

JOURNAL OF INTERNATIONAL AGING LAW & POLICY

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CONTENTS

Elder Law: An Emerging Practice

Right Honourable Beverley McLachlin, P.C. 1

Divided by a Common Language: Why the British
Adoption of the American Anti-Discrimination Model
did not Lead to an Identical Approach to Age
Discrimination Law

Timothy S. Kaye 17

Age Bias in the American Workplace – An Overview

Howard Eglit 99

Anti-Discrimination – Some Observations from
Downunder, the Australian Experience on Aged
Discrimination

Sue Field & Carolyn Sappideen 169

Journal of International Aging Law & Policy

VOLUME 3

FALL 2009

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ELDER LAW: AN EMERGING PRACTICE

Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada
to the 3rd Annual Canadian Conference on Elder Law
Vancouver, British Columbia
November 10, 2007

INTRODUCTION: DEFINING THE PROBLEM

The phone rings in a lawyer's office. A woman in her 80s is on the line, clearly distraught. A few months ago, the woman had a mild stroke that involved some memory impairment. Now, she has recovered, only to find that a family member who holds power of attorney has sold her house and put her in a nursing home. "I don't want to be here," says the woman. "What can I do?"

A 70-year-old man wants to take action against his former employer, who let him go because of his age. "I want to work," he says. "Can you help me?"

An aging woman, made vulnerable by deteriorating mental and physical health, wishes to cut out her son, who seldom visits, and replace him in her bequests by the friendly volunteer who brings meals to her home. "I want a new will," she says. "Will you draft it?"

More and more, lawyers can expect to field calls like these, as waves of baby boomers enter their senior years.

The statistics are staggering. In 2006, for the first time in Canada's history, the number of seniors, aged 65 years and over, surpassed the 4-million mark.¹ This is nearly four times as many seniors as in the 1956 census² and an increase of almost 12 percent over the previous five years.³ The 65-and-over population now

¹ Statistics Canada, *Portrait of the Canadian Population in 2006, by Age and Sex, 2006 Census* (Ottawa: Statistics Canada, 2007), online: Statistics Canada <http://www12.statcan.ca/english/census06/analysis/agesex/pdf/97-551-XIE2006001.pdf> (accessed Mar. 3, 2009).

² 1956 was the first quinquennial census.

³ Statistics Canada, *Portrait of the Canadian Population in 2006, by Age and Sex, 2006 Census* (Ottawa: Statistics Canada, 2007), online: Statistics

makes up a record 13.7 percent of our total population.⁴ This means that one out of every seven Canadians is presently a senior citizen. The 2006 Census also enumerated more than 1.1 million aged 80 years and over; a 25 percent increase since 2001.⁵ Canada's older population will only get larger. If current trends continue, a low fertility rate and an increase in life expectancy will mean that by 2031, more than one quarter of the entire Canadian population will be over 65.⁶

The changes occurring in Canada are part of a larger worldwide phenomenon. In Japan, Germany and Italy, countries with the highest proportion of elderly people, roughly one person in five is currently 65 years or older.⁷ By 2050, it is expected that one in every six persons worldwide will be at least 65 years old. In the more developed regions of the world, the proportion will be closer to one in four.⁸ The United Nations has referred to this trend as "unprecedented, a process without parallel in the history of humanity."⁹ Consequently, the effects of population ageing have generated significant international attention. The United Nations declared 1999 the International Year of Older Persons, with the purpose of fostering international awareness of the

Canada <http://www12.statcan.ca/english/census06/analysis/agesex/pdf/97-551-XIE2006001.pdf> (accessed Mar. 3, 2009).

⁴ *Id.*

⁵ *Id.*

⁶ Statistics Canada "Population Projections" *The Daily* (December 15, 2005), online: Statistics Canada <http://www.statcan.ca/Daily/English/051215/d051215b.htm> (accessed Mar. 3, 2009).

⁷ Statistics Canada, *Portrait of the Canadian Population in 2006, by Age and Sex, 2006 Census* (Ottawa: Statistics Canada, 2007), online: Statistics Canada (available at

<http://www12.statcan.ca/english/census06/analysis/agesex/pdf/97-551-XIE2006001.pdf>).

⁸ Department of Economic and Social Affairs – Population Division, *World Population Ageing: 1950-2050* (New York: United Nations, 2002), online: United Nations (available at <http://www.un.org/esa/population/publications/worldageing19502050/>).

⁹ Department of Economic and Social Affairs – Population Division, *World Population Ageing 2007* (New York: United Nations, 2007) at xxvi, online: United Nations (available at <http://www.un.org/esa/population/publications/WPA2007/wpp2007.htm>).

importance of the senior's role in society and the need for intergenerational respect and support. More recently, the *Political Declaration and Madrid International Plan of Action on Ageing* adopted at the Second World Assembly on Ageing in April 2002 marked a turning point in how the world addresses the key challenge of building a society for all ages.¹⁰ It represents the first time governments have adopted a comprehensive approach linking questions of ageing to other frameworks for social and economic development and human rights, most notably those agreed to at the United Nations conferences and summits of the 1990s.

The surge of attention that our ageing population is provoking, is an acknowledgment of the fact that its impacts will be profound, with major consequences and implications for all facets of life. In the economic arena, population ageing will have an impact on economic growth, savings, investment, consumption, labour markets, pensions, taxation and intergenerational transfers. In the social sphere, population ageing influences family composition and living arrangements, housing demand, migration trends, epidemiology and the need for health care services. In the political arena, population ageing may shape voting patterns and political representation.

Today, as you might expect, my focus will be on the impact of Canada's aging population on the law and vice versa. First, how will the law work to protect and assist the aging and the aged? Second, how will the legal profession, the mediator of legal change, respond the special challenges presented by this emerging demographic phenomenon? In the next few minutes, I will offer tentative thoughts on these difficult questions – questions that you as lawyers will be forced to face head on in the years to come.

¹⁰ Second World Assembly on Ageing, *Report of the Second World Assembly on Ageing*, Doc. A/CONF.197/9 (Madrid: 8-12 April 2002), online: United Nations (available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/397/51/PDF/N0239751.pdf?OpenElement>).

HOW WILL THE LAW WORK TO PROTECT AND ASSIST THE AGING POPULATION?

Most Canadians would agree that every person in our society, regardless of age, is entitled to three things: to live with dignity; to live in security; and to live as an autonomous human being. These values are enshrined in our constitution and reflected in the complex matrix of our social laws and practices.¹¹ Not every person in fact enjoys dignity, security and autonomy. But to the extent they do not, we tend to regard this as failure to achieve what we should.

The law has a vital role to play in ensuring that people, as they age, continue to live in dignity, security and autonomy. As people age, their dignity, security and autonomy, taken for granted in youth, may be threatened. Their dignity may be increasingly threatened by discrimination. Their security may be threatened by abuse. And their autonomy may be undermined by difficulty in accessing basic care and services. The three values of dignity, security and autonomy thus find their counterparts in three needs: the need to be protected from discrimination; the need to be protected from abuse; and the need to receive appropriate care and services. In the next few minutes, I want to focus on how the law can help ensure that these needs are met.

But before doing so, it's important to ensure that we clear away the remnants of stereotypical thinking that might otherwise cloud our view of the needs and rights of the older segment of the population.

Our society has a tendency to think of elderly people as less vital and less important than younger people. They've had their day. Their life-forces are waning. They're on the way out. Pick your cliché, and then examine the attitudes that underlie it. We live in a society that prizes youth. Our newspapers, magazines and television screens brandish the culture of youth. We all want to be young and will do virtually anything to stay young, or to try to stay young. The message is that youth is good; age is not so good. The elderly are human beings, yes, but diminished human beings.

¹¹ <http://www.canadianembassy.org/government/constitution-en.asp> (last accessed Mar. 3, 2009).

Ageism, defined as negative images of older adults as dependent, vulnerable, unable to make appropriate decisions for themselves and making no contribution to society, is prevalent throughout our society. This kind of thinking is morally wrong, and it is legally wrong. Nor is it inevitable; many cultures historically have revered and respected age.

It is important to understand that ageism is our particular cultural default zone. First, understanding this helps to explain some of the wrongs that are committed against the aged and aging that I will be discussing. Second, even if we are among the majority who would never consciously do wrong to an old person, the cultural warp in favour of youth may lead us astray. Unless we acknowledge our society's cultural bias for youth, and guard against the stereotypes and prejudices it induces, it may unconsciously skew our view of the moral and legal entitlements of the aging population. We must constantly remind ourselves that the elderly are worthy human beings endowed with the full measure of human dignity, for however long they may live and in whatever state they may find themselves.

Against this background, let me return to the three needs – dare I say entitlements? – of the elderly that I referred to earlier. The first special need that arises as we age is connected to the fundamental value of human dignity: it is protection from discrimination. The cultural bias of our society in favour of youth fosters conscious and unconscious discrimination against the elderly. Discrimination, under Canadian law, is an adverse distinction made on the basis of age that denies the full human dignity of a person. Because of a person's age they don't get something, or get to do something, that others get or get to do. Or, because of their age, they are asked to bear a burden that others are not. The *Charter of Rights and Freedoms* and provincial human rights codes protect people against distinctions of this sort when they constitute a denial of human dignity and are not shown to be justified by a greater public good – something difficult in respect of a measure that treats one person as less worthy than another.

Discrimination against elders may take many forms. I am not giving a judgment today and my list should not be taken as a prediction of how courts will view a particular situation. Suffice it to say that claims for age-based discrimination may arise in many

contexts – in the employment context, with respect to mandatory retirement rules; in the driving context, with respect to age-based license restrictions; and in the social services context, with respect to equal access to care and treatment, to mention only three. Some of these matters have already been before the courts. For example, in 1990, the Supreme Court of Canada upheld the constitutionality of mandatory retirement rules in the public sector, on the ground that this was justified in order to permit younger people to enter the work force.¹² But with the change in demographics, the greater need may be for older people to *stay* in the work force. I cannot predict how the law will respond, but it seems unlikely that the matter will not be revisited, not least by legislatures concerned to encourage older people to stay in the work force as long as they are willing and able to contribute to Canada's economy and productivity.

The second need that may become acute as we age is connected to the fundamental value of security: it is the need to be protected from abuse. In 2002, the World Health Organization defined abuse and neglect of older adults as “single or repeated acts, or lack of appropriate action, occurring within a relationship where there is an expectation of trust, which causes harm or distress to an older person.” It will be apparent that elder abuse is related to elder discrimination – it is the extreme manifestation of discriminatory attitudes that deny the human dignity of aging people.

Like other forms of abuse in our society, elder abuse may be expressed in physical, emotional or financial abuse, the restriction or denial of rights, and active or passive neglect. Because of a higher incidence of disabilities, poor health, and financial and emotional dependency, seniors are particularly vulnerable to abuse and exploitation. Sadly, elder abuse is a fact of life and thus constitutes a central concern of elder law.

Providing accurate, current information on the prevalence of elder abuse is a challenge, due to lack of research and lack of consensus on what constitutes abuse. On the best information

¹² *Mckinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483.

available, between 4 percent and 7 per cent of Canadian seniors have suffered some form of physical, emotional or financial abuse or neglect. However, as is the case with any abuse, it is often a hidden problem that many feel uncomfortable reporting. It is therefore likely that the reported cases represent only the tip of the iceberg.

What is clear, however, is that the impact of elder abuse can be devastating. Abuse can lead to declining physical and mental health, depression, even suicide. The impact of abuse bears heavily on our social, health, and justice systems.

Our criminal justice system provides a partial solution. Abuse of another is in many cases a crime, for example physical or sexual assault, threats, theft, fraud, or misappropriation of funds by a person in a position of trust. Yet, there is often a marked lack of interest in advancing or protecting the rights of the elderly, due to the stereotypes of ageism. If this apathy can be surmounted, difficulties in gathering evidence and proving the instances of abuse beyond a reasonable doubt may intervene. In a recent case before the Supreme Court of Canada, *R. v. Khelawon*, five elderly residents of a retirement home told various people that they were assaulted by the home manager. By the time of trial, two and a half years later, four of the complainants had died, and the fifth was no longer competent to testify. The Supreme Court upheld the acquittal of the defendant on the basis that the hearsay statements provided by the complainants could not safely be received in evidence.

Even where prosecution is a realistic possibility, some question its utility as a response to elder abuse. The Manitoba Law Reform Commission found that while the Criminal Code may be a powerful weapon against abuse, it is too blunt an instrument to be effective. The criminal law does not always address the complexities of intimate relationships. Given that in 90 percent of abuse cases the perpetrators are spouses or relatives, a victim may avoid initiating prosecution because of fear of rejection by other family members, loss of care, or being left alone. The intimacy of the abuser-victim relationship and the accommodation of abusive behavior over time may obscure the criminality of the conduct, and physical retaliation against a complaining elder is a real possibility. Similar problems beset the pursuit of civil remedies. Often, the

elderly are hampered in their access to the legal system because they do not recognize their rights, or are unable to navigate the impediments the legal culture has placed between them and justice.

What then can the law do to remedy elder abuse? First, it can attempt to minimize the barriers to criminal and civil prosecution, as was done a few decades ago in the case of child abuse. Changes in the law and education — which I will speak of in greater detail in a moment, may alleviate barriers. Second, lawyers and jurists can work with others to inform the public about the prevalence and illegality of elder abuse. Our society once swept child abuse under the rug. It must not permit the same thing to happen in the case of elder abuse. The abuse of a vulnerable person is a moral and legal wrong, whatever the age of the victim.

The third need of growing numbers of older people is connected with the values of independence and autonomy. It refers to the need for appropriate care and services. Elderly people, like all of us, require a suitable home, good medical care, transportation and access to shopping and entertainment. The front line on these issues lies with government and various professionals. Yet the law has a role to play. Lawyers and courts may be called upon to pursue claims that the needs of older people are not being met; in breach of legislation or the constitution.¹³ Elder cases will form an increasingly high component of disability law cases. The Supreme Court of Canada decision in *Eldridge*,¹⁴ held that a province must provide the services of an interpreter for the deaf so that they can access medical treatment in the same way as non-disabled people. While the plaintiffs in *Eldridge* were young, the same principle may apply to people who, because of age-related disabilities, find themselves unable to fully access the medical system.

Let me summarize. Different stages of life are characterized by different needs. The last stage of life is no exception. Among the needs that are critical at this stage are the need to be protected from discrimination, the need to be protected

¹³ See *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35.

¹⁴ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

from abuse, and the need for appropriate care and services. The law can play a vital role in meeting these needs. This brings me to the next question: how can the legal profession ensure the law meets this challenge?

HOW CAN THE LEGAL PROFESSION MEET THE CHALLENGE OF ELDER LAW?

More and more, as they respond to the needs that I have outlined, lawyers will find themselves practicing what is referred to as elder law. How can the legal profession best respond to the special challenges presented by our rapidly aging population?

The first thing the profession can do, in my opinion, is to recognize the importance of elder law and the unique challenges it poses to those who practice it. These challenges suggest that there may be merit in recognizing elder law as a specialty worthy of special study and support.

Other countries are already doing this. In the United States, the notion of elder law has firmly taken root since the introduction in 1965 of *The Older Americans Act*.¹⁵ It is currently one of the fastest-growing areas of law. Approximately 25 state bar associations now include elder law sections or committees, which are engaged in a variety of tasks including information-sharing and support for members, education and training of the legal community, consumer education and advocacy. The National Academy of Elder Attorneys, started in 1988, now boasts more than 5,000 members.

In Canada, the term “elder law” may not yet be familiar, but that is changing, thanks to the efforts of organizations such as the Advocacy Centre for the Elderly, the Canadian Centre for Elder Law Studies, and the Canadian Bar Association which recognized elder law as a new practice area and created, in 2002, the national elder law section.

¹⁵ *The Public Health and Welfare, Programs for Older Americans*, 42 U.S.C. §35 (1965). The Act led to the creation of a network of legal services for older adults to monitor the actions of the state, local and federal agencies as they administered programs designed to benefit older adults. As a result, the American elder law literature has tended to focus not on relationships, but more on older adults as recipients of program benefits.

What is elder law? In its broadest form, elder law refers both to a loosely defined group of legal issues and to a unique multidisciplinary approach that recognizes the connections among the legal, social and health needs of older persons and their families. Its practice includes providing advice on a range of questions, including: the preparation of wills and powers of attorney; the rights of nursing home residents and quality of long-term care; elder abuse and exploitation; age and disability discrimination in employment and housing; divorce, marriage and common law unions; health care directives; estate planning; probate applications; personal and property guardianship applications; capacity issues; human rights and agedness issues; adult protection legislation; and financial abuse. Elder law, like family law, is not a narrow specialty. Yet like family law, it will benefit from specialization and the in-depth understanding and competence this promotes.

The practice of elder law is demanding. Elder law lawyers are expected to bring to their practice more than just legal expertise. In order to properly serve their clients' interests, they must understand how to counsel older people, understand the ageing process, and be familiar with the network of ageing services available to meet their clients' needs. Above all, they must be capable of dealing with the special legal and ethical issues that may arise in the course of the representation of older persons.

One such issue is the problem of family intervention. A lawyer owes a duty of complete loyalty to her client, to the exclusion of all others. This duty may be challenged when family members become involved in the legal concerns of the older person. The lawyer must avoid taking instructions from, or giving advice to, these family members, and ensure that her client's intentions are truly her own. This may require meeting with the client alone and probing into her instructions, especially if there is any indication that the client may be in a vulnerable position or open to undue influence. That is not to say the family should never be involved. But if so, the lawyer must be satisfied that what the family member says his mother or father wants, is truly what they desire.

A related issue concerns the client's mental capacity. Cognitive decline affects many seniors. Often it is a slow and

gradual process. In the early stages, people can successfully manage their affairs and instruct a lawyer. But as the decline progresses, clients may begin to lose their reasoning and memory skills. Eventually, they may reach a stage where they are no longer competent to give instructions. Lawyers practicing elder law need to be particularly aware of the red flags that may signal a lack of competence, such as relatives insisting on being present to clarify your client's wishes, contradictory statements from one visit to the next, and requests for things that are inappropriate or impossible.

In addition to dealing with the special problems inherent in elder law, lawyers in this practice may find it necessary to adapt the way they practice, to the reality of their clients' lives. For example, hospital calls, currently viewed by many lawyers as exceptional, may become an integral part of elder law practice. To take another example, elder law lawyers may find it necessary to coordinate their work with that of other professionals to a degree uncommon in other areas of practice, working closely with doctors, social workers, and care providers to help their clients live as well and as independently as possible.

The special challenges of practicing elder law argue in favour of specialized study and practice. Against this, however, the Law Commission of Canada in 1999 worried that a separate area of law and legal practice for the elderly may inadvertently promote the pernicious belief that older persons are less capable, less deserving of respect, and less needful of independence and autonomy.¹⁶ Accepting this concern, it seems to me that if elder law is founded on the inclusionary value of respect for the full humanity of those with special needs, it can have the opposite effect. It can help reverse ageist stereotypes rather than perpetuating them, while better meeting the special needs of the aging.¹⁷

The second thing lawyers can do to ensure that the profession meets the needs of the elderly is to promote and assist in drafting legislation to palliate some of the disadvantages that may

¹⁶ Marie Beaulieu & Charmaine Spencer, *Older Adult's Personal Relationships and the Law in Canada: Legal, Psycho-social and Ethical Aspects* (Ottawa: Law Commission of Canada, 1999) at 14.

¹⁷ *Ibid.*

come the way of the aging and aged. The age of retirement is largely in the hands of individual employers, Parliament and the legislatures; as the law stands presently, mandatory retirement is permissible but not required. Other forms of discrimination against the elderly – from impediments to transport, to barriers to equal access, to social and medical services – may similarly be amenable to alleviation through legislation and regulation. Several jurisdictions in Canada have already enacted legislation to protect older adults who are victims of physical or sexual abuse, mental cruelty or inadequate care or attention, and to better coordinate legal, health and social service interventions. Detractors call this a “child welfare model” and complain that it fails to respect the independence of older adults and will inevitably infantilize them. While this is a danger, again I am not so pessimistic. We have a strong record in Canada of assisting people where they need special assistance, while maintaining their independence and human dignity to the greatest extent possible.

A third way in which the legal profession can ensure that it is meeting the needs of the senior sector of the population is by educating the public and the elderly population itself, on the rights of the elderly and the appropriateness of seeking legal redress for the wrongs that have been done to them.

I earlier spoke of the culture of youth that dominates our society and of the social stereotype of older people as less worthy than their younger peers. Lawyers and judges, in their work and in their dealings with the public, should take care that their acts and words send the opposite message – the message that all human beings are inherently worthy and possessed of human dignity, the elderly no less than others.

Educating our elders in their rights is also important. Many baby boomers now entering senior ranks may be fully attuned to the fact that they possess legal rights, and fully aware of how to assert those rights. However, many older seniors are the products of an era that pre-dated individual rights and freedoms. The generation that lived through the Great Depression and the Second World War grew up with an ethos of self-sufficiency and personal responsibility.¹⁸ Many elders have led their lives without

¹⁸ Marie Beaulieu & Charmaine Spencer, *Older Adult's Personal*

contemplating the notion that they may have personal rights that may be asserted and protected by the legal system. Indeed, they may view the need to have recourse to the law as a mark of personal failure.¹⁹ Yet, they should not, for that reason, be denied the protection of the law.

Another factor impeding access to justice for the elderly may be a view of the law as foreign and inaccessible. Exercising their legal rights may mean being confronted by a confusing legalistic culture with its own formalities and language.²⁰ The lawyer may speak of issues and in terms which the elderly client finds hard to understand. This can interfere with the free flow of information and the ability of the elderly individual to clearly tell their story, state their needs and understand the counsel that the lawyer may provide.

Once the consultation has taken place, a sensitive lawyer can alleviate many of the elder person's concerns. But what of those in need of legal services who never consult a lawyer about their problems because of ignorance, fear and anxiety? The answer, it seems to me, lies in public information and education — information that sends the message that the law is there to assist and protect our society's senior citizens.

A number of such initiatives have already been introduced at the community, provincial and federal levels. In Ontario, the Advocacy Centre for the Elderly, a legal clinic funded by Legal Aid Ontario, provides a range of legal services, including telephone advice and information, representation before courts and tribunals, public legal education services, community development projects, and law reform activities, to low-income seniors. The Canadian Centre for Elder Law Studies, which is sponsoring this conference, provides important research, law reform and education relating to legal issues of interest to older adults. The Canadian

Relationships and the Law in Canada: Legal, Psycho-social and Ethical Aspects (Ottawa: Law Commission of Canada, 1999) at 22.

