. United Airlines*, which oppose disparate impact point out that the Supreme Court has interpreted that provision of the Equal Pay Act "to preclude disparate impact claims."[113] They argue that the same interpretation should apply to the ADEA exception.[114]

However, the parallel that these circuits draw ignores a very significant difference between the ADEA and the Equal Pay exceptions. The Equal Pay Act excludes "any other factor" other than gender,[115] while the ADEA

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[108] See *infra* notes 191-98 and accompanying text for examples of current employment practices that demonstrate the need for disparate impact analysis because employees can not meet the strict animus requirements of disparate treatment.

[109] *See infra* notes 113-14 and accompanying text.

[110] 29 U.S.C. § 623(f)(1).

[111] *See* Smith v. Des Moines, 99 F.3d 1466, 1470 n.2 (8th Cir. 1996).

[112] 29 U.S.C. § 206(d)(1)(iv) (1994).

[113] Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996).

[114] *Id*; *see also* Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 734 (3d Cir. 1995); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994).

[115] 29 U.S.C. § 206(d)(1) (1994).

excludes only "reasonable factors other than age."[116] Courts supporting the use of disparate impact emphasize that the EEOC has drawn on the "reasonable factors other than age" language "to read disparate impact into the ADEA."[117] EEOC Regulations for the ADEA delineate "elaborate guidelines, designed to make certain that the purported 'reasonable factor' is significantly related to job performance."[118]

Further, in *Wards Cove Packing Co., Inc. v. Atonio*, the Supreme Court, to protect employers but also to ensure that courts consider only reasonable factors other than age, detailed specific procedures employees need to follow to establish a disparate impact claim.[119] These procedures safeguard employer rights while providing an opportunity for employees to demonstrate that some employer practices, while not based on the age animus required for a disparate treatment analysis, have a disparate impact which has the effect of discriminating against older workers. The *Wards Cove* Court held that if an employee alleging discrimination presents a satisfactory disparate impact-based prima facie case of age discrimination, his or her employer then has the opportunity to produce evidence to demonstrate that the disparity was based on reasonable factors related to the job at issue.[120] If the employer carries this burden of production, the employee, who retains the burden of persuasion throughout the litigation, must demonstrate that the alleged reasonable factors were a mere pretext.[121] If the employee cannot prove this by a preponderance of the evidence, the employer prevails.[122]

The *Wards Cove* shifting-burden procedure is significantly different from the procedure first articulated in *Griggs* eighteen years earlier, as it

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[116] 29 U.S.C. § 623(f)(1).

[117] *See Ellis*, 73 F.3d at 1008; Lumpkin v. Brown, 898 F. Supp. 1263, 1270 n.4 (N.D. Ill. 1995); 29 C.F.R. § 1625.7(d) (1999) (mandating that when an employment practice "has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as 'reasonable factors other than age' will be scrutinized in accordance with standards set forth" elsewhere); *see also, e.g.*, 29 C.F.R. §§ 1607.1, 1607.15.

[118] *Lumpkin*, 898 F. Supp. at 1270 n.4. *See, e.g.*, 29 C.F.R. §1607.15 (detailing how disparate impact information is to be collected and analyzed and how validity studies are to be done to ensure that the business necessity reason is legitimate).

[119] 490 U.S. 642, 656-60 (1989). *Wards Cove* involved salmon cannery workers who claimed that many of their company's hiring and promotion practices discriminated against nonwhites because of their race. *Id.* at 647-48. The new test the Court articulated in this case was then routinely applied by courts to age discrimination cases. This is still being done today, while Congress, by statute, has ameliorated the pro-employer impact of *Wards Cove* for Title VII plaintiffs. *See infra* notes 170-80 and accompanying text.

[120] *Wards Cove*, 490 U.S. at 656-60.

[121] *Id.*

[122] *Id.*

provides employers with more protections and places greater burdens on employees choosing to use a disparate impact analysis.[123] To establish a prima facie case through a disparate impact analysis, the Supreme Court in *Wards Cove* required the worker alleging the discrimination to identify "the specific employment practice that is challenged"; the mere presentation of statistical disparities was no longer sufficient.[124] Moreover, while courts had interpreted *Griggs* to shift the burden of proof to the employer after the worker had established a prima facie case of discrimination, the *Wards Cove* Court held that the aggrieved worker maintained the burden throughout the litigation.[125] All the employer has to do after a plaintiff establishes a prima facie case is to produce some evidence that its practices have some nondiscriminatory purpose.[126] Under *Griggs*, the employer bore the burden of proving the business necessity.[127]

Thus, *Wards Cove* provides the employer with ample opportunity to develop practices that might have a disparate impact on a protected group as long as the practice has a legitimate, reasonable, nondiscriminatory business purpose. Still, unlike gender discrimination under the Equal Pay Act, where any reason other than gender excuses an employer's actions, ADEA litigants still should be able to use disparate impact analysis as long as they also prove that the employer's proffered nondiscriminatory purpose is not a "reasonable" one.