¹⁹ Marie Beaulieu & Charmaine Spencer, *Older Adult's Personal Relationships and the Law in Canada: Legal, Psycho-social and Ethical Aspects* (Ottawa: Law Commission of Canada, 1999) at 29.

²⁰ Steven Keith Berenson, "Can We Talk: Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics" (1998) 6(2) *Elder L. J.* 185 at 194-8.

Bar Association elder law section offers an opportunity to engage in informed dialogue on case law and legislation affecting this emerging area of practice. Finally, the idea emerging in some provinces of “hubs,” where citizens can come to learn where they can go to solve their particular legal problem may well prove to be of great assistance to the elderly.

I return to the question I posed earlier: how will the legal profession meet the challenge of elder law? The answer, I have suggested, lies in professionalizing and deepening the study and practice of elder law; in promoting necessary legislative change; and in communication and education efforts to reduce the barriers that impede understanding and access by the elderly to the legal system. If profession does these things, it will go a long way to ensuring that it meets the legal needs of our aging population and that the rights of this important segment of our population are fully protected.

CONCLUSION

Allow me to conclude. Every person, regardless of age, is entitled to live in dignity, free from discrimination and abuse. Every person, regardless of age, is entitled to live in security. And every person, regardless of age, is entitled to make their own choices and to remain autonomous and independent to the maximum degree possible. The law has an important role to play in ensuring that the fundamental principles of dignity, security and autonomy are translated into the reality of the lives of our elder citizens.

In embracing this task, let us take courage from the words of Betty Friedan, who, having helped to spur the women’s revolution, turned next to the situation of elders. Friedman wrote: “Ageing is not ‘lost youth’ but a new stage of opportunity and strength.”²¹

Our elders will not be able to realize the opportunities that this special phase of life presents, nor will they be capable of pursuing those opportunities with strength, without the aid of the

²¹ Betty Friedan, “How to Live Longer, Better, Wiser” *Parade Magazine* (20 Mar 1994) 4.

law. It is our responsibility to ensure that the law will be there when they need it.

Thank you for your attention.

**DIVIDED BY A COMMON LANGUAGE: WHY THE
BRITISH ADOPTION OF THE AMERICAN ANTI-
DISCRIMINATION MODEL DID NOT LEAD TO AN
IDENTICAL APPROACH TO AGE DISCRIMINATION LAW**

Timothy S. Kaye^{*}

I. INTRODUCTION: A COMMON HERITAGE^{**}

The Common Law

Combining two clichés, it is safe to say that the United Kingdom and the United States enjoy a “special relationship,”¹ yet one that is “divided by a common language.”² Law is one of the areas in which both characteristics are openly exhibited.³ So far as the ‘special relationship’ is concerned, all but one⁴ of the legal systems in existence within the United States are based on

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¹ Winston Churchill, *Sinews of Peace Address* at Westminster College, Fulton, Missouri, March 1946 (more commonly called the *Iron Curtain* speech). According to a report in the *The New York Times Herald* in November 1945, Churchill had – in a speech that month – employed the same phrase to include Canada as well.

² Although this aphorism is usually attributed to George Bernard Shaw, no-one seems to be sure of the exact source. On the other hand, Oscar Wilde definitely did write in *The Canterville Ghost* (1887): “We have really everything in common with America nowadays except, of course, language.”

³ By way of example, the original, British spellings are retained in this article wherever U.K. laws are cited.

⁴ Louisiana is the exception, with a system taken from the French, civil law, model.

the common law of England.⁵ The substantive doctrines applied in both contracts and torts, for example, remain remarkably similar (even though the procedure for trying such cases in courts is often very different). Yet, at the same time, each of the fifty American jurisdictions⁶ which have adopted the common law methodology has also developed the law in a number of directions which differ significantly from those traveled in the United Kingdom. For instance, the development of the doctrine of ‘ultrahazardous activity,’ which arose out of American interpretations of the well-known English torts case of *Rylands v. Fletcher*,⁷ has no English analogue. Indeed, *Rylands* has essentially been emasculated in English law⁸ to the extent that it has become little more than a historical curiosity. It is one among a number of doctrines of law of English origin which have been adhered to more strongly within the United States than within the United Kingdom. Another is the parol evidence rule in contracts: it is in rude health stateside,⁹ but has long been in intensive care in Britain.¹⁰ As is so often the case, it has been the converts who have held the faith more than the originators.

The Common Disfigurement of Slavery

Unfortunately, the common law systems of both the U.K. and the U.S. share a common heritage disfigured by one feature of which both countries are now rightly ashamed. Surely the biggest blot on the landscape of the common law was its impoverished view of the notion of discrimination. Valuing freedom of choice over the autonomy of whomever else is affected, the common law

⁵ Wales and Northern Ireland essentially had the English legal system imposed upon them; Scotland continues with its own unique legal system which boasts elements of both common and civil law.

⁶ This group of fifty comprises forty-nine states (i.e., all except Louisiana) plus federal law.

⁷ (1868) L.R. 3 H.L. 330.

⁸ See *Cambridge Water v. Eastern Counties Leather* [1994] 1 All ER 53 (H.L.).

⁹ See e.g. *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d’Agostino, S.P.A.* 144 F.3d 1384 (11th Cir. 1998).

¹⁰ See Law Commission, *Law of Contract: The Parol Evidence Rule* Cmnd. 9700 (London: H.M.S.O., 1986).

has seldom been prepared to entertain complaints of improper motives (whether conscious or subconscious) of the decision-maker, even though such choices often have the effect of significantly reducing the freedom of choice of others. Indeed, the very notion of ‘discrimination’ came, in the seventeenth century,¹¹ to mean the exercise of good taste or judgement.¹² Thus the common law in both the United Kingdom and the United States was content to tolerate and enforce the practice of slavery. The United Kingdom outlawed the slave trade (though not slavery itself) in 1807,¹³ whereupon the British government sought to persuade other countries to follow suit. While this campaign of persuasion was for some – notably the indefatigable anti-slavery campaigner and British Member of Parliament, William Wilberforce – a matter of basic morality, perhaps the dominant motive for others was a desire to avoid the British colonies becoming uncompetitive if the trade were not stopped everywhere. The British Royal Navy declared that ships transporting slaves were essentially engaged in piracy and were therefore liable to be attacked and boarded. The United States responded by abolishing its own African slave trade from the beginning of the following year,¹⁴ although it declined to carry out joint enforcement operations with the British, and (as in Britain and its colonies) slavery within the U.S. continued. Yet while the British Parliament went on to abolish slavery completely in 1833,¹⁵ it took the Civil War and a Constitutional Amendment to accomplish the same thing and prohibit this barbaric practice in the United States.¹⁶ The abolition of the slave trade was perhaps the last time that the United States took its lead on matters of anti-discrimination law from the United Kingdom.

¹¹ T.F. Hoad (ed.), *The Concise Oxford Dictionary of English Etymology* (Oxford: O.U.P., 1996) p. 127.

¹² Della Thompson (ed.), *The Concise Oxford Dictionary* 9th ed. (Oxford: Clarendon Press, 1995) p. 386.

¹³ Slave Trade Act 1807.

¹⁴ “An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States” (Slave Trade Act 1808).

¹⁵ Slavery Abolition Act 1833.

¹⁶ Thirteenth Amendment (1865).

Women's Suffrage

Developments in anti-discrimination law over the next year century or so were dominated by the issue of women's suffrage. This was not, however, a period in which developments in one country could be said to have directly influenced those in the other. In the United States, indeed, this was instead a period in which federalism came to the fore. New Jersey's constitution, for example, granted the right of women to vote on the same terms as men in 1776, only for it to be taken away in 1807. Wyoming permitted women to vote in 1869.¹⁷ Idaho, Colorado and Utah followed by the end of the century, but in many other states women's suffrage was assured only by the Nineteenth Amendment, which came into force in 1920. The dominant influence in the United Kingdom, by contrast, came from its colonies. Women in Ontario, Canada gained the right to vote in 1884; those in New Zealand in 1893; those in South and Western Australia in 1901. Women over the age of thirty gained the right to vote in the United Kingdom in 1918, but it was not until 1928 that women were granted the right to vote on the same terms as men.¹⁸

Broader Anti-Discrimination Legislation

Since the Second World War, however, anti-discrimination legislation in the United States and United Kingdom has consistently demonstrated the same close ties that characterized the common law before the passage of legislation on women's suffrage. But whereas it had formerly been the case that British common law – or, more accurately, the common law of England¹⁹ – had shaped the laws of American states, the relationship between the two countries has essentially reversed

¹⁷ “An Act to Grant to the Women of Wyoming Territory the Right of Suffrage, and to Hold Office” from General Laws, Memorials and Resolutions of the Territory of Wyoming, Passed at the First Session of the Legislative Assembly, convened at Cheyenne, October 12th, 1869 (Cheyenne, 1870; Wyo 1 1869).

¹⁸ Representation of the People Act 1928.

¹⁹ See *supra* n. 5.

direction so far as recent statutory law has been concerned. In no field of the law has this been more conspicuous than in that of anti-discrimination law.

Generally speaking, the engine of anti-discrimination legislation in the United States has been the federal government rather than the individual states. The influence of the federal government beyond American shores has at times been so powerful in this area that it may even be appropriate to equate the relationship between American federal law and legislation subsequently passed within the United Kingdom²⁰ as akin to the relationship between federal law and that subsequently enacted in many U.S. states. It is certainly true that, for the last fifty years or so, new federal anti-discrimination laws adopted in the United States have often proved a decisive factor in shaping similar laws in the United Kingdom. The legacy of the 1960s Civil Rights movement, in particular, has certainly reached not only well beyond its own era but also well beyond the geographical boundaries within which that movement took place.

Part II of this article sketches the history of this relationship between anti-discrimination statutes in the U.S. and U.K., and looks at how certain pieces of legislation effectively created a template on which subsequent statutes were modeled. This process was accomplished within just a few years in the 1960s in the U.S., but was drawn out over a much longer period of time – lasting well into the 1970s – in the U.K. This discussion shows how the federal Civil Rights Act 1964 was effectively the source of anti-discrimination laws within the United Kingdom just as much as it has been within the United States. As will be

²⁰ Anti-discrimination laws generally apply throughout the U.K. in much the same way that federal legislation applies throughout the U.S. There have, however, been two exceptions to this general principle. Most significantly, discrimination on the grounds of religion (at least at work) has been outlawed in Northern Ireland since 1976 under the Fair Employment (Northern Ireland) Act. The Fair Employment (Northern Ireland) Act 1989 expanded this prohibition considerably, but discrimination on the grounds of religion was not made unlawful in mainland Britain until the issuing of the Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003, No. 1660). In Wales there is also limited protection for speakers of Welsh so far as public employers are concerned: see Welsh Language Act 1993.

explained, British laws of the 1960s and 1970s – designed to outlaw discrimination based on sex, race, marital status, and national or ethnic origin – were enacted which closely followed the U.S. approach. The Supreme Court’s decision in the case of *Griggs v. Duke Power*²¹ will also be shown to have played a seminal role in the development of British anti-discrimination law. Yet while age discrimination was prohibited within the U.S. by the federal Age Discrimination in Employment Act (A.D.E.A.)²² within just three years of the Civil Rights Act, the U.K. chose not to follow suit and, in fact, only prohibited age discrimination in late 2006.²³ By that time it had already followed the U.S. lead in adding discrimination based on sexual orientation,²⁴ religious faith²⁵ and disability²⁶ to those forms of discrimination originally proscribed. The Disability Discrimination Act 1995, in particular, followed relatively soon after the Americans with Disabilities Act of 1990 and was consciously modeled on it.

Yet age discrimination seems to have been the last taboo. If outlawed earlier, it appears almost certain that British age discrimination law would have looked very similar to that in place in the U.S. In fact, however, age discrimination in the U.K. was prohibited only in late 2006, and both its history and substance demonstrate significant differences from its American counterpart. The rest of this article considers why the British anti-discrimination law template – despite its originally being fashioned self-consciously to mimic that in place in the United States – nevertheless required a somewhat different approach to age discrimination by the time that was eventually outlawed.

This article is therefore concerned with the general principles of the two bodies of age discrimination law in the U.S. and U.K. – and of anti-discrimination laws in both countries more

²¹ 401 U.S. 424 (1971).

²² Age Discrimination in Employment Act 1967 (Pub. L. 90–202).

²³ Employment Equality (Age) Regulations 2006.

²⁴ Employment Equality (Sexual Orientation) Regulations 2003 (S.I. 2003, No. 1661).

²⁵ Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003, No. 1660).

²⁶ Disability Discrimination Act 1995.

generally – rather than with exhaustive discussion of the minutiae of detail. Many useful accounts of the respective laws have already been published elsewhere,²⁷ including a summary of the British provisions regarding age discrimination in an earlier volume of this very law review.²⁸ The discussion hereinafter proceeds by considering the fundamental elements of the respective anti-discrimination law templates within the U.K. and U.S., and then explains how each jurisdiction’s age discrimination laws fit into that context. Part III thus looks at the principal elements of the A.D.E.A. of 1967. It notes, in particular, the fact that the A.D.E.A. protects only workers over 40, and discusses the controversy over whether claims for disparate impact discrimination should be recognized.

As indicated above, it was only on October 1, 2006 that legislation came into force in the U.K. which prohibited age discrimination. Part IV examines what took place during the thirty year period from the establishment of the British anti-discrimination law template in the mid-1970s until the passage of the Employment Equality (Age) Regulations 2006.²⁹ In particular, it shows how innovative strategies developed by plaintiffs’ attorneys and, especially, by the Equal Opportunities Commission – the administrative agency responsible within the U.K. for upholding the sex discrimination laws – enabled some victims of apparent age discrimination to allege sex discrimination as an effective proxy. When this strategy seemed at last to be foundering, it was given new impetus from European sources: first by the laws of the European Union and its highest appellate court, the European Court of Justice (based in

²⁷ See Barbara T. Lindemann & David D. Kadue, *Age Discrimination in Employment Law* (Washington: Bureau of National Affairs, 2003); John Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (Cambridge: Cambridge University Press, 2006); Malcolm Sargeant, *Age Discrimination in Employment* (Farnham: Gower, 2007); James Davies (ed.), *Age Discrimination* (Haywards Heath: Tottel, 2007).

²⁸ Helen Meenan and Graeme Broadbent, *Law, Ageing and Policy in the United Kingdom*, 2 *J. Intl. Aging L. & Pol.* 69 (2007).

²⁹ The Employment Equality (Age) Regulations (United Kingdom) S.I. 2006, No. 1031. The equivalent regulations for Northern Ireland are the Employment Equality (Age) Regulations (Northern Ireland) 2006 (S.I. 2006, No. 261).

Luxemburg); and then by the European Convention on Human Rights and the court which pronounces on its definitive interpretation, the European Court of Human Rights (based in Strasbourg, France). The main lessons to be taken from this concern the definition of discrimination as ‘less favourable’ treatment and the ever-increasing significance within British anti-discrimination law of the concept of indirect discrimination, which was itself originally modeled on the U.S. notion of disparate impact discrimination first mooted in *Griggs v. Duke Power*.³⁰

Part V summarizes the statutory law finally enacted to prohibit age discrimination in the workplace within the United Kingdom. It will be seen that this has notable differences from the A.D.E.A. In particular, the concept of age discrimination is not restricted to protecting those over 40. Moreover, preferential treatment to those over 40 as against younger than 40 is itself prohibited. And indirect (or disparate impact) discrimination is expressly made just as unlawful as direct (or disparate treatment) discrimination. These fundamental distinctions from the American approach inevitably raise the question of how and why British anti-discrimination law, originally modeled so self-consciously on its American counterpart, developed its own anti-discrimination law template that effectively made adoption of the American approach to age discrimination impossible.

This is the issue which Part VI attempts to address. It dismisses the temptation simply to associate the substance of U.K. age discrimination law with the demands of European Union law on the grounds that this is to confuse cause and effect. Instead, it argues that – just as American courts nowadays adhere much more closely to original English common law than do their English counterparts – British legislation (and its interpretation by the courts) now adheres more closely to the original American model for anti-discrimination laws, established by the 1964 Civil Rights Act and *Griggs v. Duke Power*, than federal U.S. law currently does. Once again, it has turned out to be the convert which has demonstrated the more steadfast resolve.

³⁰ 401 U.S. 424 (1971).

II. ESTABLISHING A TEMPLATE FOR ANTI-DISCRIMINATION LAWS

An Enforcement Agency

The Fourteenth Amendment of the United States Constitution, passed in 1868, requires that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” While this may be said to have established a ‘floor of rights’ below which it is impermissible to go, one of the many limitations of the Amendment is that it has nothing to say about the effects of decision-making by private entities. This was one of the many things that began to change as a result of the Civil Rights movement of the 1960s. The Civil Rights Act 1964³¹ was originally intended to prohibit enforced racial segregation and discrimination in public schools,³² public places,³³ public services,³⁴ voter registration,³⁵ and employment (although it did not apply to public employers until 1972).³⁶ Title VII of the Act, which dealt with employment, had the word ‘sex’ inserted, in the words of Rehnquist J (as he then was), “at the last moment,”³⁷ so that discrimination on such grounds was also banned. Section 703(a) thus made it unlawful for an employer to:

fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual’s race, color, religion, sex, or national origin.

Discrimination on the grounds of sex was not something prohibited under the other Titles of the Civil Rights Act 1964.

³¹ Pub. L. 88–352, 78 Stat. 241 (July 2, 1964).

³² *Id.*, Title IV.

³³ *Id.*, Title II.

³⁴ *Id.*, Title III.

³⁵ *Id.*, Title I.

³⁶ *Id.*, Title VII.

³⁷ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63–64 (1986).

Indeed, its insertion into Title VII has often been seen as nothing other than an abortive, cynical attempt to derail the legislation by adding a more controversial provision so as to encourage more legislators to vote against the whole Act.³⁸ What those legislators could hardly have been expected to foresee – or even take an interest in – was the effect that this late amendment to the drafting of Title VII would have across the Atlantic. Yet, since then, this amendment has arguably turned out to hold at least as much significance within the United Kingdom as within the United States.

But that is to get ahead of the story. Just as in the United States, the immediate, pressing social problems in the United Kingdom related to matters of race and ethnicity. While civil unrest in the U.K. never reached the same scale as was experienced in some parts of the United States – perhaps at least partly due to the fact that ethnic minorities made up a far smaller proportion of the British population – racism and racial tension were nevertheless palpable. The issue came to a head with the notorious, so-called ‘Rivers of Blood’ speech delivered by the influential politician Enoch Powell, at the time the Conservative Member of Parliament for Wolverhampton South West. Powell agreed that all citizens should be equal before the law, but asserted that:

This does not mean that the immigrant and his descendants should be elevated into a privileged or special class or that the citizen should be denied his right to discriminate in the management of his own affairs between one fellow-citizen and another or that he should be subjected to an inquisition as to his reasons and motives. . . .³⁹

He argued that anti-discrimination laws would discriminate against the indigenous population and that their enforcement

³⁸ See e.g. Jo Freeman, *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 L. & Inequal. 163 (1991).

³⁹ Speech delivered to a Conservative Association meeting in Birmingham on April 20, 1968.

would “risk throwing a match on to gunpowder.”⁴⁰ Powell was, in other words, echoing the rhetoric of ‘discrimination as choice’ which had been prevalent during the era of slavery.

Against such an incendiary background, it is hardly surprising that other British politicians were hesitant to introduce wide-ranging measures prohibiting racial discrimination for fear of actually creating the very scenes – watched with horror on television news broadcasts in the U.K. – which had taken place in the United States. Private Members’ Bills seeking to outlaw racial discrimination had been introduced into Parliament on a number of previous occasions from 1951 onwards, and yet all had ultimately been rejected. It was therefore in a very cautious spirit that the British Parliament finally did decide to undertake its first foray into this area, albeit that it undoubtedly took its cue from the U.S. Congress. Thus the U.K.’s Race Relations Act 1965⁴¹ was of much more limited scope than the U.S. Civil Rights Act. Effectively, the 1965 Act covered only those issues dealt with in Title II of its American counterpart, and so sought merely to forbid discrimination on “the ground of colour, race, or ethnic or national origins”⁴² in places of “public resort”⁴³ such as on public transport, or in restaurants, pubs and hotels (though shops and boarding houses were exempted). Refusing to serve someone on such grounds, doing so after an inordinate delay, or overcharging them, thus became unlawful acts, but only if there was *a course* of such discrimination and not simply one discrete act.⁴⁴ Moreover, anyone perpetrating such acts was not subject to either civil or criminal liability for doing so.⁴⁵ Any complaints of discriminatory conduct could not be made to the courts, but had to be made to local conciliation committees, whose job was to encourage a negotiated settlement between complainant and

⁴⁰ *Id.*

⁴¹ The Act did not extend to Northern Ireland except in one respect which is irrelevant for present purposes.

⁴² Race Relations Act 1965, § 1(1).

⁴³ *Id.*, § 1(2).

⁴⁴ See Bob A. Hepple, *Race Relations Act 1965*, 66 Mod. L. Rev. 306, 308 (1966) at n. 13.

⁴⁵ Race Relations Act 1965, § 1(4).

alleged perpetrator.⁴⁶ These committees were overseen by a new body called the Race Relations Board (R.R.B.).⁴⁷

This method of dealing with complaints of discrimination had itself been taken from the United States, where it had already been found wanting.⁴⁸ Indeed, it was the very lack of success of this model which had led to the passage of the Civil Rights Act. So, a year after it had begun to be abandoned in the U.S., it was adopted in the U.K.! Several commentators in Britain predicted that this approach would fail in the U.K. too, and called for legislation more like the Civil Rights Act. The highly respected employment lawyer, Professor Bob Hepple, commented that “it is remarkable that so many [other] powers which the U.S. commissions have found to be indispensable if they are to act effectively have not been conferred on their British counterpart.”⁴⁹ The conciliation system did indeed turn out to be as ineffective in the U.K. as predicted, and was dismantled by the Race Relations Act 1976. The fact that the R.R.B. had no direct powers of enforcement meant that it too was doomed to failure.

Yet this whole approach has probably been accurately characterized as “a necessary concession to political pragmatism; in the absence of a requirement to attempt conciliation before resorting to enforcement in the courts, it is unlikely that this novel and controversial type of legislation would have been enacted”.⁵⁰ Indeed, the establishment of the R.R.B. was in itself an important milestone along the path to the creation of a practicable British template for the enactment of all anti-discrimination laws. While it had clearly been modeled on the U.S. Equal Employment Opportunity Commission (E.E.O.C.), it would have been difficult to bring the R.R.B. into existence in the U.K. without the creation of the local conciliation committees. The E.E.O.C. had, after all, itself been created by Title VII of the Civil Rights Act 1964 and was thus concerned with matters of employment. Yet those were

⁴⁶ *Id.*, § 2.

⁴⁷ Race Relations Act 1965, § 2.

⁴⁸ See Geoffrey Bindman, *The Law and Racial Discrimination: Third Thoughts* 3 Brit. J.L. & Socy. 110 (1976).

⁴⁹ Hepple, *supra* n. 44, at 311.

⁵⁰ Lord Lester of Herne Hill, Q.C., *Discrimination: What Can Lawyers Learn from History?*, Pub. L. No. 224, 225 (1994).

excluded from the ambit of the British Race Relations Act 1965 and so the R.R.B. required a different remit: if there had been no conciliation committees to oversee, there would have been no need for the R.R.B. at all. The very fact that it had been created established the basic principle that anti-discrimination laws require a dedicated administrative agency to oversee them and ensure that they are upheld. Moreover, the R.R.B. soon became one of the engines driving calls for further anti-discrimination legislation. In its first Annual Report in April 1967, for example, it argued for the Act to be extended to cover discrimination in housing, employment and financial facilities such as mortgages and car insurance.⁵¹ Such legislation was soon forthcoming, in the form of the Race Relations Act 1968.⁵² The R.R.B. thus showed that such bodies – modeled on the E.E.O.C. in the U.S. – could operate through campaigning work, even where they had no direct powers of enforcement. The latter powers were themselves also added by the 1968 Act.⁵³

The Meaning of Discrimination

American readers may find this tortured British experience somewhat amusing. After all, even the Race Relations Act 1968 did not extend as far as the U.S. had gone four years earlier with its Civil Rights Act. But the revisiting of the issue in Parliament in order to pass new legislation even to get that far turned out to have unexpected long-term implications for anti-discrimination laws in the United Kingdom. Following the U.S. model, the Race Relations Act 1965 had not actually defined discrimination. Yet with the need to debate a new Bill in 1968, it had become clear to many commentators that this lack of a definition was a somewhat bizarre omission. After all, the notion of discrimination – and as an objectionable practice rather than in its former sense of being an exercise of good taste and judgement – was the very focus of this whole area of law. Moreover, at that time, British courts took

⁵¹ *Report of the Race Relations Board for 1966–7* (London: H.M.S.O., 1967), ¶¶ 21–28 and 61–67.

⁵² This Act did not extend to Northern Ireland.

⁵³ Race Relations Act 1968, § 19.

the view that it was impermissible for them to discern the meaning of a statute by looking at the debates in Parliament and considered only the text of the legislation itself.⁵⁴

Nevertheless, the Parliamentary draftsman found a suitable definition of discrimination unusually elusive. Thus the original text of clause 1 of the 1968 Bill merely said that “‘discriminate’ means discriminate on the grounds of colour, race. . . .”⁵⁵ Professor Hepple reported soon afterwards that:

After this had been ridiculed as tautologous, discrimination was eventually defined as ‘less favourable’ treatment than that afforded to others. Some Members [of Parliament], showing little faith in judicial attitudes, feared that this might lead to a ‘separate but equal’ interpretation. With this in mind, the government accepted an amendment . . . declaring segregation to be ‘less favourable’ treatment.⁵⁶

While it may not be readily apparent merely from reading this definition of discrimination, this settlement of what many individuals probably saw as little more than a series of tedious verbal quibbles has proved to be one of the most decisive factors

⁵⁴ Courts in the U.K. have been prepared to consult Parliamentary debates only since the decision of the House of Lords in *Pepper v. Hart* [1993] 1 All E.R. 42. Even then, Lord Browne-Wilkinson, giving the judgment of the Court, insisted (at p. 66) that: “Experience in the United States of America . . . shows how important it is to maintain strict control over the use of such material.” His Lordship therefore laid down a number of criteria to be satisfied before reference to Parliamentary debates could be made in court. Although there has not been uniform adherence to these conditions, it is generally acknowledged that only one case has had its outcome changed as a result of such references. The sole dissenter in *Pepper v. Hart*, the then Lord Chancellor, Lord Mackay, had argued that such references would achieve little except waste time and money. Most British lawyers would probably agree that this is what has, in fact, happened. See, more generally, Michael A. Zander, *The Law Making Process* 6th ed. (Cambridge: Cambridge University Press, 2004) pp. 161–175.

⁵⁵ Bill 128 (April 8, 1968).

⁵⁶ Bob A. Hepple, *Race Relations Act 1968*, 69 Mod. L. Rev. 181, 182 (1969). The provision in question was subsequently re-enacted as section 1(2) of the Race Relations Act 1976.

in the shaping of the British anti-discrimination law template. In fact, the definition of discrimination as constituting ‘less favourable’ treatment has come to be seen as the basis of all subsequent anti-discrimination laws in the U.K. Every other aspect of anti-discrimination law now pivots around this point. This is in stark contrast to federal U.S. legislation, which has never provided an express definition. Yet, ironically, the British came to their definition precisely because they were attempting to emulate the American model.

In many ways, the comparison between the two countries’ approaches to the meaning of discrimination thus works as a mirror image of their respective approaches to constitutional law. The U.K. does not have a written constitution; the U.S. obviously does. So, unless an aspect of European Union law⁵⁷ or an Article of the European Convention on Human Rights and Fundamental Freedoms is implicated,⁵⁸ constitutional law in the U.K. is represented almost entirely by a combination of unwritten conventions and incremental case law. This means that the interpretation of important concepts in British constitutional law – and even the very identification of those important concepts – has had a tendency to evade precise definition and is therefore often in flux. A recent classic example of this was the marriage of the Prince of Wales, Prince Charles, to Mrs. Camilla Parker Bowles – despite the fact that the latter is a divorcée. Only seventy years earlier King Edward VIII had been forced to abdicate precisely because he had announced that he wished to marry the American, Mrs. Wallis Simpson, once she had obtained her divorce.⁵⁹ U.S. constitutional law, by contrast, must begin with the written text, a

⁵⁷ Incorporated into U.K. law under the European Communities Act 1972.

⁵⁸ Incorporated into U.K. law by the Human Rights Act 1998, which came into force on October 2, 2000.

⁵⁹ Allegations have been made more recently that there may have been other factors which led to the abdication, in particular the fact that Simpson was known to be having other affairs at the time, and the FBI’s suspicion – apparently proved true during World War II – that she was passing British and American secrets to the Nazis.

point made all the stronger by the relatively recent rise of the school of interpretation known as originalism.⁶⁰

As constitutional law scholar Philip Bobbitt has remarked, “the purposes of reducing legal arrangements to writing [are] . . . to reduce the discretion of the parties.”⁶¹ It is clear that the idiosyncratic constitutional arrangements in the U.K. constrain the British government much less than the checks which the written U.S. Constitution imposes on the U.S. government. The fact that the U.K. chose to adopt one basic, written definition of discrimination for all anti-discrimination laws has analogous implications. The British courts are not free to amend or create new definitions or forms of discrimination, as has proved possible in the U.S., where the meaning of discrimination has been left entirely for the judiciary to determine. The U.K. does, of course, have hard cases, where it is difficult to reach a judicial consensus as to whether the legislative test for discrimination has been met, but that is a far cry from requiring the judges actually to determine what that test is.

As will be seen in Parts IV and V, it was the fact that U.K. lawyers and legislators had become so accustomed to viewing discrimination as equivalent to ‘less favourable’ treatment that was one of the major reasons why the American approach to age discrimination could not be adopted in the U.K.

Different Forms of Discrimination

Yet even though the Race Relations Act 1968 now recognized that discrimination could be the result of just one act,⁶² and even though it allowed aggrieved individuals to seek limited financial compensation in the courts (with the assistance of the R.R.B. if necessary),⁶³ the Act still otherwise fell far short of its

⁶⁰ See, for example, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* ed. Amy Gutmann (Princeton: Princeton University Press, 1988).

⁶¹ *Constitutional Interpretation* (Oxford: Basil Blackwell, 1991) p. 3.

⁶² See Race Relations Act 1968, §§ 1–5, where the test in the 1965 Act that someone “practise discrimination” was replaced by the simple “discriminate”.

⁶³ Race Relations Act 1968, § 19, 22.

U.S. counterpart,⁶⁴ the Civil Rights Act of 1964. Moreover, whereas the omission from the latter of protection for public employees was a deficiency that could be made good to some extent through pleading the Fourteenth Amendment to the U.S. Constitution instead,⁶⁵ the lack of a written constitution in the United Kingdom meant that government employers remained entirely free to discriminate. Indeed, the police retained this immunity from anti-discrimination law until as late as the year 2000.⁶⁶ The Labour Party, which had lost the 1970 election only to regain power in 1974, could see the need to strengthen the legislation so as to take it much closer to the U.S. model contained in the Civil Rights Act 1964. But there were still fears of a possible white backlash. Conveniently, the U.S. legislation itself offered a method of circumventing this perceived problem.

Utilizing the last-minute insertion of the word 'sex' into Title VII of the Civil Rights Act 1964, the new corpus of anti-discrimination law in the U.K. thus began not by proposing further amendments to the existing laws regarding race relations, but by attempting to tackle – for the first time outside the question of equal pay⁶⁷ – the issue of *sex* discrimination. This was seen as a much less contentious issue than racial discrimination; government strategists decided that it was safer to start with this topic and then move on to racial discrimination if the model adopted proved reasonably practicable.⁶⁸ The Sex Discrimination Act 1975 was thus born (and the Race Relations Act 1976, which copied it almost word-for word, duly followed). This 1975 Act built upon the lessons of the preceding Race Relations Acts and, among other things, established a body with powers of

⁶⁴ An attempt to change the title of the legislation to the Civil Rights Act and thereby to broaden its substance was defeated in committee. See H.C. Standing Committee B, cols. 51–66; 83–85; 804–806.

⁶⁵ Unlike claims brought under Title VII of the Civil Rights Act, however, any claim of discrimination brought under the Fourteenth Amendment must prove disparate treatment; the Supreme Court held disparate impact theory to be inapplicable in *Washington v. Davis*, 426 U.S. 229 (1976).

⁶⁶ The immunity was abolished by § 1 of the Race Relations (Amendment) Act 2000.

⁶⁷ See Equal Pay Act 1970.

⁶⁸ See Jeanne Gregory, *Sex, Race and the Law: Legislating for Equality* (London: Sage, 1987).

enforcement much stronger than those which had been conferred on the R.R.B. This body was much more reminiscent of the E.E.O.C. in the United States, as was implied by its name, the Equal Opportunities Commission, or E.O.C.⁶⁹ Indeed, as suggested by the omission of the word ‘Employment’ from its name, the E.O.C.’s remit was actually somewhat wider than that of the E.E.O.C., since it extended to the enforcement of claims arising out of less favourable treatment on grounds of sex in connection with the provision of goods and services⁷⁰ as well as in employment.⁷¹

The Sex Discrimination Act 1975 was a much more comprehensive piece of legislation than either of the Race Relations Acts which had preceded it. Issuing instructions to discriminate,⁷² pressuring someone to discriminate,⁷³ and “aiding unlawful acts”⁷⁴ were all made unlawful; employers were also made vicariously liable for any acts of discrimination committed by their employees in the course of their employment.⁷⁵ Going beyond the position in the United States,⁷⁶ this legislation also gave individuals their own direct right of access to the courts⁷⁷ or, in employment cases, to specialist tribunals,⁷⁸ each of which had

⁶⁹ Sex Discrimination Act 1975, Part VI.

⁷⁰ *Id.*, Part III.

⁷¹ *Id.*, Part II.

⁷² *Id.*, § 39.

⁷³ *Id.*, § 40.

⁷⁴ *Id.*, § 42.

⁷⁵ *Id.*, § 41.

⁷⁶ An individual’s right to claim compensation in the U.S. under Title VII was not granted until the Civil Rights Act 1991 – and, even then, only for claims of disparate treatment and not disparate impact: see 42 U.S.C. § 1981(a) (2000). Until then – and, for disparate impact claims, even now – recourse to court was/is for purely equitable relief.

⁷⁷ Sex Discrimination Act 1975, § 66.

⁷⁸ *Id.*, §§ 62–65. Industrial tribunals which, since the coming into force of § 1 of the Employment Rights (Dispute Resolution) Act 1998 are now called employment tribunals, are specialist courts set up to decide employment-related disputes arising under certain statutes. Their powers are set out in the Industrial Tribunals Act 1996 (as amended). Each tribunal consists of a legally-qualified chair – known as an ‘employment judge’ since schedule 8 of the Tribunals, Courts and Enforcement Act 2007 came into force on December 1, 2007 – and two lay representatives: one drawn from employers’ organizations and one

the power to award compensation.⁷⁹ However, such awards were subject to arbitrary caps until the European Court of Justice decided in the second *Marshall* case⁸⁰ that any remedies must be sufficiently effective to deter employers from discriminating, and that British statutory restrictions fixing maximum levels of compensation and the award of interest were contrary to the law of the European Union. The caps were thus removed in 1993.⁸¹

The real significance of the Sex Discrimination Act 1975 was its identification of more than one form of ‘less favourable’ treatment. In fact, it identified three: direct discrimination,⁸² indirect discrimination,⁸³ and victimisation.⁸⁴ Direct discrimination was stipulated as occurring when someone was treated less favourably on grounds of gender.⁸⁵ Victimisation involved someone’s being treated less favourably either because of a prior complaint of discrimination (made in good faith)⁸⁶ or because of giving evidence in connection with such a complaint.⁸⁷ Neither of these provisions was particularly innovative. The definition of direct discrimination just restated what everyone had come to think of as constituting discrimination, while the prohibition of victimisation was obviously necessary, for otherwise victims and witnesses could too easily be deterred from

representing trades unions. Experience has proven – perhaps counter-intuitively – that the decisions of these tribunals are usually unanimous. The decisions of such tribunals can be appealed to the Employment Appeal Tribunal (E.A.T.) and thence to the Court of Appeal and – ultimately and with appropriate permission – to the House of Lords.

⁷⁹ Sex Discrimination Act 1975, § 56, 57.

⁸⁰ Case C-271/91, *Marshall v. Southampton and South West Area Health Authority (No.2)* [1993] 3 C.M.L.R. 293, [1993] I.R.L.R. 445, [1994] ICR 893 (E.C.J.). The saga of the *Marshall* litigation is discussed in more detail *infra*.

⁸¹ The Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (S.I. 1993, No. 2798), which came into force on November 22, 1993.

⁸² *Id.*, § 1(1)(a).

⁸³ *Id.*, § 1(1)(b).

⁸⁴ *Id.*, § 39.

⁸⁵ *Id.*, § 1(1)(a). Although the Act is couched in language which implies that the primary victims of sex discrimination will be women, section 2 makes it clear that the Act applies just as much to men. In addition, section 3 prohibits discrimination against married persons (albeit only in employment).

⁸⁶ *Id.*, § 4(2).

⁸⁷ *Id.*, § 4(1).

coming forward. Indeed, readers familiar with U.S. anti-discrimination law will recognize that these two forms of discrimination are essentially identical to the concepts known in the U.S. as ‘disparate treatment’⁸⁸ and ‘retaliation.’⁸⁹ Nevertheless, it is worth pausing to note that those concepts were developed by courts in the U.S. whereas the U.K., which was taking its lessons in anti-discrimination law from its trans-Atlantic neighbor, once again chose to enshrine them in legislation.

The true innovation contained in the Sex Discrimination Act 1975 was its definition of ‘indirect discrimination’. Here U.S. law made perhaps its greatest, if unwitting, contribution to anti-discrimination law in the United Kingdom. In the landmark U.S. Supreme Court case of *Griggs v. Duke Power Co.*,⁹⁰ the Court had been required to decide whether an employer was prohibited under Title VII of the Civil Rights Act 1964 from requiring a high school education or the passing of a standardized general intelligence test as a condition of employment in jobs whose performance did not require such levels of skill or intelligence, and where those requirements operated to disqualify Negroes at a substantially higher rate than white applicants.⁹¹

Under section 703(h) of the Civil Rights Act, it was not unlawful for an employer “to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results [was] not designed, intended or used to discriminate because of race, color, religion, sex or national origin.”⁹² The Court therefore first had to determine whether the employer’s policy had been adopted with an intent to discriminate against Negroes. It held, agreeing with the Court of Appeals, that there had been no such intent.⁹³ Instead, it was content to accept the evidence of a company vice president, to the effect that the objective had been to improve the

⁸⁸ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

⁸⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see now 42 U.S.C. § 2000e-3(a).

⁹⁰ 401 U.S. 424 (1971).

⁹¹ *Id.* at 425–426.

⁹² 78 Stat. 255, 42 U.S.C. § 2000e-2.

⁹³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

overall quality of the workforce.⁹⁴ But the Court went on to say, in the words of Burger C.J., that:

good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.⁹⁵

Since the evidence was that the qualifications which the employer insisted on were not a good predictor of an employee’s ability to perform the jobs in question, their use could not be objectively justified. While that did not make the use of such tests unlawful in itself, the fact that their use had the effect of excluding a disproportionate number of Negroes from employment certainly did. Although the Court did not actually use the term, the notion of ‘disparate impact’ discrimination⁹⁶ had been born. In perhaps the most famous passage, Burger C.J. declared:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the jobseeker be taken into account. It has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If

⁹⁴ *Id.* at 431.

⁹⁵ *Id.* at 432.

⁹⁶ The terminology of ‘disparate impact’ and the precise conditions required to satisfy it were not set out until *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977). See *infra* n. 108.

an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.⁹⁷

Griggs v. Duke Power Co. did not immediately resonate in the United Kingdom. Indeed, it seems that British lawyers barely knew of its existence, let alone its importance. The 1974 White Paper *Equality for Women*,⁹⁸ which outlined the government's proposed sex discrimination legislation, included no definitions of discrimination beyond victimisation and what came to be called direct discrimination. It is important at this juncture to emphasize that a failure to incorporate any notion of disparate impact theory into the definition of discrimination would have had a thoroughly debilitating effect on the Sex Discrimination Act which, unlike the U.S. Supreme Court, the British courts would have been powerless to overcome. The U.S. Civil Rights Act 1964 contained no definitions of discrimination whatsoever. After due consideration of the full implications of the Act's text and legislative history, it was therefore for the federal courts (and ultimately for the Supreme Court) to determine what constituted discrimination. As was explained earlier, the fact that no definition of discrimination had been put in writing gave the courts considerable discretion. In the United Kingdom, however, the very concept of discrimination was to be defined in the governing legislation itself. While any definition might be open to a degree of ambiguity in its interpretation by the courts in terms of its application to specific facts, judges faced with legislation which *did* contain a definition of discrimination would certainly not have been empowered to create their own. If Parliament had said that discrimination meant only either direct discrimination or victimisation, then the clear implication would have been that it did not mean anything else.

However, before the draft sex discrimination legislation was laid before Parliament, the Special Adviser who was responsible for the text, barrister Anthony Lester,⁹⁹ went on a

⁹⁷ 401 U.S. 424, 431 (1971).

⁹⁸ Cmnd. 5724 (London: H.M.S.O., 1974).

⁹⁹ Now Lord Lester of Herne Hill, Q.C..

fact-finding trip to the United States with his boss, Home Secretary Roy Jenkins. As Lester admitted years later, it was only during this visit that he learnt of the importance of prohibiting disparate impact discrimination:¹⁰⁰

[W]e were mainly inspired by ideas from across the Atlantic. Indeed, the key concept of indirect discrimination, which is not to be found in the 1974 White Paper, was hastily included in the Sex Discrimination Bill, on the eve of its publication. The omission was made good as a result of a visit with the Home Secretary to the United States. We discovered, during the visit, that we had defined the concept of what discrimination means too narrowly in the White Paper. . . . [S]ection 1(1)(b) of the legislation was Parliamentary Counsel's version of the landmark judgment of the American Supreme Court in *Griggs v. Duke Power Co.*¹⁰¹

The person who impressed upon Lester and Jenkins the importance of *Griggs* was Louis H. Pollak, then Dean of the University of Pennsylvania Law School,¹⁰² who went on to become a judge on the United States District Court for the Eastern District of Pennsylvania in 1978.¹⁰³ It seems likely that the facts of another case, about to be heard in the Supreme Court soon after Lester's and Jenkins's visit, had served to make Pollak's point particularly strongly. That case was *Albemarle Paper Co. v. Moody*,¹⁰⁴ where an employer had segregated its plant's departmental 'lines of progression' with the effect of reserving the higher-paying and more skilled lines for whites. The respective racial profiles of whole lines of progression persisted until 1968,

¹⁰⁰ Lord Lester of Herne Hill, Q.C., *Discrimination: What Can Lawyers Learn from History?*, Pub. L. No. 224, 227 (1994).

¹⁰¹ *Id.* at 227 (footnote omitted).

¹⁰² Louis H. Pollak, *Discrimination in Employment: The American Response* 15–19 (London: Runnymede Trust, 1974).

¹⁰³ See Anthony Lester, Q.C., *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537, 550–51 (1988).

¹⁰⁴ 422 U.S. 405 (1975).

when the lines were reorganized under a new collective-bargaining agreement. The court found, however, that this reorganization left Negro employees ‘locked’ in the lower-paying job classifications. The formerly ‘Negro’ lines of progression had been merely tacked on to the bottom of the formerly ‘white’ lines, and promotions, demotions, and layoffs continued to be governed – where skills were ‘relatively equal’ – by a system of ‘job seniority.’ Because of the plant’s previous history of overt segregation, only whites had seniority in the higher job categories.¹⁰⁵

It would have been hard to think of a clearer instance of disparate impact discrimination after *Griggs* than *Albemarle*. The fact that the latter was litigated all the way to the Supreme Court only four years after *Griggs* demonstrated both how ingrained such institutional discrimination had become and how important it was to eradicate it. The fact that the U.K.’s legislators heeded Pollak’s advice and prohibited disparate impact discrimination in the Sex Discrimination Act 1975 meant that it had authoritatively recognized the concept, so far as sex discrimination was concerned, even before the U.S. itself, where that view was not dispositively confirmed until the U.S. Supreme Court’s decision in *Dothard v. Rawlinson*.¹⁰⁶

The British Parliamentary draftsman’s rendering of the meaning of disparate impact in the Sex Discrimination Act 1975 was as follows:

In any circumstances relevant for the purposes of any provision of this Act . . . a person discriminates against a woman if . . . he applies to her a requirement or condition which he applies or would apply equally to a man but —

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

¹⁰⁵ *Id.* at 409.