B. Disparate Impact Analysis and the Legislative History that Led to the Enactment of the ADEA

1. The Overall Purpose of the ADEA

Many commentators concede that the legislative history of the ADEA does not provide a "smoking gun" either for or against disparate impact.[128] This, however, is not surprising. When Congress enacted the ADEA, the Supreme Court had not yet developed the disparate impact theory. Thus,

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[123] *See* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1078-81 (1998).

[124] *Wards Cove*, 490 U.S. at 656; *cf.* Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971).

[125] *Wards Cove*, 490 U.S. at 659.

[126] *Id.*

[127] *Griggs*, 401 U.S. at 431.

[128] *See, e.g.*, Brendan Sweeney, Comment, *'Downsizing' The Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527, 1573 (1996); Steven Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 292-98 (1990).

as stated above, neither Title VII nor the ADEA, in their texts or their legislative histories, speak directly on point. Therefore, one must look at the underlying purposes of the legislation.

When Congress was considering amendments to the ADEA in 1976, former Secretary of Labor Wirtz, in a statement before the House Select Committee on Aging, discussed what he saw as the original vision of the ADEA and how that vision had failed to be fully implemented in the nine years since its passage.[129] He explained that before 1965, the nation's policy regarding older workers was directed toward the idea of security.[130] With the ADEA, however, "there emerged the recognition of a second dimension of old-age policy: relating to Opportunity."[131] But Wirtz bemoaned that this promise of opportunity had not yet been fulfilled.[132] Rather, the United States had preserved its favorable employment statistics "by putting more and more people with more and more competence and capacity out to pasture earlier and earlier."[133] Speaking at a time when the economy was not expanding as rapidly as many had hoped and when unemployment stood at over eight percent, the former Secretary of Labor implored: "The unemployment costs of a distressed economy must not be thrown disproportionately on older people . . . . There is more reason now, not less, for rigorous enforcement of the ADEA . . . ."[134]

While former Secretary of Labor Wirtz, whose report served as the basis for the original statute,[135] spoke eloquently of an expansive purpose, courts questioning the application of disparate impact theory to ADEA cases see the statute more narrowly.[136] These courts emphasize that the ADEA's "primary purpose" was simply "to prohibit employers from acting upon the assumption that 'productivity and competence decline with old age.'"[137] In their view, disparate impact, as developed for Title VII litigants, had a

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[129] *Impact of the Age Discrimination in Employment Act of 1967 Before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging*, 94th Cong., 2nd Sess. (1976) (statement of Willard Wirtz, Secretary of Labor).

[130] *Id.* at 79-81.

[131] *Id.* at 79 (emphasis in original).

[132] *Id.* at 79-81.

[133] *Id.*

[134] *Id.* at 81 (emphasis in original).

[135] *See infra* note 144 and accompanying text.

[136] *See* DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 734 (3d Cir. 1995); Mullin v. Raytheon Co., 164 F.3d 696, 700-01 (1st Cir. 1999); Ellis v. United States Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996).

[137] *See DiBiase*, 48 F.3d at 734 (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)); *Mullin*, 164 F.3d at 700-01; *Ellis*, 73 F.3d at 1008.

different purpose.[138] As the *Griggs* Court explained, disparate impact was necessary to prevent racial discrimination because society needed to remove long-standing "barriers" against racial minorities.[139] "[P]ractices, procedures, or tests neutral on their face" could no longer be tolerated "if they operate[d] to 'freeze' the status quo of prior discriminatory employment practices."[140] All "artificial, arbitrary, and unnecessary barriers" blocking hiring and promotion needed to be swept away.[141] Those circuits opposing the application of disparate impact to ADEA cases believe discrimination based on age does not have a similar history of past discrimination.[142] Therefore, they see no need for disparate impact because there is no fear of "freez[ing]" an old "status quo."[143]

This argument is unpersuasive. These courts seem to assume that only barriers based on animus create problems. But one can have a "status quo" based on inaccurate stereotypes that society needs to destroy as much as one can have "status quo" based on animus that should be swept away. The Secretary of Labor's initial report to Congress in 1965, while conceding that age discrimination "rarely was based on the sort of animus motivating some other forms of discrimination," argued that it was "based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes."[144] If, as is conceded by all courts, the Secretary's Report is one of the best indications of Congress' intent in enacting the ADEA,[145] this Report provides more support for applying than denying disparate impact theory. Because "the sort of animus motivating some other forms of discrimination" was generally not present in age discrimination cases, it would seem that disparate treatment, which requires specific proof of discriminatory motive or proof that the employer's facially-neutral policy was a pretext motivated by age animus, would be rare.[146] More common, and of greater concern, would be arbitrary discrimination based on irrational stereotypes, something better identified by disparate impact analysis.

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[138] *See DiBiase*, 48 F.3d at 734; *Mullin*, 164 F.3d at 701.

[139] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

[140] *Id.* at 430.

[141] *Id.* at 431.

[142] *See DiBiase*, 48 F.3d at 734; *Mullin*, 164 F.3d at 701.

[143] *See DiBiase*, 48 F.3d at 734 (quoting *Griggs*, 401 U.S. at 429-30); *see also Mullin*, 164 F.3d at 701.

[144] EEOC v. Wyoming, 460 U.S. 226, 231 (1983).

[145] *See, e.g.*, *Mullin*, 164 F.3d at 702; *Ellis*, 73 F.3d at 1008.

[146] *See* EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078-80 (7th Cir. 1994) (Cudahy, J., dissenting).

Disparate impact theory was designed to uncover a pattern of discriminatory results, motivated not by animus but primarily by inaccurate stereotypes.[147] The *Mullin* Court, arguing against the use of a disparate impact theory, agreed that the Secretary's Report demonstrated "the need for legislation [against age discrimination] to combat stereotyping and to rectify the perception that older persons cannot do particular jobs."[148] However, it then concluded that "[i]nasmuch as disparate impact theory is designed to combat invidious prejudice *that is entirely unrelated to an ability to perform the job*, the Report's findings suggest that the theory has no utility in age discrimination cases."[149]

It is in this phrase, "entirely unrelated to an ability to perform the job,"[150] that one finds the key difference in the way the different circuits have approached age discrimination. Those circuits that oppose the use of disparate impact emphasize that stereotypes based on age do, at least in part, relate to the ability to perform the job.[151] For them, racial or gender factors rarely, if ever, have any relation to the ability to perform a job.[152] However, they contend that older workers at some point become less productive.[153] Age does eventually slow people down.[154] Thus, the stereotypes people hold about the elderly are not completely irrational. Moreover, even if a particular employee's productivity remains the same as it was when he or she was younger, that employee has been receiving regular pay raises over the years. Therefore, on a pure cost-benefit analysis, the employee with the same productivity level at age forty as at age thirty would be less productive because he or she is producing the same amount but earning a higher salary.

In his 1965 Report, Secretary of Labor Wirtz specifically addressed this issue of older workers posing a higher cost to employers.[155] He concluded that the negative effects of age discrimination on older workers and the economy outweighed a specific employer's concern for cutting costs.[156]

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[147] *See Mullin*, 164 F.3d at 703.

[148] *Mullin*, 164 F.3d at 703.

[149] *Id.* (emphasis added) (citation omitted).

[150] *See supra* note 149 and accompanying text.

[151] *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1213 (7th Cir. 1987) (Easterbrook, J., dissenting).

[152] See Ellis v. United States Airlines, Inc., 73 F.3d 999, 1007, n.13 and 1009 (10th Cir. 1996); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 734 (3d Cir. 1995).

[153] *See Metz*, 828 F.2d at 1213 (Easterbrook, J., dissenting).

[154] *Id.*

[155] *See supra* notes 20-21 and accompanying text.

[156] *See supra* notes 20-21 and accompanying text.

Therefore, at least based on the legislative history, Congress did intend to eliminate discrimination against older workers simply because they were paid more. Congress and Wirtz wanted not only to eliminate the "perception that older persons cannot do a particular job," but also the practice of eliminating higher salaried workers because they were less productive.[157]

Older workers, let go by employers seeking to cut costs by eliminating more highly-paid workers, will have no recourse if the courts do not permit a disparate impact analysis. They will be unable to prove the age animus required under a disparate treatment theory. If the ADEA is to protect older workers from being dismissed simply because they earn more, a disparate impact theory must be available to plaintiffs seeking redress.[158]

2. "Arbitrary" Discrimination Versus "Special Institutional Arrangements"

While the major thrust of the Secretary's Report appears to support the use of disparate impact theory, at least based on the rationale provided by the *Griggs* Court, critics of disparate impact also point to another portion of the legislative history to provide additional support for their arguments against the use of disparate impact.[159] The Secretary's Report outlined three areas in which age discrimination was most keenly felt: (1) overt age ceilings; (2) neutral policies and programs such as educational level and testing "which . . . affect older workers more strongly, as a group, than they do younger workers"; and (3) special institutional arrangements that "indirectly restrict the employment of older workers," like seniority, pension programs, and promotion from within.[160] Several circuits, along

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[157] *Mullin*, 164 F.3d at 703; *see supra* notes 16-35 and accompanying text.

[158] This type of discrimination is probably the most prevalent today and it was one of the types of discrimination specifically identified by Wirtz in 1965. It seems unlikely that Congress intended to pass an age discrimination statute that exempts this large area of potential discrimination from coverage without explicit language or legislative history.

[159] *See infra* notes 161-63 and accompanying text.