¹⁰⁶ 433 U.S. 321 (1977).

- (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
- (iii) which is to her detriment because she cannot comply with it.¹⁰⁷

Such an amorphous concept needed a name: somewhat inconveniently, the Supreme Court had omitted to provide a suitable label in *Griggs* (and, did not, in fact, adopt the term ‘disparate impact’ until some years later.)¹⁰⁸ To distinguish it from overt discrimination, which was thenceforth redefined as ‘direct discrimination,’¹⁰⁹ the draftsman came up with the term ‘indirect discrimination.’ Despite the section’s “technical and crabbed language,”¹¹⁰ which has been criticized as “a narrow and awkwardly-phrased expression of the idea of institutional

¹⁰⁷ Sex Discrimination Act 1975, § 1(1)(b).

¹⁰⁸ The first use of the term ‘disparate impact’ by a federal judge occurred in 1973 in the United States District Court for the Northern District of Ohio. In *Smith v. City of East Cleveland*, 363 F. Supp. 1131 (1973), District Judge Thomas Lambros found (at 1145) that imposing a minimum height requirement on police force applicants had a disparate impact on women and therefore amounted to unlawful discrimination. The term ‘disparate impact’ was also used just over a year later by Judge Albert Engel in the Court of Appeals for the Sixth Circuit, in *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (1975), a case on age discrimination. Yet, five years after *Griggs v. Duke Power*, the Supreme Court had still not adopted this terminology and instead employed the terms ‘discriminatory impact’ and ‘disproportionate impact’ when giving judgment in *Washington v. Davis*, 426 U.S. 229 (1976). The first usage of the term ‘disparate impact’ by a Supreme Court Justice was by Stewart J in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977), where he provided a full explanation of what it meant and how it differed from ‘disparate treatment’. The odd thing is that, just one month later, it had still not apparently seeped into the Court’s consciousness. The majority opinion in *Dothard v. Rawlinson*, 433 U.S. 321 (1977) again talked solely of ‘discriminatory impact’ and ‘disproportionate impact’. Only Rehnquist J (as he then was), who filed a very short opinion concurring in the result and concurring in part, used the term ‘disparate impact,’ and even then just once: see 433 U.S. 321, 338 (1977).

¹⁰⁹ Sex Discrimination Act 1975, § 1(1)(a).

¹¹⁰ Lester, *supra* n. 100, at 227.

discrimination,”¹¹¹ the concept of indirect discrimination has proved to be of huge importance in British anti-discrimination law. Right from the beginning, British courts openly took their cue on its interpretation from *Griggs*.¹¹² Yet at the same time, the adoption of this concept marked the beginning of a big fork in the road of anti-discrimination law along which the two countries had been traveling.

So far as the United States is concerned, it has been noted that: “By and large, ‘disparate impact’ cases are fairly infrequent, as compared to cases alleging intentional discrimination.”¹¹³ Yet in the United Kingdom, it is indirect discrimination which has proved to be of far more significance than direct discrimination.¹¹⁴ The British experience has, moreover, been replicated in other common law countries which also adopted the concept of disparate impact from the United States.¹¹⁵ It is submitted that,

¹¹¹ Laurence Lustgarten, *Racial Inequality and the Limits of Law*, 49 Mod. L. Rev. 68, 72 (1986).

¹¹² See e.g. *Steel v. Union of Post Office Workers* [1978] I.R.L.R. 288, 291 (E.A.T.); *Clarke v. Eley (IMI) Kynoch Ltd, Eley (IMI) Kynoch Ltd v. Powell* [1982] IRLR 482, 485 (E.A.T.).

¹¹³ Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 Neb. L. Rev. 304, 314 (1992).

¹¹⁴ The fact that this continues to be the case has been illustrated recently in *Allen and others v. G.M.B.* [2008] E.W.C.A. Civ. 810, where the Court of Appeal held that the striking of a deal by a trade union with a local authority as to terms and conditions of employment pursuant to a national collective agreement establishing a common pay and grading structure for all local authorities was indirectly discriminatory. The deal attempted to achieve compensation for some union members for past pay inequality as well as future pay and employment protection for all members. Although it involved the application of a provision, criterion or practice which applied equally to men, it operated to the detriment of a considerably larger proportion of women.

¹¹⁵ See, for example, the ruling of the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624 (holding that the absence of sign language interpreters for patients consulting health care practitioners amounted, in and of itself, to *prima facie* indirect discrimination against deaf people); and that of the Constitutional Court of South Africa in *The City Council of Pretoria v. Walker* (1998) 3 S.A. 24 at ¶ 31, interpreting what was then § 8(2) of the Interim Constitution of the Republic of South Africa (essentially reproduced in § 9(3) of the Constitution of the Republic of South Africa): “The inclusion of both direct and indirect discrimination within

since the passage of the 1991 Civil Rights Act,¹¹⁶ the availability of damages in cases of disparate treatment but not in cases of disparate impact has played a significant role in skewing the types of claims brought in the United States. Michael Selmi has commented, for example, that: “Many of the recent large class action claims have proceeded under an intentional discrimination theory, even though many of their core allegations sound in traditional disparate impact language.”¹¹⁷

Selmi’s own claim that, apart from written employment tests, “disparate impact theory has produced no substantial social change”¹¹⁸ may thus be true within the United States but not beyond its shores. (Indeed, written employment tests have never been popular in the U.K. except in the civil service, although their use is now growing in the legal and financial sectors because of the influx of American-owned banks and law firms.) For example, the requirement upon which American courts have insisted, namely that detailed statistics be produced in order to determine the precise impact on different groups of specific employment practices, has been held by the British courts to be often of dubious value, given that many such statistics involve averaging and approximations.¹¹⁹

Bona Fide Occupational Qualifications

So far we have seen that the British template for anti-discrimination laws involves three elements: a definition of discrimination as ‘less favourable’ treatment, a recognition of ‘indirect’ discrimination as well as direct discrimination and victimisation, and the establishment of a public agency responsible for the oversight and enforcement of the legislation. It is completed by a fourth element: defendants need to be given

the ambit of the prohibition . . . evinces a concern for the consequences rather than the form of conduct.”

¹¹⁶ 42 U.S.C. § 1981(a) (2000).

¹¹⁷ Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. Rev.* 701, 736 at n. 142 (2006).

¹¹⁸ *Id.* at 705.

¹¹⁹ See e.g. *Jones v. University of Manchester* [1993] I.C.R. 474 per Evans L.J. at 502 (C.A.).

the chance to show that any discrimination, whether it occurred directly or indirectly, might nevertheless be justified. In other words, the law needed to provide for a potential defense to the proof of a *prima facie* case. In accordance with what, by now, will have become a familiar pattern, it was again taken from the U.S. model laid out in Title VII of the Civil Rights Act 1964. There – having prohibited employment practices which discriminated against a person because of individual’s race, color, religion, sex, or national origin – an exception was made whereby an employer could justify such a practice (and thus escape liability) if religion, sex or national origin had been used as a criterion amounting to a “*bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”.¹²⁰ The British legislation therefore needed to create a similar defense.

Another point of comparison here will also have a familiar ring to it. The Civil Rights Act left the meaning of “*bona fide* occupational qualification” (bfoq) undefined, and thus a matter for the courts. By contrast, British legislators – concerned about the common law’s checkered history on the concept of discrimination – were not content to rely on the judiciary and so felt the need for a definition to be set out in the Sex Discrimination Act itself. In addition, both politicians and lawyers within the U.K. have become increasingly uncomfortable with the use of pig Latin.¹²¹ Accordingly, whatever definition was formulated, the concept could not readily be labeled as a “*bona fide* occupational qualification.”¹²² Instead, section 7 of the Act talks of “*genuine* occupational qualification” (emphasis added).¹²³ There is a clear semantic difference between the two labels. The American version depends on *bona fides* – good faith. In other words, the defense of “*bona fide* occupational qualification” demonstrates an emphasis in federal U.S. anti-discrimination law

¹²⁰ Civil Rights Act 1964, § 703(e)(1), (now § 2000e-2(e)(1)).

¹²¹ Courts in the U.K. no longer, for example, grant *certiorari* to quash previous decisions; instead, they issue ‘quashing orders’: Civil Procedure Rules 1999, rule 54.1.

¹²² Canada chose to keep the ‘*bona fide*’ terminology when it adopted its own anti-discrimination laws: see Canadian Human Rights Act 1977, § 15.

¹²³ Sex Discrimination Act 1975, § 7.

on the motivation and state of mind of the employer, as does the fact that claims of disparate treatment have proved to be more popular in the U.S. than claims of disparate impact. The British version of the defense, by contrast, is not concerned with the state of mind of the employer at all; it is instead focused on the nature of the alleged occupational qualification, and whether it can be objectively justified. The motivation of the employer in adopting this criterion – whether good or bad – is thus irrelevant.

As it turned out, the U.S. Supreme Court in *Dothard v. Rawlinson* – the first case on sex discrimination to come before the Court under the Civil Rights Act – went beyond the limitations of the text and found that it was also persuaded by “the relevant legislative history . . . that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.”¹²⁴ By adopting an approach to statutory interpretation entirely foreign to the British courts, the Supreme Court thereby effectively ensured that its approach amounted to an application of the Title VII defense more along the lines of what the British text already said. Seven years later the respected British barrister, David Pannick, Q.C., thus felt able to say:

It would not seem that much turns on the fact that the 1975 Act validates discrimination where sex is a ‘genuine’ occupational qualification, whereas Title VII recognizes an exception in ‘bona fides’ cases. The language of section 7 is, however, preferable in avoiding any inference that the defence depends on the state of mind of the employer than the objective nature of the job in question.¹²⁵

¹²⁴ 433 U.S. 321, 334 (1977). See also *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that the bfoq relates to the “essence” or “central mission of the employer’s business,” and that there must be no less-restrictive or reasonable alternative).

¹²⁵ David Pannick, *When is Sex a Genuine Occupational Qualification?*, 4 Oxford J. Leg. Stud. 198, 201–2 (1984).

Whether those proposing that the defense in the Sex Discrimination Act 1975 should be a matter of objectively genuine qualifications really understood the subtle difference between that definition and the potentially narrower implications of the *bona fide* approach is, however, unclear. Home Secretary Roy Jenkins admitted that identifying exactly what constituted a genuine occupational qualification was “a difficult drafting job,” but did not appear to find the label itself problematic.¹²⁶ This was really somewhat ironic, because the British definition actually made it much easier to stipulate acceptable criteria. The Sex Discrimination Act 1975 thus identified a number of circumstances where the use of a person’s gender would amount to a genuine occupational criterion. Among the most important are the following:

- (i) where there is a genuine physiological requirement (other than physical strength or stamina);¹²⁷
- (ii) for authenticity (such as casting a male actor to play the part of a man in a film);¹²⁸
- (iii) because of decency or privacy (such as a female care assistant at a women's refuge);¹²⁹
or
- (iv) in the provision of personal services.¹³⁰

Through the Sex Discrimination Act 1975, the U.K. thus forged a template for anti-discrimination laws with four, related elements. Discrimination was defined as ‘less favourable’ treatment; it encompassed ‘indirect’ discrimination as well as direct discrimination and victimisation; employers could mount a defense¹³¹ of ‘genuine occupational qualification’ focused on the

¹²⁶ 889 H.C. 517 (March 26, 1975).

¹²⁷ Sex Discrimination Act, § 7(2)(a).

¹²⁸ *Id.*, § 7(2)(a).

¹²⁹ *Id.*, § 7(2)(b).

¹³⁰ *Id.*, § 7(2)(e).

¹³¹ There was some controversy as to where the burden of proof lay on this issue. It was finally resolved by regulation 5 of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (S.I. 2006, No.

objective requirements for a job and not on their own state of mind; and a specific public agency would be established to uphold and enforce the legislation. Each of these elements had been taken from, and were designed essentially to imitate, provisions in federal U.S. law.

III. AGE DISCRIMINATION LAW IN THE UNITED STATES

Origins

During the debates on what became the Civil Rights Act of 1964, proposals were made to include age among the list of prohibited criteria. However, those proposals were rejected on the grounds that there was no way to identify what age would be the appropriate yardstick. Representative Celler commented: “What age? Some men are old at 20. Others are young at 70. At what age would discrimination occur?”¹³² Instead, Congress instructed the Secretary of Labor, Willard Wirtz, to investigate whether age discrimination was as prevalent as alleged and, if so, to make recommendations as to how it should be addressed.¹³³ The following year, Wirtz reported that ageism in employment was indeed a significant problem.¹³⁴ President Johnson took up the cause in his address on January 23, 1967, and urged Congress to take action. Congress duly obliged later that year by passing the Age Discrimination in Employment Act (A.D.E.A.).¹³⁵ The A.D.E.A. has three expressed aims: “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help

2660), which inserted a new section 63A into the Sex Discrimination Act 1975 to the effect that this was indeed an affirmative defense with the burden of proof on the defendant.

¹³² Quoted by Constance Kleiner Hood, *Age Discrimination in Employment and the Americans with Disabilities Act: A Second Bite at the Apple*, 6 *Elder L.J.* 1, 3–4 (1998).

¹³³ Civil Rights Act 1964, § 715.

¹³⁴ U.S. Department 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) (available at www.theederalregister.com/d.p/2006-08-11-E6-13138).

¹³⁵ Age Discrimination in Employment Act 1967 (Pub. L. 90–202).

employers and workers find ways of meeting problems arising from the impact of age on employment.”¹³⁶ It answered Congressman Celler’s question by specifying that the “prohibitions . . . shall be limited to individuals who are at least 40 years of age.”¹³⁷

Originally, the A.D.E.A. was overseen by the Department of Labor but, in 1979, that responsibility passed to the E.E.O.C.¹³⁸ Those claiming to have been victims of age discrimination in employment now usually have 180 days from the date of the alleged discrimination to file a charge with the E.E.O.C. (and/or the state agency in the state in which they were employed).¹³⁹ The E.E.O.C.’s role on receiving the charge is to “promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.”¹⁴⁰ “If a satisfactory conciliation is not reached, the E.E.O.C. proceeds with suit in federal court. . . .”¹⁴¹ If the aggrieved chooses to bring suit individually, that can be filed once 60 days have elapsed since the filing of the charge with the E.E.O.C., but such a suit “shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right” of the employee.¹⁴² Unlike in the U.K., where the E.O.C. assists a claimant’s action

¹³⁶ *Id.*, § 2(b); 29 U.S.C. § 621(b).

¹³⁷ *Id.*, § 12(a); 29 U.S.C. § 631(a). Originally, the legislation protected only workers aged between 40 and 65, but the upper age limit was removed in 1986, effectively abolishing mandatory retirement. See Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, sec. 2(c), § 12(a), 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. § 631(a) (1994)).

¹³⁸ Presidential Reorganization Plan No. 1 of 1978.

¹³⁹ Age Discrimination in Employment Act 1967, § 7(d)(1); U.S. Code § 626(d)(1).

¹⁴⁰ *Id.*, § 7(d); 29 U.S.C. § 626(d).

¹⁴¹ Bryan D. Glass, *The British Resistance to Age Discrimination Legislation: Is it Time to Follow the U.S. Example?*, 16 *Comp. Lab. L.J.* 491, 496 (1995).

¹⁴² Age Discrimination in Employment Act 1967, § 7(c),(d); U.S. Code § 626(c),(d). See also Candis A. McGowan, *The ABCs of Title VII Class and Age Discrimination Collective Actions*, 25 *Am. J. Trial Advoc.* 257, 260 (2001).

only by agreement, employees in the U.S. have no formal ability to prevent the E.E.O.C. from taking up their case.

It has been suggested that “Congress's choice of age 40 for legislative protection [took account of] the experience of Congressman Pucinsky in the mid-1960s, who applied undercover for several jobs at factories at age 46, and was told that he could not be interviewed because it was company policy not to hire anyone over the age of 40.”¹⁴³ In any event, the consistent theme – running through not just Pucinsky’s experiences, but also Secretary Wirtz’s report and President Johnson’s speech – was that it was *older workers* who needed protection.¹⁴⁴ The A.D.E.A.’s prohibition on age discrimination reflected that concern and thus had three significant limitations. First, it did not protect anyone below the age of forty. Secondly, like Title VII but unlike Titles I to VI of the Civil Rights Act 1964, it applied only to matters of employment.¹⁴⁵ As Judge Tuttle noted in *Hodgson v. First Federal Savings and Loan Association*, “With a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that ‘age’ has been substituted for ‘race, color, religion, sex or national origin. . . .’”¹⁴⁶ Thirdly, as with the Civil Rights Act itself, nothing was said about disparate impact discrimination.

Younger Employees

It has always been clear that employees under the age of 40 are not protected by the A.D.E.A. But some commentators argued that analogies with Title VII of the Civil Rights Act meant that anyone over 40 would potentially have a claim even if treated less favorably on the grounds of his or her age than another person over 40. As Hartzler has explained:

¹⁴³ Glass, *supra* n. 141, at 497.

¹⁴⁴ See *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1242–3 (2004).

¹⁴⁵ The Age Discrimination Act 1975 extended the prohibition on age discrimination to all programs or activities receiving federal funding or assistance.

¹⁴⁶ 455 F.2d 818, 820 (5th Cir., 1972).

The theory of reverse discrimination evolved under Civil Rights Act jurisprudence. For example, as between racial groups under Title VII, a non-minority plaintiff may successfully state a claim for relief when replaced by a minority worker. In this manner, Title VII plaintiffs have successfully challenged employer actions that indicate a preference for traditionally disenfranchised individuals. Due to the similarities between Title VII and the A.D.E.A., courts have frequently applied Title VII substantive case law to A.D.E.A. claims. Consequently, A.D.E.A. plaintiffs have attempted application of the Title VII discrimination theories to their age discrimination claims.¹⁴⁷

The counter-argument to this is that a *reverse* age discrimination claim is not analogous to a reverse sex or race discrimination claim. Alleged victims of sex discrimination, for example, compare their position with individuals of the opposite sex. Alleged victims of racial discrimination compare their treatment with that meted out to individuals of a different racial or ethnic group. So, it was argued, this must mean that individuals aged 40 or over could claim the protection of the A.D.E.A. only if they were treated unfavorably as compared to those under 40, not if they were treated unfavorably in comparison with someone else over 40. The defendant employer in *O'Connor v. Consolidated Coin Caterers Co.* made just such an argument after it had dismissed the petitioner at age 56 and replaced him with a 40-year-old.¹⁴⁸ However, the Supreme Court held that there was no requirement that the petitioner had to be replaced by someone outside the protected class. It found that the “fact that one person in the protected class has lost out to another person in the

¹⁴⁷ Kelly J. Hartzler, *Reverse Age Discrimination Under the Age Discrimination in Employment Act: Protecting All Members of the Protected Class*, 38 Val. U. L. Rev. 217, 229–230 (2003).

¹⁴⁸ 116 S. Ct. 1307 (1996).

protected class is thus irrelevant, so long as he lost out because of his age.”¹⁴⁹

Less than a decade later, however, the Supreme Court apparently abandoned this clarity of vision. In *General Dynamics Land Systems, Inc. v. Cline*,¹⁵⁰ a collective-bargaining agreement between petitioner General Dynamics and the United Auto Workers eliminated the company’s obligation to provide health benefits to subsequently retired employees, except as to then-current workers at least 50 years old. Cline was one of a number of employees who objected because they were under 50 and so would have had no right to the benefits. These individuals were also over 40 and so were apparently protected by the Act. However, a majority of the Supreme Court had other ideas. Writing for the majority, Souter J remarked that “the 40-year threshold makes sense as identifying a class requiring protection against preference for their juniors, not as defining a class that might be threatened by favoritism toward seniors.”¹⁵¹ He noted with approval the fact that the District Court had called the claim one of “‘reverse age discrimination,’ upon which, it observed, no court had ever granted relief under the A.D.E.A.”¹⁵² Souter J took the view that the word ‘age’ bears different meanings in the A.D.E.A., depending on the context, and “that reference to context shows that ‘age’ means ‘old age’ when teamed with ‘discrimination.’”¹⁵³ He even made the bizarre claim that “the provision of an affirmative defense when age is a bona fide occupational qualification¹⁵⁴ readily shows that ‘age’ as a qualification means comparative youth.”¹⁵⁵ Unfortunately, the last statement is an utter *non sequitur*. Age could be a bona fide occupational qualification when it is a person’s specific age that matters: hiring an actor to play a part because he is of about the same age as the character is a good example. Hiring anyone in a

¹⁴⁹ *Id.* at 1310.

¹⁵⁰ 124 S. Ct. 1236 (2004).

¹⁵¹ *Id.* at 1243.

¹⁵² *Id.* at 1239–40.

¹⁵³ *Id.* at 1246.

¹⁵⁴ Age Discrimination in Employment Act 1967, § 4(f)(1).

¹⁵⁵ 124 S.Ct. 1236, 1246 (2004).

very different age range simply would not do, whether they were much older or much younger.

How Souter J's rhetoric managed to convince a majority of his colleagues remains a matter of conjecture. It certainly did not convince Thomas J, who adopted a much more straightforward approach. Indeed, Thomas J's opinion, in which Kennedy J joined, opens with the words: "This should have been an easy case."¹⁵⁶ In a judgment reminiscent of British judges before *Pepper v. Hart* was decided by the House of Lords in 1993,¹⁵⁷ he considered that there was no need to consider the "social history"¹⁵⁸ which led up to the passage of the A.D.E.A., and argued instead that the text of the Act should be given its natural meaning:

The plain language of the A.D.E.A. clearly allows for suits brought by the relatively young when discriminated against in favor of the relatively old. The phrase 'discriminate . . . because of such individual's age' . . . is not restricted to discrimination because of relatively older age. If an employer fired a worker for the sole reason that the worker was under 45, it would be entirely natural to say that the worker had been discriminated against because of his age. I struggle to think of what other phrase I would use to describe such behavior. I wonder how the Court would describe such incidents, because the Court apparently considers such usage to be unusual, atypical, or aberrant.¹⁵⁹

Disparate Impact

The issue of disparate impact age discrimination has proved to be just as controversial. Although "for over two decades after our decision in *Griggs*, the Courts of Appeals uniformly

¹⁵⁶ *Id.* at 1249.