[160] *See* SECRETARY'S REPORT, *supra* note 15 at 6-17 (quotations at pp. 11 and 15). The Report discusses numerous personnel programs and practices that disproportionately affect older workers, although many, ironically, were developed to protect the employment of older workers and provide support for them when they retire or become ill. *Id.* The Report labels such practices as "institutional arrangements that indirectly restrict the employment of older workers." *Id.* at 15. It then provides examples of such institutional arrangements: (1) "arbitrary" and generalized hiring policies that "ignore individual differences" and "deprive companies of talent and qualified workers of opportunity;" (2) promotion-from-within policies that greatly benefit currently-employed workers, but tend to restrict outside hiring; (3) seniority systems which protect older workers in their jobs, but may result in layoffs of older workers if their seniority units for layoff purposes are narrowly defined; (4) workers' compensation laws which can allow employees to recover for non-job-related disabilities that create employer reluctance to hire older workers; and (5) private pension, health, and insurance plans that provide security to older workers, but which make it more costly to employ older workers at a

with legal scholar Alfred Blumrosen, argue that the Secretary's Report's distinctions between these three areas are significant.[161] They claim that the Secretary's Report recommended that arbitrary discrimination be prohibited through legislation while problems caused by institutional arrangements "be addressed through educational programs and institutional restructuring."[162] Thus, they conclude that only "intentional discrimination in age cases" is prohibited by statute; facially-neutral discrimination was to be handled by other congressional programs.[163]

Employment lawyer Keith Fentonmiller, analyzing the legislative history of the ADEA, provides a great deal of evidence that Congress adopted no such dichotomy.[164] After summarizing the Secretary's Report and subsequent congressional legislation, Fentonmiller points to the interpretive regulations issued by the Department of Labor under Secretary Wirtz just nine days after the ADEA went into effect.[165] These regulations describe a number of institutional arrangements, tests, and educational requirements that the Labor Department ruled were outlawed unless employers could demonstrate their necessity for a particular job.[166] On this basis, Fentonmiller concludes that no such distinction between arbitrary discrimination and special institutional arrangements existed in the Secretary's Report, as Blumrosen claimed.[167] Rather, "there is substantial evidence in the ADEA's legislative history to support the application of disparate impact analysis to private employers."[168] Furthermore, because Congress has not commented on these regulations in the thirty years they have existed, "such early statutory interpretations . . . are 'entitled to great

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benefit level comparable to younger workers. *Id.* at 15-17. The Secretary proposed that the practices detailed in (3), (4), and (5) be adjusted by "programmatic measures," although he proposed no such measures. *Id.* at 2, 22. More importantly, the policies detailed in (1) and (2) were not listed as ones that could be adjusted by any other congressional programs. *Id.*

[161] *See* Alfred Blumrosen, AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 68 (Monte B. Lake, ed., 1982); Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996); *Mullin,* 164 F.3d at 703.

[162] *Mullin*, 164 F.3d at 703.

[163] *See id.*; Blumrosen, *supra* note 161 at 115.

[164] Fentonmiller, *supra* note 123 at 1100-07.

[165] *Id.* at 1104.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 1107.

deference.' Indeed, the Supreme Court has relied on the same body of regulations as persuasive authority in interpreting the ADEA."[169]

C. Subsequent Legislative Action and Disparate Impact.

Many in Congress believed the Court had undermined Title VII's disparate impact analysis in *Wards Cove* because it had shifted too much of the burden onto the worker.[170] Thus, in 1991, Congress amended Title VII, explicitly adding a disparate impact cause of action for Title VII litigation.[171] However, while Congress also amended the ADEA "in myriad respects," it did not explicitly add a disparate impact cause of action to the age discrimination law.[172] For the circuits opposing the use of disparate impact in age discrimination, this was a clear indication that Congress intended to distinguish between the ADEA and Title VII.[173]

Others contend that this silence proves nothing.[174] Justice Scalia, in his dissent in *Johnson v. Transportation Agency* arguing for a plain meaning reading of Title VII,[175] persuasively noted that "vindication by congressional inaction is a canard."[176] Earlier, the Court had noted that "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."[177]

Congress, in amending Title VII, focused on overruling a specific Supreme Court decision effecting only Title VII.[178] "There was no comparable Supreme Court decision concerning disparate impact under the ADEA."[179] Congress, believing it should focus on the specific Court

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[169] *Id.* at 1106; *see also* Western Airlines, Inc. v. Criswell, 472 U.S. 400, 412 (1985) (relying on federal regulations to interpret the BFOQ exception to ADEA); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (discussing and adopting EEOC's regulations and interpretations).

[170] *See supra* notes 119-127 and accompanying text; *see also* Fentonmiller, *supra* note 123 at 1081.

[171] *See* Ellis v. United States Airline, Inc., 73 F.3d 999, 1008 (10th Cir. 1996); Mullin v. Raytheon Co., 164 F.3d 696, 703 (1st Cir. 1999); *see also* 42 U.S.C. § 2000e-2(k) (explicitly detailing the "burden of proof" needed in Title VII "disparate impact cases").