¹⁵⁷ [1993] 1 All E.R. 42. *See supra* n. 54.

¹⁵⁸ *Id.* at 1250.

¹⁵⁹ *Id.* at 1250.

interpreted the A.D.E.A. as authorizing recovery on a ‘disparate-impact’ theory in appropriate cases,”¹⁶⁰ this apparent uniformity of view was challenged in *Hazen Paper Company v. Biggins*.¹⁶¹ A former employee alleged that Hazen Paper had dismissed him because of his age. It had apparently done so in order to prevent his pension benefits from vesting. The Supreme Court held that this was not a violation of the A.D.E.A. O’Connor J, writing for the Court, found that while pension status is often correlated with age, the “employee’s age is analytically distinct from his years of service.”¹⁶² The A.D.E.A. would be implicated only if it were the former that had motivated the employer’s decision, which the Court found not to be the case here. Again employing what Thomas J would, a year later in *General Dynamics* call a “social history” analysis,¹⁶³ the Court found that the concerns about negative stereotyping of older people, which had motivated the A.D.E.A., were not present when the reason for the dismissal was the employee’s years of service. The Court indicated, however, that it would have taken a different view if the pension plan in question had depended on an employee’s age rather than length of service. The Court also acknowledged that there may be instances where an employer uses pension status as a proxy for age and so develops a policy in order to flush out older employees. That would involve a dismissal motivated by age.

Interestingly, Thomas J joined a concurrence written by Kennedy J, who noted that the respondent:

¹⁶⁰ *Smith v. City of Jackson*, 125 S. Ct. 1536, 1542–3 *per* Stevens J (2005). See *e.g.* *Holt v. Gamewell Corp.*, 797 F.2d 36, 37 (C.A.1 1986); *Maresco v. Evans Chemetics*, 964 F.2d 106, 115 (C.A.2 1992); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (C.A.3 1987); *Wooden v. Board of Ed. of Jefferson Cty., Ky.*, 931 F.2d 376, 379 (C.A.6 1991); *Monroe v. United Air Lines*, 736 F.2d 394, 404, note 3 (C.A.7 1984); *Dace v. A.C.F. Industries*, 722 F.2d 374, 378 (C.A.8 1983), modified, 728 F.2d 976 (1984) (*per curiam*); *Palmer v. United States*, 794 F.2d 534, 536 (C.A.9 1986); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (C.A.10 1993) (assuming disparate-impact theory); *MacPherson v. University of Montevallo*, 922 F.2d 766, 771 (C.A.11 1991); *Arnold v. United States Postal Serv.*, 863 F.2d 994, 998 (C.A.D.C.1988) (assuming disparate-impact theory)).

¹⁶¹ 113 S. Ct. 1701 (1993).

¹⁶² *Id.* at 1707.

¹⁶³ *Supra* n. 158.

has advanced no claim that petitioners' use of an employment practice that has a disproportionate effect on older workers violates the ADEA. As a result, nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964. . . . As the Court acknowledges . . . we have not yet addressed the question whether such a claim is cognizable under the ADEA,¹⁶⁴ and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.¹⁶⁵

Judge Tuttle's recognition that, "With a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex or national origin'"¹⁶⁶ apparently did not necessarily mean that the application of the A.D.E.A. was identical to that of the Civil Rights Act itself. As the Supreme Court itself acknowledged twelve years later in *Smith v. City of Jackson*,¹⁶⁷ *Hazen Paper* was taken by several U.S. Courts of Appeals as authority for the proposition that disparate impact claims were not available under the A.D.E.A..¹⁶⁸ Indeed, in *Smith*, Kennedy and Thomas JJ – joined on this occasion by O'Connor J – reiterated their objections to the idea that a disparate impact claim could be brought under the A.D.E.A..¹⁶⁹ They were, however, in the minority. *Smith* involved a pay plan that aimed to attract more qualified police officers by making starting salaries competitive. Thus the City of Jackson gave proportionally higher salary increases to its less senior officers. The Court did not find the city liable for disparate

¹⁶⁴ *Supra* n. 161 at 1706.

¹⁶⁵ *Id.* at 1710.

¹⁶⁶ *Hodgson v. First Federal Savings and Loan Association* 455 F.2d 818, 820 (5th Cir., 1972).

¹⁶⁷ 125 S. Ct. 1536 (2005).

¹⁶⁸ *Id.* at 1543.

¹⁶⁹ *Id.* at 1549.

treatment and, since disparate impact had not been pleaded, it was unable to rule dispositively on that point. Nevertheless, the majority did hold that disparate impact claims are cognizable under the A.D.E.A.¹⁷⁰

Yet this general ruling was delivered with forked tongue. Writing for the majority in language that might have been taken straight out of the English case of *Francis v. British Airways Engineering Overhaul Ltd.* decided over twenty years before,¹⁷¹ Stevens J found that:

petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers . . . it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'¹⁷²

Effectively, federal U.S. law on age discrimination in 2005 had regressed to a point that, as we shall see, English anti-discrimination law had reached back in 1982 but from which it had subsequently moved on.

This was confirmed in the very recent case of *Kentucky Retirement Systems v. E.E.O.C.*¹⁷³ It concerned a disability retirement plan that imputed years of service to 'hazardous position' employees who were disabled before reaching the age of retirement. Under the retirement plan, an employee could retire and receive benefits either upon turning 55 or after 20 years of

¹⁷⁰ *Id.* at 1540.

¹⁷¹ [1982] I.R.L.R. 10 (E.A.T.). *See infra* n. 200.

¹⁷² *Supra* n. 167 at 1545.

¹⁷³ 128 S. Ct. 2361 (2008).

service. If an employee became disabled before he was eligible, he would have years of service imputed to him so that he would become eligible for retirement benefits. However, an employee who became disabled after 55 – like the complainant – was not eligible for imputed years of service. Employee benefits were calculated by multiplying a percentage of the employee’s pay by the years of service. Thus the complainant had been treated less favorably solely because he had become disabled after reaching the age of 55.

The plaintiff filed a claim with the E.E.O.C., which brought suit against Kentucky Retirement Systems. The E.E.O.C. alleged disparate treatment on the grounds that the retirement plan was facially discriminatory based on age. Citing *Hazen Paper*, the Court said that a plaintiff alleging disparate treatment cannot succeed unless the employee’s age actually played a role in the employer’s decision-making process. Since the Court held that the differential treatment was not motivated by age-related stereotyping, the Kentucky retirement plan was not contrary to the A.D.E.A. The narrowness of the Court’s approach was demonstrated by the fact that the possibility that these facts might found a disparate impact claim was not even considered.¹⁷⁴

IV. DEVELOPING AGE DISCRIMINATION LAWS IN THE UNITED KINGDOM

The British Anti-Discrimination Law Template

The significance of the Civil Rights Act of 1964 was not limited to prohibiting the forms of discrimination set out explicitly in its text. Just as important is the fact that its terminology and structure effectively created a template for every subsequent statute aimed at eradicating some form of discrimination. Thus, when the A.D.E.A. was passed in 1967, it was – as has been shown – seen to be very much on all fours with the Civil Rights Act, save for the insertion of the word ‘age’ at appropriate points instead of race or sex.

¹⁷⁴ *Id.* at 2366.

As a much more limited measure than the ambitious Civil Rights Act, the British Sex Discrimination Act 1975 could not have been expected to perform the equivalent function of setting out the template for future anti-discrimination laws in the U.K.. Nevertheless, the subsequent thirty years has demonstrated that this is – more or less – precisely what it did. The template for British anti-discrimination law which that Act created has – as we have seen – four, related elements:

- (i) the establishment of a public agency (in that case, the Equal Opportunities Commission) responsible for the oversight and enforcement of the legislation;
- (ii) a defense of ‘genuine occupational qualification’ focused on the objective requirements for a job and not on the state of mind of the employer;
- (iii) a definition of discrimination as ‘less favourable’ treatment; and
- (iv) a recognition and definition of ‘indirect’ discrimination as well as of direct discrimination and victimisation.

The approach piloted by the Sex Discrimination Act 1975 proved sufficiently successful for the subsequent Race Relations Act 1976 to copy most of it almost verbatim.¹⁷⁵ Indeed, over twenty years later it could be said, without fear of contradiction, that the template had in the meantime undergone only relatively minor legislative updates.¹⁷⁶ This is not to say that the British template for dealing with discrimination claims proved to be perfect. On

¹⁷⁵ Thereby repealing the Race Relations Act 1968. The new agency operating under the aegis of this Act was called the Race Relations Commission: see Race Relations Act 1976, § 43.

¹⁷⁶ See Evelyn Ellis, *The Development of Sex Discrimination Law: From Aspiration to Reality*, 18 *Holdsworth L. Rev.* 139, 147 (1997).

the contrary, each of these elements was afflicted with an inherent structural defect, which will now be addressed.¹⁷⁷

There were, for example, significant problems with some of the agencies involved in monitoring and upholding the anti-discrimination legislation. The Commission for Racial Equality (C.R.E.), which was responsible for upholding the race relations legislation,¹⁷⁸ had an extremely checkered history. Beset by internal feuding, its record was less than impressive to say the least. By contrast, however, the Equal Opportunities Commission, responsible for the sex discrimination legislation,¹⁷⁹ developed a reputation for thoughtful and innovative work,¹⁸⁰ and proved in fact to be the principal player in the subsequent development of age discrimination laws in the U.K. Partly to eradicate the problems besetting the C.R.E. and partly to overcome the fragmentation of the enforcement of anti-discrimination laws, the C.R.E. and E.O.C. were combined – together with the Disability Rights Commission¹⁸¹ – into one body, known as the Equality and Human Rights Commission (E.H.R.C.),¹⁸² which thus more closely resembles the E.E.O.C.

So far as the defense of ‘genuine occupational qualification’ is concerned, although it has been established that it is focused on the objective requirements for a job and not on the state of mind of the employer, the definition has proved defective in failing to identify from whose point of view these requirements are to be judged. It could simply be a matter for the employer, which might lead to idiosyncratic design of work practices which then make gender a job requirement.¹⁸³ On the other hand, it could reflect the manner in which current employees have chosen to go about doing the job in practice. In *Sisley v. Britannia*

¹⁷⁷ See Gerald P. McGinley, *Judicial Approaches to Sex Discrimination in the United States and the United Kingdom – A Comparative Study*, 49 Mod. L. Rev. 413 (1986).

¹⁷⁸ Race Relations Act 1976, § 43.

¹⁷⁹ Sex Discrimination Act 1975, § 53.

¹⁸⁰ A. Lester, *Discrimination: What Can Lawyers Learn from History?*, Pub. L. No. 224, 230 (1994).

¹⁸¹ This had been set up under the Disability Discrimination Act 1995.

¹⁸² Equality Act 2006.

¹⁸³ *Timex Corporation v. Hodgson* [1982] I.C.R. 63 (E.A.T.).

Security Systems Ltd. an employer's refusal to hire a man as a security officer was upheld by the Employment Appeal Tribunal (E.A.T.)¹⁸⁴ on the grounds that the current employees – all women – were in the habit of removing their uniforms and resting on a bed in their underwear during quiet periods on a long shift.¹⁸⁵ Although it would have been possible to change into other clothes, or simply to continue to wear the uniform while resting (since the employer had not required that outer wear remain uncrumpled) these possibilities appear to have been overlooked. Alternatively, 'genuine occupational qualification' could be a matter of trying to second-guess what potential customers might prefer. *Wylie v. Dee & Co. (Menswear) Ltd.* involved the unsuccessful complaint of a woman who had been refused employment in a menswear shop on the grounds that she might have to take inside-leg measurements.¹⁸⁶ As David Pannick has pointed out, it appears that it was not necessary for a successful defense "for the employer to prove that men do or would so object, only that they 'might'."¹⁸⁷

By contrast, the definition of discrimination as 'less favourable' treatment looks unproblematic. Yet the use of the comparative adverb 'less' was soon taken to mean that complainants had to compare their position to that of someone from (in sex discrimination cases) the opposite sex, or (in race relations cases) a different racial, ethnic or national group. This has regularly caused considerable difficulties. Perhaps the most notorious case occurred when a pregnant woman brought a claim of discrimination. In *Turley v. Allders Department Stores Ltd.* it was held that, because men do not get pregnant, there was no appropriate comparator.¹⁸⁸ Thus a majority of the Employment Appeal Tribunal – a specialist appellate employment law court –

¹⁸⁴ The Employment Appeal Tribunal is, as its name implies, an appellate court (chaired by a High Court judge, flanked by one representative each from both employers' organizations and trades unions) which deals with appeals over employment-related disputes.

¹⁸⁵ [1983] I.C.R. 683 (E.A.T.).

¹⁸⁶ [1978] I.R.L.R. 103.

¹⁸⁷ David Pannick, *When is Sex a Genuine Occupational Occupation?*, 4 Oxford J. Leg. Stud. 198, 213 (1984).

¹⁸⁸ *Turley v. Allders Department Stores Ltd.* [1980] I.C.R. 66 (E.A.T.).

declared that: “When she is pregnant a woman is no longer just a woman. She is a woman, as the Authorised Version of the Bible accurately puts it, with child, and there is no masculine equivalent.”¹⁸⁹ Without an equivalent man with whom to compare her treatment, it was impossible for the complainant to show that hers had been less favourable and her claim was therefore rejected.¹⁹⁰

Thankfully, that view was soon abandoned by the E.A.T. itself¹⁹¹ and has now been replaced by a rule that any unfavorable treatment of a woman because she is pregnant or because of the consequences of pregnancy results from a uniquely female factor and therefore automatically constitutes direct discrimination.¹⁹² Yet that is clearly not what the text of the legislation itself dictated. It is, in fact, a conclusion which has been reached only because of a judgment of the European Court of Justice¹⁹³ which, under European Union law,¹⁹⁴ was able effectively to demand that the British courts relinquish “any pretence of refusing to distort the words of the statute.”¹⁹⁵ As we shall see, this is by no means the only instance where a defect in British anti-discrimination law has been repaired by European jurisprudence.

It is for the complainant, not the tribunal or the defendant, to choose an appropriate comparator.¹⁹⁶ One problem inherent in

¹⁸⁹ *Id.* at 70 *per* Bristow J.

¹⁹⁰ There is an American analogue to *Turley* in the form of *General Electric Co. v. Gilbert* 429 U.S. 125 (1976), where the U.S. Supreme Court held that a health insurance plan which provided for all disabilities except pregnancy was not based on gender. This was, the Court ruled, because both sexes were entitled to the same benefits; denying some women an additional benefit could not be discriminatory. The Court retreated somewhat from this position in *Nashville Gas Co. v. Satty* 434 U.S. 136 (1977), and the Pregnancy Discrimination Act 1978 was subsequently passed to make such treatment *prima facie* unlawful discrimination under Title VII.

¹⁹¹ *Hayes v. Malleable Working Mens Club* [1985] I.C.R. 703 (E.A.T.).

¹⁹² *Webb v. EMO Air Cargo (U.K.) Ltd. (No. 2)* [1995] I.R.L.R. 645 (H.L.).

¹⁹³ *Webb v. EMO Air Cargo (U.K.) Ltd.* [1994] I.R.L.R. 482 (E.C.J.).

¹⁹⁴ Equal Treatment Directive (76/207/EEC), Arts. 2(1), 5(1); Council Directive 92/85/EEC (Pregnant Workers Directive), Art. 10.

¹⁹⁵ Anne Morris, *The Death Throes of the Sick Man: Webb v. EMO Air Cargo (UK) Ltd (No 2)*, 5 *Web J. Curr. Leg. Issues* (1995).

¹⁹⁶ *Ainsworth v. Glass Tubes and Components Ltd.* [1977] I.R.L.R. 74 (E.A.T.).

the requirement for a comparator was avoided by the precise wording of the definition of discrimination which – taking the Sex Discrimination Act as the model for all the anti-discrimination legislation – is said to occur if a man treats a woman “less favourably than he treats *or would treat* a man” (emphasis added).¹⁹⁷ This means that a complainant does not have to point to a man who was actually in the same position and yet received more favourable treatment: demonstrating how a hypothetical man would likely have been treated will suffice. Of course, this is much easier to do when there are currently men in similar positions, even if those men cannot themselves be used as comparators,¹⁹⁸ or when a woman is replacing or being replaced by a man. Where the workforce has been effectively segmented, so that one department is staffed almost exclusively by men and another by women, it is much more difficult to show what treatment any hypothetical comparator might have received. This was highlighted by a long-running equal pay dispute within certain supermarkets where women staffing checkouts sought to be treated equally with men working in warehouses.¹⁹⁹ Ironically, such segmentation of the workforce may occur precisely because of the stereotyping which is arguably at the root of much unlawful discrimination, yet has the effect of potentially immunizing those guilty of perpetrating those stereotypes from any effective legal action. This clearly could have major implications in respect of potential age discrimination claims, with older and younger employees being effectively segregated into different sections of the workforce.

In a similar vein, the definition of ‘indirect discrimination’ turned out to be unduly restrictive. It will be recalled that the definition in section 1(1)(b) of the Sex Discrimination Act 1975 stipulated that:

¹⁹⁷ Sex Discrimination Act 1975, § 1(1)(a).

¹⁹⁸ See e.g. *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

¹⁹⁹ See *Pickstone v. Freemans plc* [1989] A.C. 66 (H.L.).

a person discriminates against a woman if . . . he applies to her a requirement or condition which he applies or would apply equally to a man but —

- (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
- (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
- (iii) which is to her detriment because she cannot comply with it.

As a result, it was held in *Francis v. British Airways Engineering Overhaul Ltd.*²⁰⁰ that an employer which drew up classifications of its workforce in such a way as to provide promotion opportunities for all sections except one dominated by women, it was held that those women could not succeed in a claim for sex discrimination because no requirement or condition had been imposed on them, as required by section 1(1)(b). The job just provided no opportunity for promotion; it was “simply a ‘dead end job’.”²⁰¹ Subsection (iii) exacerbated the difficulty. In *Watches of Switzerland v. Savell*,²⁰² a woman whose employer used mainly undisclosed, subjective criteria to decide upon promotions, had a her claim for sex discrimination rejected even though the tribunal which heard the claim agreed that she had been subjected to “unconscious bias”.²⁰³ Although she argued that the fact that the criteria had not been disclosed meant that she was unable to comply with them, the Employment Appeal Tribunal held that she was actually perfectly capable of complying: “there was nothing to indicate that she would fail to achieve promotion later because of her sex.”²⁰⁴ So subsection (iii) was inapplicable and her complaint failed.²⁰⁵

²⁰⁰ [1982] I.R.L.R. 10 (E.A.T.). Compare *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), *supra*. n. 167.

²⁰¹ *Id.* at 16.

²⁰² [1983] I.R.L.R. 141 (E.A.T.).

²⁰³ Decision of the industrial tribunal (at ¶ 55); quoted in *id.* at 147.

²⁰⁴ *Id.* at 149.

²⁰⁵ *Id.*

Again, both these interpretations have now been reversed because of the intervention of European Union law. A European Council Directive mandated a broader definition of indirect discrimination.²⁰⁶ Article 2(2) required Member States to give effect to a definition of indirect discrimination which applies “where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.” This resulted in the drafting of an amendment to the Sex Discrimination Act 1975.²⁰⁷ While the complainant still needs to demonstrate a detriment, there is no longer any requirement that she be unable to comply with the requirement imposed, and the nature of that “requirement or condition” has been relaxed to the much more general “provision, criterion or practice”.²⁰⁸ However, the ambit of this relaxed definition of indirect discrimination is restricted to discrimination at work or in vocational training.²⁰⁹ In all other areas, the original definition is still controlling.²¹⁰

Age Discrimination as Indirect Sex Discrimination

In addition to all these structural defects of the U.K.’s anti-discrimination law template, no legislation was forthcoming to prohibit age discrimination until 2006. Yet the efforts of the Equal Opportunities Commission meant that the concept of indirect sex discrimination came strongly to the fore as a workable proxy for age discrimination. The case that first demonstrated that this theory was viable was *Price v. Civil Service Commission*.²¹¹ Indeed, it raised such a novel issue that no cases at all were cited in the judgment. Supported by the E.O.C., the 35-year-old applicant, a married woman with children, had answered a

²⁰⁶ Council Directive 97/80/EC, December 15, 1997.

²⁰⁷ Sex Discrimination Act 1975, § 1(2), as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (S.I. 2006, No. 2660), regulation 3.

²⁰⁸ *Id.*

²⁰⁹ Sex Discrimination Act 1975, § 1(3).

²¹⁰ *Id.*

²¹¹ [1977] 1 W.L.R. 1417 (E.A.T.).

newspaper advertisement for candidates for the post of executive officer in the Civil Service. She was sent a booklet stating the conditions of appointment, one of which was that candidates should be “at least 17½ and under 28 years of age.” She complained to an industrial tribunal that the Civil Service Commission was unlawfully discriminating against her on the ground of her sex, contrary to section 1(1)(b) of the Sex Discrimination Act 1975, in that (a) the condition imposing an upper age limit of 28 was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so, and (b) she was herself unable to comply with it. The industrial tribunal dismissed the complaint on the ground that the phrase “can comply with it” in section 1(1)(b)(i) was to be strictly construed as meaning physically able to comply, and that since the total number of men and women in the population was not very different, it was impossible to say that the proportion of women who could comply with the age requirement was considerably smaller than the proportion of men.