[172] *Mullin*, 164 F.3d at 703; *see also Ellis*, 73 F.3d at 1008.

[173] *See Ellis*, 73 F.3d at 1008; *Mullin*, 164 F.3d at 703.

[174] *See, e.g.*, Alfred W. Blumrosen et al., *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943, 983-84 (1998).

[175] 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

[176] *Id.*

[177] Harrison v. PPG Indus. Inc., 446 U.S. 578, 592 (1980).

[178] 42 U.S.C. § 2000e-2(k), by detailing the burden of proof needed in title VII disparate impact cases, overturned *Wards Cove*, 490 U.S. at 656. See *supra* notes 58-64 and accompanying text for details of *Wards Cove* shifting-burden requirements.

[179] Blumrosen et al., *supra* note 174 at 984.

decision it opposed, might easily have assumed that, given the parallel language between Title VII and the ADEA and given the long history of applying the same tests because of this similar statutory language, its actions amending Title VII would automatically be applied to the ADEA.[180]

What Congress did do regarding the ADEA was to amend that statute in 1990 by adding the Older Workers Benefit Protection Act ("OWBPA") to § 626 of the ADEA.[181] Responding to the ever-increasing number of cases where employers offer workers compensation in connection with layoffs or early retirement programs only on the condition that the affected employees sign waivers agreeing not to pursue any discrimination claims, Congress enacted the OWBPA to ensure that older workers only waive their rights under the ADEA knowingly and voluntarily.[182] To facilitate knowing and voluntary waivers, the OWBPA requires employers to provide individuals from whom waivers are requested with at least twenty-one days to consider the agreement; to allow the workers at least seven days in which to revoke the waivers; to inform the workers in writing that they should consult an attorney before waiving any rights; and to provide workers with "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program."[183]

The language of ADEA and its OWBPA amendment, along with the legislative intent expressed in OWBPA's legislative history, seems to make clear that by adding the OWBPA language to the ADEA, Congress intended to ensure that "employees who have just lost their jobs" would have "sufficient information" to decide whether to waive their ADEA rights or to litigate.[184] Specifically, before deciding whether to sue or take the severance pay the employer offered in exchange for a waiver of the right to sue, workers must receive information on the ages of the workers offered severance pay and those who were not let go.[185] Requiring an employer to provide these statistics under the OWBPA only makes sense if an employee can use disparate impact analysis to bring a claim.[186] What other use would there be for statistics comparing the ages of those

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[180] *Id.*

[181] 29 U.S.C. §§ 623, 626, 630(f) (1994).

[182] 29 U.S.C. § 626(f)(1) (1994).

[183] 29 U.S.C. §§ 626(f)(1)(E)-(G), (H)(ii) (1994).

[184] Blumrosen et al., *supra* note 174 at 985.

[185] 29 U.S.C. § 626(f)(1)(H)(ii) (1994).

[186] Blumrosen et al., *supra* note 174 at 985.

terminated and those retained if not to assist a terminated worker in deciding whether he or she has a disparate impact claim against the employer?[187]

In addition, "requiring proof of intent in these cases," as disparate treatment analysis does "would produce an anomaly."[188] If those who claimed discrimination based on age could not use a disparate impact analysis while those claiming discrimination based on Title VII factors could, "[p]laintiffs claiming age discrimination would have a more difficult time establishing discrimination in a downsizing than would plaintiffs suing" under Title VII.[189] "But the ADEA is the only anti-discrimination statute where Congress has expressly sought to facilitate the making and evaluation of claims by reliance on the statistics showing the effect of the downsizing program."[190] Thus subsequent legislative history supports, more than undermines, arguments for the continued use of disparate impact analysis for ADEA claims.

D. Policy Considerations

1. The Need for Disparate Impact Analysis Given Current Employer Practices

Rarely do employers today display the kind of age animus necessary for workers to prevail using a disparate treatment theory. Therefore, disparate impact is necessary to combat the less obvious but equally damaging results of facially-neutral policies that adversely impact older workers. Some recent cases and economic developments illustrate the need for retaining the option of using a disparate impact analysis in age discrimination litigation.[191]

In the area of promotions, for example, disparate impact could be needed to prove age discrimination. In *Mangold v. California Public Utilities Commission*, older employees of the California Public Utilities Commission ("PUC") filed suit alleging that a subjective promotional

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[187] It must be admitted that statistics are sometimes used to buttress a disparate treatment claim when employing the *McDonnell Douglas* shifting-burden test. However, as a practical matter, in reduction-in-force ("RIF") cases, such statistics will not be sufficient to prove age animus. In reality, to win in RIF cases, statistics are only helpful to demonstrate that a facially-neutral RIF procedure had an adverse disparate impact on older employees.

[188] Blumrosen et al., *supra* note 174 at 985.

[189] *Id.*

[190] *Id.* at 985-86.

[191] *See infra* notes 192-98 and accompanying text.

process at the PUC discriminated against them based on age.[192] Supplying statistics to show that the older the employee the lower the score on the various required examinations, the EEOC, on behalf of the employees, argued that the promotional process was designed to favor younger workers.[193] Because the Ninth Circuit still accepts a disparate impact theory and because plaintiffs were aided by proof of intentional discrimination because supervisors were so inept that they told the older employees that the PUC needed "fresh young blood," the older workers prevailed.[194] But if the supervisors were not so indiscrete and if the Ninth Circuit had rejected a disparate impact analysis for ADEA litigation, the older employees would have been unable to present a prima facie case of age discrimination.

Even clearer improper promotion procedures were at issue in *Lumpkin v. Brown*.[195] The federal government had adopted an "Outstanding Scholars Program" which allowed agencies to hire and promote outstanding college graduates without using the "usual bureaucratic channels."[196] Thus, younger workers received automatic promotions every year while older workers were shut out from advancement.[197] Based on the evidence presented, the court determined that the Department of Veteran Affairs' application of this Outstanding Scholars Program had a "significant adverse impact on 40-year-old-and-over employees . . . within the contract specialist category . . . without any showing of business necessity."[198] In other words, though the Department had no proof that college graduates or younger employees were better managers or did a better job at the GS-12 level, it gave young college graduates significant preference in promotions over older workers with more years of service.

This is clearly the kind of stereotyping the ADEA was designed to prohibit. However, if only a disparate treatment analysis had been available, the older employees would have been unable to prove their case because the agency had demonstrated no overt "discriminatory animus." Rather, it argued that it simply preferred applicants with college degrees, although it undertook no study to determine whether or to what extent

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[192] Mangold v. California Pub. Utilities Comm'n, 67 F.3d 1470, 1473 (9th Cir. 1995).

[193] *Id.* at 1473-74.

[194] *Id.*

[195] Lumpkin v. Brown, 898 F. Supp. 1263 (N.D. Ill. 1995).

[196] *Id.* at 1267.

[197] *Id.* at 1272.

[198] *Id.*

college degrees related to the job. Only a disparate impact analysis would enable older workers to present a prima facie case of age discrimination.

2. Disparate Impact Adequately Protects Employers

Disparate impact analysis provides employees with a necessary method of proving discrimination. Furthermore, it does not significantly prejudice employers. Because of the shifting burden procedures spelled out in *Wards Cove*,[199] as well as other burdens courts have placed on plaintiffs alleging age discrimination,[200] when the employees' charges were not well-founded, employers have found sufficient safeguards, even under disparate impact theory. For example, in *Koger v. Reno*, a case involving alleged discrimination in promotions, older deputy marshals filed suit arguing that the subjective criteria used to determine promotions discriminated against them.[201] The D.C. Circuit rejected the disparate impact analysis because the marshals' statistical evidence "simply failed to show that the disparities in the intermediate phases of the process actually disadvantaged them at all."[202]

Employers are also protected in layoff situations. Employees who file ADEA claims using disparate impact analysis must still prove that the employer's proffered reason for the decisions made in layoffs was merely a pretext for age discrimination.[203] For example, the New York City Parks Department eliminated the job title "Laborer."[204] Because everyone employed as a laborer was over the age of forty, the terminated workers argued that the decision to eliminate this job title disparately impacted older workers.[205] The Second Circuit rejected the workers' reasoning.[206] The Department prevailed because the laid-off workers could not demonstrate that the decision-making process had, when viewed more broadly throughout the entire department, a disparate impact on older

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[199] *See supra* notes 123-27 and accompanying text.

[200] *See infra* notes 201-11 and accompanying text.

[201] 98 F.3d 631 (D.C. Cir. 1996)

[202] *Id.* at 639-40.; *see also* Smith v. Des Moines, 99 F.3d 1466, 1468, 1473-74 (8th Cir. 1996) (holding that a firefighter, who alleged that he was dismissed because he could not pass a required test which he claimed discriminated against him and others based on age, failed to prove that the test was not warranted for "safe and efficient job performance").

[203] *See supra* notes 61-64 and accompanying text.

[204] District Council 37 v. New York City Dep't of Parks and Recreation, 113 F.3d 347, 349 (2d Cir. 1997).

[205] *Id.*

[206] *Id.* at 351-54.

workers.[207] The Court concluded that while disparate impact analysis is valid for ADEA claims, the process of selecting which jobs would be eliminated must be viewed in its totality and not on a job category by job category basis.[208] "Where all of the candidates participate in the entire [employment] process, and the overall results reveal no significant disparity of impact, scrutinizing individual [steps] would, indeed, 'conflict [] with the dictates of common sense."[209] As an additional safeguard for employers, the Eighth Circuit made clear that for older workers to use a disparate impact analysis there must be statistically significant data available.[210] When only one or a few workers are laid off, the sample is too small to employ a disparate impact analysis.[211] Thus, courts have provided numerous safeguards to protect employers from frivolous age-discrimination suits.