On appeal, however, a majority of the Employment Appeal Tribunal held that “can” in section 1 (1)(b)(i) of the Sex Discrimination Act 1975 should not be construed so as to mean ‘theoretically possible’ but had to be interpreted in context to see whether the condition could be complied with in practice.²¹² Accordingly, the upper age limit of 28 had to be considered against the known fact that a considerable number of women aged between 25 and 35 were occupied rearing children. As a result, there were a certain number of women who could not comply with the condition because they were women.²¹³ However, the industrial tribunal which initially heard the case had not decided, as a matter of fact, whether that number was such that the proportion of women who could comply with the condition was “considerably smaller than the proportion of men who [could] comply with it” as required by the legislation. The Appeal Tribunal was therefore unable to reach a final determination of whether an instance of indirect sex discrimination had occurred, and instead remitted the case to be heard by a new tribunal with

²¹² *Id.* at 1421.

²¹³ *Id.* at 1422.

the express instruction that it decide this point.²¹⁴ Crucially, however, it suggested that it was likely that the appropriate ‘pool’ of women or men available for comparison was the number of *qualified* men and women rather than the total male and female population.²¹⁵

Price was given added weight by the decision of the E.A.T. two years later in *Steel v. Union of Post Office Workers*.²¹⁶ The complainant entered the employment of the Post Office in 1961 as a temporary, full-time post-woman. Before 1975 women could not attain permanent status. From September 1, 1975, in preparation for the coming into operation of the Sex Discrimination Act 1975, it was agreed with the union that thenceforth full-time post-women would be employed on the same terms and conditions as full-time postmen. In March 1976, the Post Office advertised a vacant ‘walk’²¹⁷ in the office in Newport where the complainant worked. In accordance with normal practice to allot walks by seniority, the vacant walk was allotted to a Mr. Moore, who had become a permanent full-time postman on July 9, 1973, and therefore had two more years’ seniority. The E.A.T. commented pointedly:

Though the effect of the agreement has been to eliminate it for the future, the form of the agreement is such that its effects will linger on for many years. Thus in any competition for a walk for some years to come the most mature post-woman will be at a disadvantage compared with comparatively youthful postmen whose seniority will be greater albeit that their total years of service are considerably less. The Post Office accepts that this

²¹⁴ *Id.* at 1422G.

²¹⁵ *Id.* at 1422G.

²¹⁶ [1978] 1 W.L.R. 64.

²¹⁷ “A postal walk is the name given to the arrangement or round according to which a particular delivery is made in a particular district, and is the way in which duties are allotted to individual postmen. Though the enjoyment of a particular walk does not bring with it, directly at least, any financial advantage, some walks are preferable to others and it is an undoubted advantage to be able to obtain the walk of one’s choice.” *Id.* at 66.

is the consequence of the agreement made with the union, but excuse themselves by saying that the results of which the complainant, and other women, complain flow from past acts of discrimination antedating the coming into effect of the Sex Discrimination Act 1975 ... In effect the attitude of the Post Office is the not uncommon one of supporting sex equality – but not yet. The attitude of the union is similar ... There is no doubt that the Sex Discrimination Act 1975 does not operate retrospectively, but some acts of discrimination may be of a continuing nature and it would seem to us to be in accordance with the spirit of the Act if it applied as far as possible to remove the continuing effects of past discrimination.²¹⁸

Steel thus raised similar issues to those dealt with in the U.S. Supreme Court case of *Albemarle Paper Co. v. Moody*²¹⁹ at the very time when the British Sex Discrimination Act 1975 was being drafted. This makes the effective locking-in of the effects of past discrimination, supposedly in order to meet the requirements of the respective anti-discrimination legislation, doubly ironic. In *Steel* the E.A.T. went on to hold that the requirement that postal walks were awarded according to seniority was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so, within the meaning of section 1(1)(b)(i) of the Act, and that the requirement was to the complainant's detriment within section 1(1)(b)(iii). Accordingly, unless the Post Office could show that the requirement was justifiable irrespective of sex, there had been an act of discrimination against the complainant.²²⁰ It dealt with this issue by going back to the U.S. Supreme Court case, which had acted as the catalyst for the prohibition of indirect sex

²¹⁸ *Id.* at 67G.

²¹⁹ 422 U.S. 405 (1975); *see supra* n. 104.

²²⁰ *Id.* at 68B, E-G.

discrimination in the United Kingdom, namely *Griggs v. Duke Power Co.*:²²¹

Although the terms of the Act there in question are different from those of the Sex Discrimination Act 1975, it seems to us that the approach adopted by the court is relevant. In other words a practice which would otherwise be discriminatory, which is the case here, is not to be licensed unless it can be shown to be justifiable, and it cannot be justifiable unless its discriminatory effect is justified by the need – not the convenience – of the business or enterprise.²²²

Price and Steel were quite revolutionary decisions in their day. Nevertheless, their implications were apparently overlooked less than a decade later. In *Huppert v. University Grants Committee and University of Cambridge*,²²³ another case supported by the E.O.C., a 39-year-old woman who had had her job application rejected by the University of Cambridge because she was over 35 complained that she had been the victim of indirect sex discrimination. The job had been advertised because money had been made available to public universities throughout the U.K. by their central funding body, the (now-defunct) University Grants Committee (U.G.C.), which had specified that it be used for ‘new blood’ appointments of junior faculty aged 35 or below. Ms. Huppert was clearly qualified for the job in question because, after the initiation of proceedings, the University decided to appoint her in any event and the case against it was therefore dropped. The case against the U.G.C. proceeded. The industrial tribunal ruled that the fact that the funding policy was so inflexible as to permit no exceptions for female applicants who could show that their career had been delayed while they had a family meant that this was indeed a case of unjustified indirect sex discrimination.

²²¹ 401 U.S. 424. (1971).

²²² [1978] 1 W.L.R. 64, 71.

²²³ 3 *Equal Opportunities Rev.* 38 (1986).

Clearly neither *Price* nor *Huppert* involved any intent to discriminate against women, while the facts of *Steel* arose precisely because the employer was seeking (albeit half-heartedly) to avoid such discrimination. Yet the claimants were all successful in showing acts of indirect sex discrimination, emphasizing not only that indirect age discrimination focuses on the consequences rather than on the state of mind of the defendant, but also that such indirect sex discrimination could be an effective proxy for age discrimination claims. Yet the case that really brought to the fore the full implications of treating some instances of age discrimination as indirect sex discrimination was brought by another E.O.C.-supported applicant, Miss Helen Marshall. *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)* involved litigation which ran from June 1980 into the early 1990s.²²⁴ It arose after Miss Marshall, a consultant surgeon,²²⁵ had been forced to retire by the local health authority which employed her. It was common ground, so far as both British and European law were concerned, that this meant that she had been dismissed from her employment. The health authority had a policy of requiring its employees to retire when social security pensions become payable, and Miss Marshall had already been retained beyond this point.²²⁶ At the time, the social security pensionable age was set at age 65 for men, but at age 60 for women. Miss Marshall felt that she continued to be highly competent and, indeed, the health authority had already exercised its discretion – as its own policy permitted – to allow her to remain in employment for two years beyond the normal, mandatory retirement age. It therefore seemed to her that her enforced retirement was a simple case of age discrimination, but the law at the time did not recognize such a form of discrimination as being unlawful. Instead she brought a claim of indirect sex discrimination, essentially alleging that a facially neutral requirement – namely retirement at pensionable age – had

²²⁴ [1986] Q.B. 401 (E.C.J.).

²²⁵ In the U.K., medical consultants are known as ‘Mr.’, ‘Mrs.’, ‘Miss’ or ‘Ms’ and not as ‘Dr.’. The same is true of dentists.

²²⁶ There neither was nor is a legally-mandated retirement age: social security pensions are simply deferred while someone continues in employment beyond regular retirement age.

been applied to her which had caused her a disadvantage. It might be said that she had been the victim of both institutional sexism and institutional ageism.

Yet even her claim of indirect sex discrimination faced two serious obstacles under English law. First, there was the limb of the indirect discrimination test which required that the requirement or condition be “such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it. . . .”²²⁷ In fact, women could actually comply with the requirement to retire at pensionable age just as easily as men. Since she could not satisfy the demands of this statutory provision, domestic British legislation was unable to assist Miss Marshall’s claim. As explained above,²²⁸ it was not until 2001 that this defect in the legislation was rectified (and, even then, only in cases relating to employment or vocational training) to have the effect that the criterion need only disadvantage a substantially higher proportion of women than of men.²²⁹ In any event, the Sex Discrimination Act 1975 also specifically barred claims arising out of a “provision in relation to . . . retirement.”²³⁰ English law was therefore again unable to assist her. Instead, Miss Marshall attempted to rely directly on a Directive of the European Union.²³¹

Article 1(1) of Council Directive 76/207/E.E.C. provided that:

The purpose of this directive is to put into effect in the member states the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working

²²⁷ Sex Discrimination Act 1975, § 1(1)(b)(i).

²²⁸ *Supra* n. 207.

²²⁹ Sex Discrimination Act 1975, § 1(2), as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (S.I. 2006, No. 2660), regulation 3.

²³⁰ Sex Discrimination Act 1975, § 6(4).

²³¹ Council Directive 76/207/E.E.C.

conditions and . . . social security. This principle is hereinafter referred to as ‘the principle of equal treatment.’

Article 5(1) of the Directive provided that: “Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.” Article 5(2) continued: “To this end, member states shall take the measures necessary to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished. . . .”

While this Directive undoubtedly covered the issue at hand,²³² there was another problem. As an instrument of public international law, European Directives are addressed only to Member States and are therefore enforceable by one country – or, more commonly, by the European Commission acting on behalf of the Union as a whole – against the country allegedly in default. While a nation may be in default of its international obligations imposed by such a Directive, the latter confers no rights on individuals. In *Marshall*, however, the European Court of Justice, to which the English Court of Appeal had referred the case for a definitive ruling on European law, decided to take an innovative approach. In a decision which would undoubtedly be labeled ‘activist’ in the United States, it emphasized its own jurisprudence which had held that a Member State should not be able to take advantage of its own non-compliance with European law.²³³ Since the health authority was a public body,²³⁴ and the Directive was expressed in sufficiently “clear and unconditional” terms,²³⁵ it went on to hold that the Directive could override domestic English law and be enforced against the authority so as to enable Miss Marshall to obtain compensation.²³⁶ Public employers guilty

²³² [1986] Q.B. 401, ¶ 38.

²³³ *Id.* at ¶ 49.

²³⁴ *Id.* at ¶ 50.

²³⁵ *Id.* at ¶¶ 52–55.

²³⁶ *Id.* at ¶ 56.

of perpetrating age discrimination as a form of indirect sex discrimination could now be sued for so doing.

Essentially the converse issue arose in *Barber v. Guardian Royal Exchange*.²³⁷ The normal pensionable age for employees at Mr. Barber's place of work was 62 for men and 57 for women. The pension scheme provided, however, that all members of the pension fund could claim an immediate pension if they were 'retired' by their employer at any time during the seven years before they reached the relevant age. Mr. Barber was dismissed for redundancy at the age of 52. He was not granted an immediate pension, which was instead deferred until he turned 62. If Mr. Barber had been a woman aged 52, he would have received an immediate pension. The case had added poignancy because Mr. Barber died while the proceedings were in progress, and the case was continued by his widow. On another reference from the Court of Appeal, the European Court of Justice adopted reasoning very similar to that in *Marshall* to decide that discriminating between men and women by providing for pension benefits to be payable on retirement at different ages was unlawful.²³⁸

Until the judgment in *Barber*, it had been conventional in the United Kingdom for men to have a retirement age of 65 while women had a retirement age of 60. *Barber* suggested that this state of affairs needed revision, and the matter was given added urgency when the trustees of a pension scheme, established by a group of companies which had just gone out of business, sought direction from the English High Court as to how to distribute the assets of the fund.²³⁹ The High Court in turn referred the matter to the European Court of Justice, which held that from May 17, 1990 onwards, it was unlawful for male and female pension benefits to be provided at different retirement ages and that, until any scheme was amended to come into line with this ruling, male members of a pension scheme were entitled to be treated as if their normal retirement age was the same as that applicable to female members. In most cases this meant that a *de facto* common

²³⁷ [1991] 1 Q.B. 344 (E.C.J.).

²³⁸ *Id.* at ¶ 32.

²³⁹ *Coloroll Pension Trustees Ltd. v. Russell* [1995] I.C.R. 179 (E.C.R.).

pensionable age of 60 was introduced.²⁴⁰ Concerned that enabling men to take pensions several years earlier than had previously been the norm would cause an infeasible imbalance between those contributing to pension schemes through employment and those drawing benefits from them, the government introduced the Pensions Act 1995 to enable every scheme to equalize its pensionable ages, with such power of amendment backdated to May 17, 1990.²⁴¹ Most indeed took the opportunity not to reduce men's pensionable age to 60, but to raise women's pensionable age to 65.

The limits of viewing age discrimination as a form of indirect sex discrimination were demonstrated in *Secretary of State for Trade and Industry v. Rutherford (No 2)*.²⁴² The applicants were male employees dismissed by their respective employers when they were over 65. They were denied compensation in accordance with legislation that precluded such awards to those over pensionable age.²⁴³ They claimed that this meant that they were victims of indirect sex discrimination in that the upper age limit provisions had a disparate impact on men because (i) more men worked beyond the age of 65 than did women, (ii) that such a disparity could not be objectively justified, and (iii) that European Union law meant that these statutory bars to compensation should be ignored. On appeal, however, the House of Lords ruled that the claimants were seeking to use the wrong comparators. The right approach was to compare the position of the men in question with women in work who were also 65. On this basis, it could be seen that the statutory bar to compensation applied to both sexes equally and so there was no indirect sex discrimination.

From European Union to European Convention on Human Rights

As *Rutherford* illustrates, even after the changes to pensionable age were made, apparent disparities between the

²⁴⁰ *Id.*

²⁴¹ Pensions Act 1995, § 62, 63(7).

²⁴² [2006] I.C.R. 785 (H.L.).

²⁴³ Employment Rights Act 1996, § 109(1)(b), 156(1)(b).

sexes concerning other age-related entitlements continued to exercise the courts. Michael Matthews was 64 when, some time before the year 2000, he was refused a concessionary bus pass on the grounds that he was not of pensionable age. The pass would have been given to a woman. Finding European Union law unhelpful on this point because the latter dealt essentially with work-related matters, Matthews – backed on this occasion by the campaigning civil liberties group, Liberty – decided instead to make an application to the European Court of Human Rights.²⁴⁴ He alleged infringement of his rights under the European Convention on Human Rights, specifically Article 14 (the prohibition of discrimination) and Article 1 of the First Protocol to the Convention (the protection of property). When, at a preliminary hearing, the Court held the case admissible, the British government caved in and brought forward new legislation. “[I]t appeared likely that the government would lose a discrimination case before the European Court of Human Rights and it therefore decided to equalise the age of men’s eligibility with that of women.”²⁴⁵ The Travel Concessions (Eligibility) Act, containing just three sections, became law on February 26, 2002.

Human Rights Act 1998

The case of Michael Matthews was the precursor to another instrument in the delegitimization of age discrimination within the United Kingdom. In 1998 the U.K. Parliament had passed the Human Rights Act (H.R.A.), which incorporated the European Convention on Human Rights into English law. However, the H.R.A. did not take effect until October 2, 2000 and so came too late to assist Mr. Matthews. Whereas he had to go to the considerable difficulty – not to mention cost, defrayed in his case by Liberty – of lodging a complaint with the European Court of Human Rights in order to seek redress, anyone in the U.K.

²⁴⁴ See www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2000/bus-passes.shtml.

²⁴⁵ House of Commons Library Research Paper 01/80, October 30, 2001, www.parliament.uk/parliamentary_publications_and_archives/research_papers/research_papers_2001.cfm (last visited, Feb. 7, 2009).

wishing to bring a claim under the Convention on or after October 2, 2000 has been able to do so in the ordinary British courts.²⁴⁶

Nevertheless, the position regarding age discrimination was still by no means clear cut. Age discrimination is not mentioned explicitly in the Convention. Indeed, it is doubtful whether the concept was even contemplated at the time that the Convention was drafted, but what has come to be known in the United States as ‘originalism’ – a method of interpreting the Constitution or federal legislation which purports to give effect to the meaning that it was commonly thought to have at the time that it was passed – has never been the European style.²⁴⁷ On the contrary, the European Court of Justice has emphasized that “the Convention is a living instrument which ... must be interpreted in the light of present-day conditions.”²⁴⁸ So the absence of any express mention of age discrimination in the Convention is by no means fatal to its ability to assist those claiming that they have suffered such discrimination. As the Matthews case illustrated, for these purposes the most significant part of the Convention is to be found in Article 14 of the Convention, which says:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

²⁴⁶ Human Rights Act 1998, § 7, 8.

²⁴⁷ It is therefore somewhat ironic to read one of the most prominent advocates of originalism claim that it is a civil-law approach: see A. Scalia, ‘Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws’ in *A Matter of Interpretation: Federal Courts and the Law* ed. Amy Gutmann (Princeton: Princeton University Press, 1988). In fact, the civil-law dominated European Court of Human Rights has actively encouraged the practice of going beyond the formal rules to consider their indirect and practical effects. See, for example, *Adolf v. Austria* 4 E.H.R.R. 313 at ¶ 30 (1982); *Duinhof v. Netherlands* 13 E.H.R.R. 478 at ¶ 34 (1991).

²⁴⁸ *Tyrer v. U.K.* 2 E.H.R.R. 1 at ¶ 31 (1979–80).

The really important words in Article 14 for present purposes are the last three: “or other status.” The question that they posed was whether “other status” included age. Almost all the other categories listed in Article 14 concern ascribed or inherited characteristics rather than traits chosen voluntarily. On this basis age would appear to be covered, since it too is ascribed and is clearly not a product of choice. The inclusion of religion and political or other opinion, however, casts some doubt on this notion of “other status” as encompassing other forms of ascribed or inherited characteristics. This ambiguity was exacerbated by two other difficulties. The first is that, just like the Fourteenth Amendment of the U.S. Constitution, Article 14 is enforceable only against public bodies.²⁴⁹ The second is that, *unlike* the Fourteenth Amendment of the U.S. Constitution, Article 14 does not create a free-standing right. It can be invoked only when another Article in the Convention or in one of the Protocols is also implicated. (This was the reason why Mr. Matthews had to invoke Article 1 of the First Protocol in his claim regarding a concessionary bus pass.)

Nevertheless, there was a considerable body of opinion which took the view that age discrimination was indeed caught by Article 14. In the month that the Human Rights Act came into force, the British Medical Association (B.M.A.) – the body which represents doctors in the U.K. – counseled those working in the National Health Service – the name for the socialized healthcare system in the U.K. – that:

A ‘blanket ban’ on providing certain treatments on the ground of age, for example, may contravene patients’ right to be free from torture, inhuman or degrading treatment (Article 3) and also their right to respect for private and family life (Article 8). ... An example of a breach of Article 14 could be rationing which appears solely based on age rather than evidence of effectiveness and benefit for the individual. Age discrimination falls within the ambit of Article 14, even though it is not mentioned

²⁴⁹ Human Rights Act 1998, § 6.

explicitly, because the list in Article 14 is not exhaustive and includes “other status”. Clinical indicators demonstrating that older people in general benefit less from a certain treatment may not be accepted as a justification if such arguments are applied in a blanket way rather than treatment decisions being based on individual assessment. It is very unlikely, however, that health authorities and individual doctors could be seen as obliged to provide futile, ineffective or unproven treatment. It is important, therefore, that attention is paid to the individual circumstances of each case and the requirements of the individual patient.²⁵⁰

In a Parliamentary Written Answer on precisely this issue, the Parliamentary Under-Secretary of State at the Department of Health, Lord Hunt of King’s Heath, accepted that Article 14 might outlaw such age discrimination, but refused to be definitively drawn on that point.²⁵¹ However, one of the most important features of both the B.M.A.’s advice and Parliamentary debate is that, since the Convention is to be treated as a ‘living document,’ once a significant body of individuals come to believe that Article 14 prohibits discrimination based on age, then that actually becomes the true interpretation.

Direct Discrimination Revisited

Gerald McGinley’s gloomy prediction “that only the grosser forms of discrimination will be caught by the British Acts”²⁵² has thus turned out to be embarrassingly far off the mark. His further claim that “the United States approach is more likely to catch the subtler and more pervasive forms of discrimination in

²⁵⁰See

www.bma.org.uk/ap.nsf/Content/HumanRightsAct~relevant~article14.

²⁵¹ *Hansard* H.L. vol. 622, col. WA163 (March 1, 2001).

²⁵² Gerald P. McGinley, *Judicial Approaches to Sex Discrimination in the United States and United Kingdom – A Comparative Study*, 49 *Mod. L. Rev.* 413, 444 (1986).

the market place than will the British²⁵³ has largely proved to have got things the wrong way round. Strangely for an article published in the mid-1980s, McGinley made no mention at all of the *Marshall* litigation and relied far too heavily on data which were already out of date by the time of publication. Indeed, the tale of anti-discrimination law in the United Kingdom still had one more twist to come before age discrimination was prohibited.

The combination of repeated focus on indirect discrimination, greater exposure to European legal reasoning and the embracing of the European Convention on Human Rights eventually led to a fundamental reappraisal even of the hitherto unproblematic notion of direct discrimination. While the role of the decision-maker's state of mind so far as indirect discrimination had always been considered irrelevant, direct discrimination had always been considered an intentional wrong. This position had seemed to follow naturally from the fact that the U.K. expressly based its template for anti-discrimination law on both the Civil Rights Act of 1964 and on the judgment of the U.S. Supreme Court in *Griggs v. Duke Power Co.* In *Griggs* it was, after all, accepted that the Supreme Court first had to determine whether the employer's policy had been adopted with an intent to discriminate against Negroes. It held, agreeing with the Court of Appeals, that there had been no such intent and so there could be no question of disparate treatment.²⁵⁴ Only then did the question of disparate treatment enter into the equation. The Supreme Court clearly confirmed this approach when it insisted on looking into the motivation of the defendant employer in both *Hazen Paper Company v. Biggins*²⁵⁵ and *Kentucky Retirement Systems v. E.E.O.C.*²⁵⁶

Yet despite the fact that the U.K. based its template for anti-discrimination law federal U.S. law, the application of that template subsequently created a momentum of its own which, with considerable assistance from European institutions, took British law much further. By 2000 it had reached the point where

²⁵³ *Id.* at 445.

²⁵⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

²⁵⁵ 113 S. Ct. 1701 (1993); *supra* n. 161.