3. Economic Policy Considerations

While the requirements of disparate impact analysis provide safeguards for employers in suits alleging discrimination in promotions, employers still fear that disparate impact analysis will undermine their ability to make the hard business decisions based on salary and productivity necessary to remain competitive in tight markets.[212] While such fears are understandable, recent studies raise doubts about how much weight society should give to these concerns balanced against the significant economic and psychological costs to terminated older workers.[213]

Judge Easterbrook, dissenting in *Metz v. Transit Mix*,[214] pointed to "[a] growing literature on education, training, employment, and other aspects of human capital" that indicates that the wages employers pay are often not coordinated with "employees' marginal products."[215] This body of literature maintains that when first hired, employees are often paid more

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[207] *Id.*

[208] *Id.*

[209] *Id.* at 353 (alteration in original) (citations omitted).

[210] *See, e.g.*, Lewis v. Aerospace Community Credit Union, 114 F.3d 745, 747-48, 750 (8th Cir. 1997); Harper v. TWA, 525 F.2d 409, 412 (8th Cir. 1975).

[211] *Id.*

[212] *See, e.g.*, Kaminshine *supra* note 128 at 269-76; Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999).

[213] See *infra* notes 214-32 and accompanying text.

[214] 828 F.2d 1202, 1220-21 (7th Cir. 1987).

[215] *Id.* at 1220.

than they are worth as they go through a period of training.[216] However, employers are willing to finance this training because, for many years after training, employees will be worth more than their salaries.[217] However, toward the end of their careers, employees' productivity again declines.[218] While this situation might encourage employers "to behave opportunistically--to fire the employee as soon as his [or her] current productivity no longer covers his current wage," Easterbrook believes that this will not happen because it would effect the company's ability to attract new workers.[219] New workers would be reluctant to join a firm that would let them go as soon as their productivity declined after working there for years at a salary below their value based on high productivity in the middle years of their work life-cycle.[220]

Others question Easterbrook's optimistic claims that the market, on its own, will prevent unreasonable discrimination based on age.[221] Labor Law Professor Steven Kaminshine argues that "Easterbrook's formula fails to distinguish between a productivity rating that declines due to an actual diminution in an employee's productivity and one that declines simply because the senior worker receives a higher salary due to an employer's decision to credit seniority and job tenure."[222] Rather than preventing employers from making legitimate business decisions, Kaminshine argues, a disparate impact theory provides a balanced approach necessary to encourage businesses to treat older workers fairly.[223] "[D]isparate impact analysis provides a means for courts to assess the justification for, and necessity of, harmful neutral criteria."[224] If an employee can present a prima facie case, the disparate impact analysis allows courts to determine whether the criterion being challenged "'significantly serves' the employer's productivity needs and, if so, . . . whether these needs can be satisfied by less restrictive alternatives."[225]

Alfred Blumrosen and his associates demonstrate the need to subject downsizing decisions "to substantive judicial review."[226] They list three

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[216] *Id.*

[217] *Id.* at 1220-21.

[218] *Id.*

[219] *Id.* at 1221.

[220] *Id.*

[221] *See infra* notes 222-32 and accompanying text.

[222] *See* KAMINSHINE, *supra* note 128 at 272-76.

[223] KAMINSHINE, *supra* note 128 at 279.

[224] *Id.*

[225] *Id.*

[226] Blumrosen et al., *supra* note 174 at 954.

compelling reasons to require such review. First, "[t]he economic performance of employers in conducting downsizings in the last decade has been dismal."[227] Downsizing increased productivity in less than half of the cases studied. "An employment practice, which has such dismal results and causes such economic and social havoc, deserves a searching examination to establish its business necessity, and to assure that alternatives were examined."[228] Second, because managers selecting those to be laid off often make subjective judgments, "[t]hese judgments are fertile grounds for discrimination."[229] Blumrosen and his associates propose that where the difference between the retention and separation rates of older and younger workers exceed twenty percent, adverse impact issues emerge and employers should be required to justify their processes and procedures under "'business necessity' standards of anti-discrimination laws."[230] Finally, because the ADEA requires employers to provide downsized employees with information on the ages of those retained and terminated, the only possible use for such information is to allow the terminated employees to decide whether they should waive their ADEA rights and accept a severance pay package, or to litigate under a disparate impact theory using the evidence supplied by the employer, as required by the ADEA.[231]

Given the safeguards provided to employers by the ADEA and the disparate impact analysis to make legitimate business decisions, courts should not fear allowing employees to use a disparate impact analysis. If Easterbrook's optimistic scenario proves to be true, there will be no litigation. Employers will not let older workers go merely because they have reached the downslope on the productivity curve without other compelling reasons. If suits do arise, employers will prevail if their decisions are based on "reasonable factors other than age."[232] The older worker, after all, retains the burden of proof.

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[227] *Id.* at 954-955.

[228] *Id.* at 955.

[229] *Id.*

[230] *Id.*

[231] *Id.* at 955-56; *see also supra* notes 181-87 and accompanying text.

[232] Metz. v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987).

E. The Role of Congress in Determining the Viability of Disparate Impact

While the statutory language, prior and subsequent legislative history of the ADEA, and policy considerations all provide support for the continued application of disparate impact analysis in ADEA cases, those who propose to eliminate such an analysis have legitimate concerns which must be addressed. Unlike race or gender, age is a continuum. Therefore, "the line defining the class that is disparately impacted by a challenged policy is an imprecise one, which could be manipulated to either strengthen or to weaken the impact of a policy on some age group."[233] Moreover, aging is inevitable. At some point, older workers can become a significant economic liability to their employers.[234] As pressures mount for businesses to remain competitive in increasingly-tight international markets, many believe that downsizing, cost cutting, and efficiency are necessary if American companies are to compete successfully.

Those courts opposing the use of disparate impact analysis in ADEA litigation seem to fear that allowing employees to use a disparate impact analysis when they are adversely affected by decisions "wholly motivated" by factors other than age, might prevent the flexibility that businesses require.[235] The Sixth Circuit concluded that "[t]he ADEA was not intended to protect older workers from the often hard economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations."[236] While this Comment has demonstrated that disparate impact analysis provides sufficient safeguards for employers so they can make such hard economic decisions and still prevail in court, it is true that there are costs involved in merely being exposed to actual, and even potential, litigation. Furthermore, while the study of downsizing decisions by Blumrosen and his associates challenges some of these assumptions, logic leads one to conclude that businesses can cut costs significantly by terminating older workers whose annual raises have increased their salaries beyond their productivity levels.

But more is at stake here than a dispute over different economic analyses. As the United States enters the twenty-first century, it must face the social and moral implications of downsizing and other seemingly heartless economic decisions. While successfully competing in world

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[233] Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996).

[234] Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999).

[235] *See, e.g.*, DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732-33 (3d Cir. 1995); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-11, 618 (1993).

[236] Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 (6th Cir. 1995).

markets is necessary if the United States hopes to continue the level of economic prosperity it currently enjoys, society must also consider the costs. As Secretary of Labor Wirtz noted over three decades ago, older workers facing unemployment from downsizing experience "profoundly harmful" psychological and economic effects.[237]

It is time for Congress to restudy the issue of older workers in the labor force. Economic conditions have changed significantly since the 1960s. Congress needs to undertake serious economic studies of the results of the extensive downsizing that has taken place over the last decade and that continues today. It needs to determine whether Blumrosen and his associates are right in claiming that downsizing has produced "dismal results" at tremendous economic and social cost, or whether Judge Easterbrook's more optimistic model is working. If such studies indicate that downsizing does lead to greater economic efficiency, Congress must then decide, as a matter of social policy, whether protecting older workers is more important than the desire to become the most economically-efficient business organization one can be. If Congress determines that economic efficiency is essential for America's well being, then it needs to develop policies and programs that address the psychological and economic effects that downsizing has on older workers.

Such policy decisions, requiring detailed economic and psychological studies and the weighing of economic, social, and moral concerns, should be made deliberately by the branch of government the Constitution designates as the policy-making institution. The courts should not change their ADEA jurisprudence in an attempt to deal with such problems. Indeed, by retaining the option of disparate impact analysis, which might allow employees to challenge employer efforts to downsize or cut costs in ways that adversely impact on older workers, courts would increase the pressure on the governmental body that should be solving these complex problems--the Congress of the United States.

IV. CONCLUSION

The workplace has changed dramatically since Congress enacted the ADEA in the 1960s. Courts and the Congress have not kept up with these changes. Instead, applicable analytical frameworks are increasingly embedded in stone, divorced from the realities of the workplace. The Supreme Court exacerbated this problem when it took a narrow view of the

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[237] *Cited* in *EEOC v. Wyoming*, 460 U.S. at 231.

nature and purpose of the ADEA. Following that lead, several circuits have interpreted the statutory language, past legislative history, and subsequent congressional actions as showing that only employers motivated solely by age discrimination animus violate the ADEA. They argue that courts must be sensitive to the needs of business to adjust to an increasingly competitive world.

While there are legitimate arguments on both sides, the ADEA's statutory language as well as prior and subsequent legislative action indicate a clear congressional intent to permit disparate impact analysis in age discrimination suits. Moreover, public policy considerations demonstrate the continuing need for disparate impact analysis if age is going to continue to be a protected category. The ADEA and the courts have provided employers with sufficient safeguards to permit them to make legitimate and necessary business decisions while still providing older workers with the opportunity to demonstrate that some employer actions are based on stereotypes or other considerations not necessary to the business.

Whether age should no longer be a protected category because of changing economic or other considerations is a decision for Congress, not the courts. Such a decision should be made deliberately, after open political debate, balancing economic concerns against the important social, psychological, and moral issues at stake.