²⁵⁶ 128 S. Ct. 2361 (2008); *supra* n. 173.

it could be asserted without fear of contradiction that even direct discrimination need not be intentional. This was confirmed, by a majority of 4–1, in the House of Lords in a case concerning alleged direct racial discrimination, *Nagarajan v. London Regional Transport*.²⁵⁷ Lord Nicholls of Birkenhead explained:

in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? . . . Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances. The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination . . . as distinct from indirect discrimination . . ., the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negated by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign. For instance, he may have believed that the applicant would not fit in, or that other employees might make the applicant's life a misery. If racial grounds were the

²⁵⁷ [2000] 1 A.C. 501.

reason for the less favourable treatment, direct discrimination . . . is established.²⁵⁸

Since the framing of direct discrimination in every U.K. anti-discrimination law instrument is virtually identical, it is clear that this approach is to be applied to all types of prohibited discrimination, even to age discrimination, which only became unlawful six years after *Nagarajan* was decided. It does not matter whether less favourable treatment occurs directly or indirectly, nor is it material what motivated that treatment. The relevant issues relate to conduct, not state of mind, and must be judged objectively in terms of their consequences. As Lord Browne-Wilkinson pointed out in his dissent in *Nagarajan*, this means that the perpetration of unlawful discrimination under English law has become “something akin to strict liability. . . .”²⁵⁹

In an article published in 1985, Steven Willborn argued that “Title VII has spawned two models of discrimination, but only one theory.”²⁶⁰ His two models were disparate treatment and disparate impact. His complaint was that, while the disparate treatment model could be explained on the basis that it is both immoral and uneconomic, the disparate impact model had suffered from a “theoretical vacuum”²⁶¹ which had led to inconsistencies in courts’ reasoning in applying it. Unfortunately, Willborn attempted to fill this vacuum by recourse to dubious economic analysis, attributing disparate impact discrimination simply to market imperfections.²⁶² He labeled his view the ‘statistical discrimination’ theory.²⁶³ But his whole analysis suffered from a fundamental flaw. He insisted on seeing both forms of discrimination purely from the point of view of the decision-maker.

As this discussion has shown, the history of anti-discrimination law in the United Kingdom has involved its

²⁵⁸ *Id.* at 511–2.

²⁵⁹ [2000] 1 A.C. 501, 510.

²⁶⁰ Steven L. Willborn, *The Disparate Impact Model and Discrimination: Theory and Limits*, 34 *Am. U. L. Rev.* 799, 800 (1984–85).

²⁶¹ *Id.* at 801.

²⁶² *Id.* at 814, 818.

²⁶³ *Id.* at 814.

moving from a position where discrimination involved the application of good taste – judged from the point of view of the decision-maker – to a point where it is presumptively unlawful – judged objectively according to the consequences on those affected by the decisions taken. As the Constitutional Court of South Africa put it in *The City Council of Pretoria v. Walker*,²⁶⁴ “The inclusion of both direct and indirect discrimination within the ambit of the prohibition ... evinces a concern for the consequences rather than the form of conduct.” In other words, both direct and indirect discrimination in the United Kingdom (and often in other jurisdictions too) share the *same* theoretical underpinning. This is a rights-based approach: every person simply has the right not to be subjected to unjustified discrimination. Seen in this light, it was purely a matter of time before age discrimination was also finally made unlawful in its own right.

V. AGE DISCRIMINATION LAW IN THE UNITED KINGDOM

Employment Equality (Age) Regulations 2006

In 1995, one American asked whether it was now time for the United Kingdom to follow the United States in enacting age discrimination legislation.²⁶⁵ He answered in the affirmative and commented that: “because of the United Kingdom’s peculiar role in the European Union, it may choose not to follow the E.U.’s lead in the realm of social and economic legislation. This may be a competing or a cooperative force towards adoption of a statute such as the A.D.E.A....”²⁶⁶ In the event, and as the preceding historical account suggests, he could scarcely have turned out to be more wrong. As already noted, age discrimination became definitively unlawful within the United Kingdom only on October

²⁶⁴ (1998) 3 S.A. 24 at ¶ 31. See *supra* n. 115.

²⁶⁵ Bryan D. Glass, *The British Resistance to Age Discrimination Legislation: Is it Time to Follow the U.S. Example?*, 16 *Comp. Lab. L.J.* 491 (1995).

²⁶⁶ *Id.* at 536.

1st, 2006,²⁶⁷ when it put into practice a new E.U. Equal Treatment Directive which mandated such regulations.²⁶⁸

Six months later, 972 claims had been lodged with employment tribunals.²⁶⁹ This compared with 28,153 claims of sex discrimination; 3,780 of racial discrimination; 5,533 of disability discrimination; 648 of religious discrimination; and 470 claims of discrimination on grounds of sexual orientation.²⁷⁰ Age discrimination claims thus made up 2.46% of the total number of discrimination claims during that period,²⁷¹ while claims of racial discrimination made up 9.56%, sex discrimination 71.17% and disability discrimination 13.99%. In the U.S., charges of age discrimination filed with the E.E.O.C. during the whole of 2006 represented 21.8% of all complaints of discrimination (as compared to 35.9% of claims relating to racial discrimination, 30.7% being of sex discrimination, and 20.6% of disability discrimination).²⁷² Although none of the seventeen cases which proceeded to a full hearing within that very short time-frame actually resulted in success for the claimant,²⁷³ age discrimination claims were still very much in their infancy in the U.K.. Such claims can certainly be expected to rise both in absolute terms and relative to other types of discrimination claims.

²⁶⁷ S.I. 2006, No. 1031. The equivalent regulations for Northern Ireland are the Employment Equality (Age) Regulations (Northern Ireland) 2006 (S.I. 2006, No. 261). Although, as their name implies, both sets of Regulations are forms of secondary legislation, they have exactly the same force of law as an Act of Parliament. The reason for their being issued as Regulations is simply that section 2(2) of the European Communities Act 1972 provides for this as a quick means of passing laws which are intended to comply with European Directives.

²⁶⁸ Council Directive 2000/78/EC.

²⁶⁹ Employment Tribunal Service (E.T.S.), *Employment Tribunal and EAT Statistics (GB): 1 April 2006 to 31 March 2007* (London: H.M.S.O., 2007) p. 2.

²⁷⁰ *Id.*

²⁷¹ Note that employment tribunals hear many claims which do not allege any form of unlawful discrimination, such as claims of unfair dismissal or of unauthorized deductions from wages.

²⁷² E.E.O.C., *Charge Statistics FY 1997 Through FY 2007*, <http://www.eeoc.gov/stats/charges.html>.

²⁷³ E.T.S., *supra* n. 269 at 3. This contrasts with 56 claims which reached a settlement after conciliation, and a further 51 claims which were withdrawn for unspecified reasons.

Indeed, the first high-profile case has already been settled: Selina Scott, a 57-year-old nationally-known television newsreader, has recently received over £250,000 as part of an out-of-court settlement after the network that had apparently lined her up to provide maternity cover for the regular presenter – but which then subsequently overlooked her in favor of two other presenters, aged 28 and 32 respectively – apologized and caved in to her claim that the reason for her non-appointment was her age.²⁷⁴ Moreover, there are predictions that the current economic crisis will lead to a mushrooming of age discrimination claims over the next year or so unless businesses are careful in developing appropriate criteria for selecting employees for redundancy.²⁷⁵

There are significant differences between the British Employment Equality (Age) Regulations 2006 and the American A.D.E.A., even though they are both said to apply only to work-related issues.²⁷⁶ For example, the British Regulations cover employment agencies,²⁷⁷ education and training organizations,²⁷⁸ institutions of further and higher education,²⁷⁹ bodies that award or certify qualifications,²⁸⁰ trade or business organizations²⁸¹ in addition to potential,²⁸² actual²⁸³ or former²⁸⁴ employers (and no matter whether in the private or public sectors). In accordance with the overall anti-discrimination model, the Regulations

²⁷⁴ Urme Khan, *Selina Scott Reaches Six Figure Settlement with Channel Five over Age Discrimination*, Daily Telegraph December 5, 2008.

²⁷⁵ Rosie Murray-West, *Age Discrimination Claims to Rise as Redundancies Soar*, Daily Telegraph (December 29, 2008).

²⁷⁶ The Employment Equality (Age) (Amendment No. 2) Regulations 2006 (S.I. 2006, No. 2931) extend the application of the Regulations to occupational pension schemes.

²⁷⁷ Employment Equality (Age) Regulations 2006, regulation 21, www.ofmdfmi.gov.uk/draft_employment_equality_age_regulations-2.pdf, (last visited Feb. 7, 2009).

²⁷⁸ *Id.*, regulation 20.

²⁷⁹ *Id.*, regulation 23.

²⁸⁰ *Id.*, regulation 19.

²⁸¹ *Id.*, regulation 18.

²⁸² *Id.*, regulation 7.

²⁸³ *Id.*

²⁸⁴ *Id.*, regulation 24.

prohibit both direct and indirect age discrimination,²⁸⁵ as well as victimisation²⁸⁶ and the giving of instructions to discriminate.²⁸⁷ Harassment on the grounds of age is also made unlawful,²⁸⁸ as is aiding an act of discrimination.²⁸⁹ Employers can be vicariously liable.²⁹⁰ The standard affirmative defense of genuine occupational requirement is also available,²⁹¹ and again requires objective justification rather than a subjectively benevolent motive.

Reflecting some of the case law already discussed regarding indirect discrimination and the Human Rights Act, the Regulations also mandate employers to consider applications from employees who wish to continue working beyond the otherwise standard retirement age.²⁹² Nor is this a mere formality to which employers need pay only lip-service. The procedure which must be followed in order for an employer to fulfill the requirement to consider such an application is set out in considerable detail.²⁹³ However, the Regulations do explicitly permit employers to set a default retirement age, so long as it is set at age 65 or above.²⁹⁴ It therefore remains the position that employees will have to show a good reason for rebutting the presumption that they will retire at such age rather than employers' having to explain in each case why forced retirement is appropriate.

A challenge brought under E.U. law to the very concept of mandatory retirement ages, alleging that they conflict with the requirements of the new Equal Treatment Directive,²⁹⁵ was

²⁸⁵ *Id.*, regulation 3(1).

²⁸⁶ *Id.*, regulation 4.

²⁸⁷ *Id.*, regulation 5.

²⁸⁸ *Id.*, regulation 6.

²⁸⁹ *Id.*, regulation 26.

²⁹⁰ *Id.*, regulation 25.

²⁹¹ *Id.*, regulation 8.

²⁹² *Id.*, regulation 47.

²⁹³ *Id.*, schedule 6.

²⁹⁴ *Id.*, regulation 30.

²⁹⁵ 2000/78/EC. This Directive does not cover sex or racial discrimination, already covered by the Equal Treatment Directive (76/207/EEC), but applies to religion or belief, disability, age or sexual orientation, as regards access to employment or occupation and membership of certain organizations.

recently brought before the European Court of Justice in a Spanish case, *Felix Palacios De La Villa v. Cortefiel Servicios SA*.²⁹⁶ That challenge was, however, unsuccessful because the Court held that Spain's default retirement age of 65 does not go beyond what is appropriate and necessary to achieve the legitimate aim of reducing unemployment.²⁹⁷ Whether this conclusion is really sustainable is, however, open to doubt since the policy merely means swapping one person in employment for another or, as it has been described in the American context, "the shifting of the problem of insufficient jobs from one age group to another."²⁹⁸ In any event, it remains unclear whether this judgment is applicable to the United Kingdom, since the U.K. government has never undertaken the sort of detailed analysis of the labor market that the Spanish government had done before introducing its default retirement age.²⁹⁹ Indeed, the only official justification proffered for allowing employers to continue to impose their own mandatory retirement ages does seem quite weak:

Whilst an increasing number of employers are able to organise their business around the best practice of having no set retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily. This is our primary reason for setting the default retirement age.³⁰⁰

²⁹⁶ C-411/05, [2007] E.C.R. I-8531.

²⁹⁷ *Id.* at ¶ 58–75. The relationship between Directive 2000/78/EC and the Employment Equality (Age) Regulations 2006 reflects the fact that the European Court of Justice has used the terms 'proportionate' and 'appropriate and necessary' interchangeably. Thus Article 6(1)(a) of the Directive talks of justifiable means being "appropriate and necessary," whereas regulation 3(1) of the Regulations prefers the epithet "proportionate".

²⁹⁸ Howard C. Eglit, *Is Compulsory Retirement Constitutional?*, 1 Civ. Lib. Rev. 87, 92 (1974).

²⁹⁹ E.U. law operates what is called a 'margin of appreciation,' whereby it is permissible for the same over-arching rules to be implemented slightly differently in each Member State so as to accord with local customs, traditions and legal principles. *See e.g.* Case C-331/88 *R v. Minister for Agriculture, Fisheries & Food, ex parte Fedesa* [1990] E.C.R. 1–4023 at ¶ 13.

³⁰⁰ Department of Trade & Industry, *Equality and Diversity: Coming of*

An English case on much the same point, brought by the charity Age Concern, therefore remains on the Court's docket awaiting resolution, although the Advocate-General's recent opinion suggest that the case is likely to be decided in the same way as *Felix Palacios*.³⁰¹

Reverse Age Discrimination

There are currently thought to be several hundred cases which have been stayed pending the final judgment of the European Court in the Age Concern case. But disputes over pensions under the Regulations have raised other issues too. In *Bloxham v. Freshfields Bruckhaus Deringer*,³⁰² the defendant international law firm had been paying partners' pensions out of the firm's annual profits. Such payments were subject to a cap of 10% of total annual profits. This provoked a growing perception of "intergenerational unfairness."³⁰³ As the ratio of retired partners to younger, active partners grew, the latter saw an ever greater proportion of the firm's profits being used to pay for retired partners' pensions while they themselves faced the prospect of the value of their own pensions being eroded because the expansion of the firm meant that the cap would soon come into play.³⁰⁴

After much consultation, Freshfields replaced the scheme with a less generous arrangement, which came into force in May 2006. Under transitional arrangements, partners over 50 could retire under the old scheme provided they did so before 31 October 2006. Those retiring between the ages of 50 and 54 would, however, receive a reduced pension. The complainant,

Age – Consultation on the draft Employment Equality (Age) Regulations 2006 (London: H.M.S.O., 2005) at ¶ 6.1.14.

³⁰¹ *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07: opinion of Advocate-General delivered September 23, 2008.

³⁰² ET/2205086/06 (unreported), judgment given October 9, 2007.

³⁰³ *Id.* at ¶ 120.

³⁰⁴ *Id.* at ¶ 130(1).

Peter Bloxham, former head of insolvency at the firm, had planned to retire at age 55 in March 2007, but decided instead to retire on 31 October 2006 at age 54 in order to retain the benefits under the original scheme, albeit that his pension was then subject to the stipulated reduction of 20%. He argued that this amounted to direct age discrimination. The employment tribunal which heard the case agreed,³⁰⁵ but held that it was objectively justified. The attempt to provide a more financially sustainable pension scheme that reduced the intergenerational unfairness on younger partners was a legitimate aim,³⁰⁶ while the 20% reduction of Mr. Bloxham's pension was entirely proportionate to that aim.³⁰⁷ The tribunal effectively decided that, in order to eliminate a serious form of age discrimination of long standing, it will sometimes be necessary to treat others less favourably. To have held otherwise would have prevented necessary and worthwhile reform. Indeed, Freshfields had consulted widely³⁰⁸ and taken expert advice,³⁰⁹ yet no less discriminatory solution could be conceived.³¹⁰ Moreover, those affected were partners with a direct ability to influence the decision-making processes of the firm, and so were hardly in the position of junior employees with little or no voice in the way that it operated.

Bloxham has echoes of *O'Connor v. Consolidated Coin Caterers Co.*,³¹¹ since both cases involve one person over 40 seeking to show that he has been the victim of age discrimination because he has been treated less favorably than another person over 40. Just as in the U.S., it is clear that British age discrimination law recognizes such claims and does not require that the comparator be someone aged under 40. Indeed, U.K. law goes much further. The protection from age discrimination is not restricted to those over 40. In fact, there is absolutely no minimum age at which age discrimination may be successfully claimed. In answer to the question that Representative Celler

³⁰⁵ *Id.* at ¶ 94, 96.

³⁰⁶ *Id.* at ¶ 124.

³⁰⁷ *Id.* at ¶ 130.

³⁰⁸ *Id.* at ¶¶ 35–38.

³⁰⁹ *Id.* at ¶ 29.

³¹⁰ *Id.* at ¶ 129.

³¹¹ 116 S. Ct. 1307 (1996).

posed when it was first proposed to prohibit age discrimination in the United States: “At what age would discrimination occur?”³¹² the United Kingdom has responded: “Any age”!

The recent case of *Galt v National Starch & Chemical Ltd.*³¹³ illustrates this well. The claimants had been dismissed for redundancy by the defendant company, and had received enhanced redundancy payments based on a policy which provided for three weeks’ pay per year of service up to age 40 and four weeks’ pay per year of service over 40. The claimants contended that this meant that the calculation of these payments favored older employees, so that they had been the victims of age discrimination. At the hearing the company accepted that the scheme treated the claimants less favourably by reason of their age,³¹⁴ so that the question for the employment tribunal was whether or not the scheme was objectively justified.³¹⁵ In order to show that it was, the company needed to show – as in *Bloxham* – that the discriminatory effect of the scheme represented a proportionate means of achieving a legitimate aim. In fact, the company argued in *Galt* that its aim had been to avoid unrest and to bring about an orderly and satisfactory closure of the site.³¹⁶ The tribunal accepted that this was capable of representing a legitimate aim,³¹⁷ but a majority held that this had not been the real purpose behind the policy.³¹⁸ The company also submitted, echoing the arguments behind the American A.D.E.A., that favoring older workers was legitimate since older workers found it harder to find new employment. The tribunal, however, was not prepared to accept this contention without evidence and, in any event, it again did not believe that the policy had been introduced or maintained for such a reason.³¹⁹ As the tribunal put it, “the disparate treatment ... was a consequence of the actions of the Company; it was not meted out of itself to achieve the particular

³¹² *Supra* n. 132.

³¹³ ET/2101804/07 (unreported), judgment given November 27, 2007.

³¹⁴ *Id.* at ¶ 2, 11.

³¹⁵ *Id.* at ¶ 12.

³¹⁶ *Id.* at ¶ 5.

³¹⁷ *Id.* at ¶ 15.

³¹⁸ *Id.* at ¶ 23.

³¹⁹ *Id.* at ¶ 18.

goal.”³²⁰ It therefore followed that the claimants had suffered unlawful age discrimination and the case was re-listed for a hearing as to the appropriate remedy,³²¹ at which various awards of compensation were made.³²²

Younger Employees

The Employment Equality (Age) Regulations 2006 therefore protect young and old alike (although, somewhat anomalously, there is a lower national minimum wage for those under 18).³²³ Claims for discrimination on the grounds of youth are therefore just as feasible as those on grounds of maturity. A particularly egregious example of discrimination on grounds of youth can be found in the case of *Wilkinson v. Springwell Engineering Ltd.*³²⁴ Miss Wilkinson was taken on by Springwell as an office administrator from January 3, 2007 for a probationary period of three months, though she was subsequently dismissed on March 16, 2007. She was 18 at the time and brought a claim of age discrimination. The tribunal found that she did not have a formal interview and took over the role from her aunt, with whom there was a period of overlap and from whom she received some instruction on her duties.³²⁵ Although the employers argued before the tribunal that Miss Wilkinson’s work was error-ridden, the tribunal could find no discernible difference in its quality in comparison to that of both her immediate predecessor and immediate successor.³²⁶ She had been informed in February 2007 that she was doing 90% of her duties and that she would need to improve her work rate over the next few months, but there were no expressions of major concern as to her competence.³²⁷ Yet Springwell asked another, older, administrator to cover some of Wilkinson’s work. The tribunal found that:

³²⁰ *Id.* at ¶ 19.

³²¹ *Id.* at ¶ 25.

³²² ET/2101804/07 (unreported), judgment given February 20, 2008.

³²³ Employment Equality (Age) Regulations 2006, regulation 31.

³²⁴ ET/2507420/07 (unreported), judgment given February 25, 2008.

³²⁵ *Id.* at ¶ 10.4.

³²⁶ *Id.* at ¶ 10.2.

³²⁷ *Id.* at ¶ 10.4.

the respondents were assuming, on that basis, that a relationship between experience and age almost equating the same on the one hand, and lack of experience and incapability as equating to the same on the other, and therefore that there is a link between age and capability. They were thus making a stereotypical assumption to the prejudice of the claimant.³²⁸

On 16 March 2007 Springwell terminated Wilkinson's employment without notice and asked her to leave the premises immediately. Wilkinson alleged that she was told that she was "too young for the job." When sent the required pre-claim letter and an (optional) age discrimination questionnaire, the employers declined to answer for reasons which the tribunal found unintelligible.³²⁹ It rejected the employer's defense that Miss Wilkinson had been dismissed for incapability and upheld her claim of age discrimination, based largely upon the aforementioned notion of age stereotyping.³³⁰ It is noteworthy that whereas the U.S. chose to adopt a minimum age for age discrimination laws because of the stereotyping of older workers, this case demonstrates how age discrimination laws in the U.K. have expanded to proscribe the stereotyping of younger workers too. Thus the defense of genuine occupational requirement needs to be proven on a case by case basis in relation to young workers just as much as to those over 40. Simple assertions that a particular employee must be within a certain age range in order to carry out the job successfully will not suffice. So, having previously been earning £146.45 per week – and having worked at the firm for less than three months – Miss Wilkinson was awarded compensation totaling £16,081.12. In other words, she received more than ten times in compensation what she had earned during her brief employment. In its own way, Miss Wilkinson's award has done as much as the claim of the more

³²⁸ *Id.* at ¶ 10.5.

³²⁹ *Id.* at ¶ 10.9.

³³⁰ *Id.* at ¶ 12–14.

celebrated Selina Scott to bring age discrimination law to general attention.

Miss Wilkinson's case also serves to bring home a major distinction in the application of U.K. age discrimination law as compared to its U.S. counterpart. Since the former renders unlawful any act of discrimination which is based on age, no matter whether that be a matter of maturity or youth, it follows that it is equally impermissible for employers to adopt policies that favor one age group over another. So-called 'positive' discrimination – more commonly known as 'affirmative action' in the U.S. – is just as unlawful in British age discrimination law as 'stereotyping' discrimination, for the simple reason that it has the effect of favoring one section of the population at the expense of another. However, what is usually called 'positive action' in the U.K. – whereby a historically disfavored group is offered guidance and training to enable its members to compete on a level playing-field – is not simply permitted but encouraged.³³¹ Yet positive discrimination at the point of selection, promotion or other advancement is entirely unlawful, in the same way that discrimination against men is just as unlawful as discrimination against women,³³² and discrimination against a white person is just as unlawful as discrimination against someone of (say) Afro-Caribbean or Asian origin.³³³

Indirect Discrimination

Thus far the cases under the Employment Equality (Age) Regulations 2006 seem essentially to be mimicking the pattern of cases which followed the passage of the Sex Discrimination and Race Relations Acts in 1975 and 1976 respectively. The first cases to be heard have all been ones of direct discrimination, where the discrimination is explicit or overt (though, as under those Acts, it need not be intentional). If this pattern continues to

³³¹ Employment Equality (Age) Regulations 2006, regulation 29. See also Sex Discrimination Act 1975, § 43, 47, 48; Race Relations Act 1976, sections 34, 37, 38.

³³² Sex Discrimination Act 1975, § 2.

³³³ See Race Relations Act 1976, § 1, 3.

be played out over time, it is to be expected that the focus will subsequently move – unlike in the United States – to claims of indirect age discrimination. As under the amended provisions of the Sex Discrimination Act 1975 regarding indirect employment discrimination,³³⁴ the test for indirect age discrimination involves complainants' being put at an unjustified disadvantage as a result of the application of a "provision, criterion or practice. . . ."³³⁵ There is no requirement for claimants to show that they were subjected to a criterion with which they could not comply.

While it is always a little dangerous to speculate, two instances of potential indirect age discrimination already come to mind. One involves employers who require job applicants to complete online application forms. Figures from the Office for National Statistics show that in February 2006, 45% of those aged 55 or over in the U.K. (and 32% of those aged 45 to 54) had not used a computer in the previous three months (compared to 15% of those aged between 16 and 24).³³⁶ Other figures show that only 61% of households currently have internet access. Any employer which does not permit applicants to complete the relevant forms by hand in the traditional manner is likely to run the risk of perpetrating indirect age discrimination against potential applicants aged (say) 55 or over who do not have internet access. Whether it would prove a successful defense to point out that such access is available free at every public library in the country remains, for the moment at least, a matter of conjecture.

So far as indirect age discrimination against the young is concerned, the increasing number of advertisements that claim that applicants must be graduates has echoes of *Griggs v. Duke Power Co.* itself.³³⁷ So long as the nature of the employment really does demand graduate skills, knowledge or ability,

³³⁴ Sex Discrimination Act 1975, section 1(2), as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, regulation 3; *supra* n. 207.

³³⁵ Employment Equality (Age) Regulations 2006, regulation 3(1)(b).

³³⁶ *National Statistics Omnibus Survey* 'Adults who have used the internet in the 3 months prior to interview by sex/age (Great Britain)': www.statistics.gov.uk/StatBase/ssdataset.asp?vlnk=6929&Pos=3&ColRank=1&Rank=272.

³³⁷ 401 U.S. 424 (1971).

employers will of course be able to rely on the defense of genuine occupational requirement. Otherwise, however, they run the risk of being found to have perpetrated indirect age discrimination on those aged under 21 (when most university students in the U.K. graduate).

VI. CONCLUSION

Two Models of Anti-Discrimination Law

Over thirty years ago, Peter Schuck argued that anti-discrimination law could be said to be predicated on the basis of one of two models (or a combination of both).³³⁸ He identified them as the “nondiscrimination model” and the “allocative model”³³⁹ and argued that:

What most clearly distinguishes the nondiscrimination model from the allocative model is the different attitude implicit in each toward the use of particular attributes such as age to help shape social choice: the one, at least in its purest ‘attribute-blind’ form, is implacably opposed to such use; the other embraces such a use as a means of defining needs and informing the exercise of discretion.³⁴⁰

In other words, the allocative model is re-distributive: it seeks to allocate resources to protected classes of person, in order that they might overcome the present effects of past discrimination or other adversity.³⁴¹ The nondiscrimination model, on the other hand, is “a non-dynamic, non-distributive one.”³⁴²

³³⁸ Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 *Yale L.J.* 27 (1979–1980).

³³⁹ *Id.* at 38.

³⁴⁰ *Id.* at 38–9.

³⁴¹ See e.g. Robert D. Bickel, *The Non-discrimination Principle and American Higher Education: Judicial Failure to Recognize the Present Effects of Past Discrimination*, 20 *Ed. & L.* 1 (2008).

³⁴² Ellis, *supra* n. 176 at 155.

A few years later, Barry Bennett Kaufman examined the legislative history of the A.D.E.A. in an attempt to ascertain “whether Congress intended the Act to embody the allocative model, the nondiscrimination model, or both.”³⁴³ He concluded that the legislative history was so sparse as to render a definitive conclusion impossible, and that such evidence as did exist was, in any event, equivocal.³⁴⁴ Its history after enactment has been no clearer, since it began in 1967 with both lower and upper age limits (of 40 and 65 respectively), and then subsequently had the upper removed but not the lower. The maintenance of these limits is potentially consistent with the allocative model, in that it could encourage the shifting of resources to the protected class, while the removal of the upper limit implies a promulgation of the nondiscrimination principle, whose supporters consistently criticized those limits from the very beginning.³⁴⁵ Kaufman then turned his attention to Title VII, and noted that the lack of a legislative definition of unlawful discrimination again made the identification of the underlying theory extremely problematic.³⁴⁶

It is submitted that this confusion of underlying purpose in U.S. anti-discrimination law has allowed the baleful influence of the old common law to reassert itself. Over twenty years ago, Professor Laurence Lustgarten – an American working at a British law school – compared anti-discrimination law in the United Kingdom unfavorably to that in operation in the United States. He attributed this to the “deadening influence of the common law” which was “brought into sharp focus by a comparison with American civil rights law ...”³⁴⁷ American federal courts, he said, “do not see [their] task as one of subtle linguistic analysis, nor do they locate statutes in relation to pre-existing *legal* rules. Rather they treat major statutes as blueprints

³⁴³ Barry Bennett Kaufman, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. Cal. L. Rev. 825, 838 (1982–1983).

³⁴⁴ *Id.* at 841.

³⁴⁵ See e.g. Myres S. McDougall, Harold D. Lasswell & Lung-Chu Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 28 U. Fla. L. Rev. 639, 649 (1975–76).

³⁴⁶ *Id.* at 846–7.

³⁴⁷ Laurence Lustgarten, *op. cit.*, n. 95, at 74 (1986).

of *social* policy.”³⁴⁸ That analysis must now be reversed, superseded by the simultaneous rise of a new school of statutory interpretation in each country.

In the United States, a movement towards textualism, championed by (among others) Supreme Court Associate Justice Antonin Scalia,³⁴⁹ has seen the federal courts in the United States move towards the very approach formerly applied in the United Kingdom and so decried by Lustgarten. Thus the very absence of express, statutory definitions of such fundamental concepts as ‘discrimination,’ ‘disparate treatment’ and ‘disparate impact’ has meant that the courts have filled these voids with deadening equivocations which have served only to exacerbate the confusion of objectives behind federal anti-discrimination law. There is thus not even any consistency as to the degree of oversight to be applied in discrimination cases. So-called ‘strict scrutiny’ is applied to cases of alleged racial or religious discrimination,³⁵⁰ but ‘intermediate scrutiny’³⁵¹ is applied to cases of sex discrimination, which allegations of age or disability discrimination apparently merit only ‘rational basis’ review.³⁵² This might suggest that an allocative model is in play for racial discrimination, except that such prohibitions have been held to apply just as much to discrimination against whites as against any other racial or ethnic group.³⁵³ On the other hand, measures which benefit under-represented groups at the point of decision-making may be tolerated,³⁵⁴ but sometimes only if they adhere to a confusing formula,³⁵⁵ and apparently only for another twenty years.³⁵⁶ Similarly, those in the workplace who are over 40 years

³⁴⁸ *Id.* at 74.

³⁴⁹ Antonin Scalia, *op. cit.*, n. 48.

³⁵⁰ See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *Vand. L. Rev.* 793 (2006).

³⁵¹ *Craig v. Boren*, 429 U.S. 190 (1976); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

³⁵² See e.g. *Federal Communications Commission v. Beach*, 508 U.S. 307 (1993).

³⁵³ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

³⁵⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³⁵⁵ *Id.* at 335–41.

³⁵⁶ *Id.* at 343.

of age apparently merit protection which those under 40 do not enjoy – again suggesting an allocative model at work in their favor – but, as a result of the deadening effects of the common law-style application of the very concept of discrimination, they are then easily denied occupational pension rights which are often the most important benefit which they enjoy. As Schuck predicted, this inadvertent combination of the models has “set policy adrift from its moorings ..., for each model generates distinctive tendencies and implications that are at war with one another.”³⁵⁷

The Rights Model

Over the same period, by contrast, British courts have become accustomed, in Lester’s admiring phrase, to approaching statutory interpretation “purposively, rationally, and in the European way.”³⁵⁸ Indeed, it is clear that: “By the late 1980s, the European influence upon [the] most senior judges – the Law Lords and the Court of Appeal – was encouraging the development of a progressive and enlightened jurisprudence.”³⁵⁹ The United Kingdom has thus moved steadily towards an ever-stronger embrace of the nondiscrimination model, which is perhaps best summarized in the first sentence of Article 26 of the United Nations Covenant on Civil and Political Rights. This provides that: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”³⁶⁰ Of course, the right to equality before the law does not imply that every difference in treatment must be discriminatory. What it does mean is that no-one should be treated in a particular

³⁵⁷ *Supra* n. 338 at 84.

³⁵⁸ Anthony Lester, ‘Discrimination: What Can Lawyers Learn from History?’ [1994] *Pub. L.* 224, 230.

³⁵⁹ *Id.* at 232. See *Pickstone v. Freemans plc* [1988] I.C.R. 697 (H.L.); *Bromley v. H. & J. Quick Ltd.* [1988] I.C.R. 623 (C.A.); *Leverton v. Clwyd County Council* [1989] I.C.R. 33 (H.L.); *Hampson v. Department of Education and Science* [1989] I.C.R. 179 (C.A.), [1990] I.C.R. 511 (H.L.); *James v. Eastleigh B.C.* [1990] I.C.R. 554 (H.L.).

³⁶⁰ International Covenant on Civil and Political Rights, U.N. G.A. Res. 2200A (XXI), December 16, 1966; entered into force March 23, 1976 (999 U.N.T.S. 171).

manner only because he or she is identified as a member of a particular social group. “A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26.”³⁶¹ Or, as the European Court of Human Rights phrased it in its June 2002 judgment in *Willis v. the United Kingdom*: “[A] difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aims sought to be realised’.”³⁶²

Yet this is arguably something that goes beyond the nondiscrimination model that Schuck had envisaged. Indeed, his bifold classification of anti-discrimination law into the nondiscrimination and allocative models fails to appreciate another distinction, noted by Alan David Freeman in the context of racial discrimination, that is even more fundamental.³⁶³ The real lesson of the development of anti-discrimination law in the United Kingdom, culminating in the prohibition of age discrimination without upper or lower limits, is that the true distinction to be made is one of perspective. Is the alleged discriminatory act to be viewed from the point of view of the person making the decision, or from that of the person whom that decision affects?³⁶⁴ Assuming an unrealistic degree of freedom of choice, the common law has always viewed things from the perspective of the decision-maker. The whole point of the American civil rights movement, however, was to re-focus public policy and the law on the situation of ordinary people who did not always enjoy significant autonomy. As its name implied, it sought

³⁶¹ *S.W. Broeks v. The Netherlands* United Nations Human Rights Committee, Comm. No. 172/1984, May 12, 1999, at ¶ 13. One obvious instance where a difference in treatment will often be justified is where it accommodates someone with a particular disability. See, in the U.S., the Americans with Disabilities Act (A.D.A.) of 1990 and, in the U.K., the Disability Discrimination Act 1995 (which was expressly modeled on the A.D.A.).

³⁶² Eur. Ct. H.R., Appl. 36042/97, judgment given June 11, 2002, at ¶ 39.

³⁶³ Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049 (1977–1978).

³⁶⁴ *Id.* at 1052.

a rights-based approach, focused on the position of those subjected to the treatment in question. The true rights perspective means, of course, that no-one should be subjected to unjustified discrimination, irrespective of whether that occurs intentionally, negligently, by complete accident or with the most benevolent of motives. Every instance of unjustified discrimination constitutes a rights violation. And every such instance should enable the victim to claim appropriate compensation.

This rights-based approach explains why restricting the ambit of age discrimination laws only to those aged over 40 could never have been tolerated. While the young may face different challenges in the workplace, they enjoy the same rights as their more mature colleagues. Similarly, it explains why the motivation and reasoning behind an act of direct discrimination are totally irrelevant: what matters is that someone suffered unjustifiably as a result of the use of inappropriate criteria. It also explains why the law must constantly be vigilant to ensure that instances of indirect discrimination (or disparate impact) are identified and rectified with vigor. The shame is that federal U.S. law currently either fails to live up to these objectives or equivocates in confusion. The picture of anti-discrimination laws on either side of the Atlantic shows two victories for the converts. While the U.S. continues to cling to the English common law, it is the United Kingdom's anti-discrimination law model that now reflects more accurately the aspirations behind the U.S. Civil Rights Act.

AGE BIAS IN THE AMERICAN WORKPLACE – AN OVERVIEW^{*}

HOWARD EGLIT^{**}

I. INTRODUCTION – AGE AND AGEISM

The use of age as a basis for allocating economic, social, and political benefits, for imposing responsibilities, and for granting rights and privileges is a pervasive facet of American society. Age is utilized overtly in government laws and policies to identify who must attend school, who may vote, who can be hired to serve as firefighters and police officers, who is entitled to government-funded medical care, who may be excused from jury service, and so much more, as well.¹ Informally, age serves as a covert, but powerful, trigger for how we react to, and interact with, both those younger and those older than us; as a factor – sometimes obvious, sometimes subliminal – in arousing or discouraging sexual attraction; as a determinant as to what is appropriate in terms of how one dresses and how one presents oneself to others; and, again, much more.²

Of course, many uses of age are innocuous, and so they warrant neither praise nor condemnation. Some uses, however, are at the least problematic. And a few are outright offensive. Overall, the appropriate characterization for the use of age in a given circumstance often is one arrived at quite subjectively. For example, numerous government programs in the United States – most prominently Medicare – provide benefits primarily to older

^{*} This paper constitutes a much expanded version of a paper that was published in 51 *Retraite et Societe*, an issue entitled *La discrimination fonde sur l'age dans l'emploi* (2008). The article, written by this author and published in French, is entitled *L'age dans le monde du travail aux etats-unis*. The author expresses his gratitude to the publishers of *Retraite et Societe* for their permission to use that article as a basis, in very much-modified form, for this article in the *Journal of International Aging Law & Policy*.

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¹ See generally Howard Eglit, *ELDERS ON TRIAL – AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* 6 - 8 (2004) [hereinafter *ELDERS ON TRIAL*].

² *Id.*

individuals. From the perspective of the elderly these programs are a boon, but for needy younger individuals who have not yet attained the requisite eligibility age, such programs legitimately may be viewed as unfairly discriminatory: these people are disqualified solely on the basis of the immutable characteristic of age. Another, albeit more mundane, example of the ambiguity associated with appropriately characterizing age-based distinctions is provided by the widespread state laws barring youngsters under a certain age – typically 16 – from securing licenses to drive automobiles. From the standpoint of the adult populace, the exclusion of drivers 15 and under from the roads is a sensible safety precaution; from the perspective of 14-year-olds these licensure laws no doubt can be perceived as unfair age-based deprivations. Or take the example of the bikini-clad 50-year-old beachgoer. From her perspective, her garb is comfortable, seductive and, anyhow, she ‘doesn’t give a darn.’ To the 20-somethings snickering in the background, this ‘old bat’s’ revealing attire (or lack thereof) is ludicrously unappealing.

Focusing on the particular arena of concern here, i.e., the workplace, here, too, policies and practices geared to age can evoke conflicting characterizations. On the one hand, for example, it can be argued that age-based mandatory retirement undeservedly imposes hardship on blameless older men and women without regard to their individual abilities to perform. Alternatively, the practice can be defended on a number of reasonable grounds. It creates room for younger employees to move up in the ranks;³ it enables employers to avoid the painful task of individually judging older employees and then telling those found lacking that they are deficient;⁴ and it facilitates the removal of highly paid senior staff, thereby affording fiscal relief for financially stressed employers.⁵

In any event, no matter how one characterizes particular age classifications, the common use and ready acceptance of age distinctions separate age from other personal characteristics that typically do engender consistent strenuous condemnation. I am

³ This rationale was used in *Vance v. Bradley*, 440 U.S. 93 (1979), discussed *infra* at note 160 and accompanying text.

⁴ A similar rationale was utilized in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), discussed *infra* at notes 163 - 164 and accompanying text.

⁵ See notes 132 - 142 and accompanying text *infra*.

speaking here of race, ethnicity, religion, and in many instances gender – characteristics that constitute the necessary preconditions for racism, xenophobia, religious conflict, and sexism. These extreme prejudices are understood in contemporary American society as possessing no saving justifications (with the rare exception, perhaps, of some gender-based distinctions).⁶ Rather, they are rightly deplored as evils born of irrationality and twisted values. In contrast, the use of age as a basis for private and public decisions, government and corporate policies, and federal, state, and local laws is an enterprise evoking much more ambivalence.

Why is this so? There are several answers. For one, age-based decision making typically is not an expression of the intense animosity that accompanies racism and its malignant compatriots,⁷ and so decisions based on age are deemed more tolerable. Moreover, the use of age as a determinant to include some and exclude others, such as in the case of Medicare, often can be reasonably justified (as admittedly can be the uses of gender, perhaps) because of age's empirical verifiability, a quality which quashes ambiguity and thereby minimizes the potential for abuses that might otherwise occur if program eligibility and benefits were determined by the exercise of bureaucratic discretion. And finally, in some instances there is some empirical support for age-based attitudes and practices – even in the case of negative stereotypes and attitudes regarding old age and old people.⁸

⁶ Arguably, there are some instances when the biological differences between men and women might appropriately be taken into account in the workplace. That, at least, is the premise supporting the availability to employers of the bona fide occupational qualification (BFOQ) defense set forth in §703(e), 42 U.S.C. §2000e-2(e), of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17. As to discussion of the parallel BFOQ defense in the age context, see notes 56 - 61 and accompanying text *infra*.

⁷ See United States Secretary of Labor, THE OLDER AMERICAN WORKER – AGE DISCRIMINATION IN EMPLOYMENT, REPORT TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter SECRETARY OF LABOR REPORT], discussed *infra* at notes 41, 55, and 100 and accompanying text.

⁸ See Section III *infra*. The task of defining *old age* is quite complex. Some gerontologists distinguish between the *young-old* (those 55 - 75), the *old* (those 76 - 85), and the *old-old* (those 86 and older). See Bernice L. Neugarten and Gunhild Hagestad, *Age and the Life Course*, in HANDBOOK OF AGING AND THE SOCIAL SCIENCES 35, 46 (Robert H. Binstock and Ethel Shanas, ed. 1976). "The World

Ambiguity notwithstanding, there is only so far that one can (or should) legitimately go in unquestioningly accepting the ubiquity of age distinctions. This is because reliance on age as a basis for the allocation of benefits and detriments, as well as for other ends, can inflict harm – most commonly, harm suffered by blameless men and women unfairly and erroneously deemed too old and thereby subjected to the bias commonly known as *ageism*.⁹ Unfortunately, however, deploring this reliance on the age factor as a decision-making and allocative device deployed against the ‘too-old’ is easier said than is achieving the cessation of that reliance. This “ism” is ingrained in American society, as it is in just about every developed society’s customs and laws.¹⁰ Note, for example, the fact that the

Health Organization classifies persons . . . between 60 and 75 as elderly [, those] between 76 and 90 . . . as old, and those over 90 . . . as very old." Alexander P. Spence, *BIOLOGY OF HUMAN AGING* 8 (1989). Adding to the ambiguity of the situation is the question of context: one may be *old* or *too-old* in one setting, but not so in another. On the American scene, for example, a professional baseball player is old at 40; a college attendee in her 30's is described as an “older” student; a 7-year-old is considered too old for kindergarten.

⁹ Generally, age bias is thought of as afflicting only the elderly. This understanding is in good measure due to the explication of ageism most famously iterated by Dr. Robert Butler. See *WHY SURVIVE? BEING OLD IN AMERICA* 6 - 7 (1975). However, while Dr. Butler focused on discrimination suffered by the old, age bias actually can occur at any point in an individual victim’s life, as discussed earlier in the example involving disaffected teen-agers desiring to be licensed to drive cars, or in the case of a 36-year-old fully fit applicant for a job as a police officer who confronts the common requirement imposed by municipalities throughout the United States that new hires for law enforcement positions not be older than 35 or thereabouts. See, e.g., *Feldman v. Nassau County*, 434 F.3d 177 (2d Cir. 2006); *Equal Employment Opportunity Comm’n v. Missouri State Highway Patrol*, 555 F. Supp. 97 (W.D. Mo. 1982), *aff’d in part & rev’d in part*, 748 F.2d 447 (8th Cir. 1984). Thus, there is an important distinction to be made between *ageism* and *old-ageism*, the latter applying only with regard to bias directed against those at the farther end of the age spectrum.

¹⁰ If respect and proper treatment of the elderly were the normal, innate pattern of human behavior, presumably there would have been less of a need for the Fifth Commandment, which commands us to honor our fathers and our mothers. (Of course, fathers and mothers start out young, and only eventually become old. Also, in the days of the Old Testament the longevity of most people – save for Abraham, Sarah, and a select group of other patriarchs, matriarchs, and prophets, was abbreviated in comparison to today. But this latter observation simply supports the further observation that someone at the age of 45 would have been deemed elderly

English lexicon contains an array of negative epithets that are thoughtlessly used in everyday discourse to negatively label and/or describe older men and women: “*old bag, old bat, battle ax, bidy, cantankerous, codger, coot, crank, crotchety, curmudgeon, dirty old man, [doddering,] dotard, dotty, eccentric, fogy, old fool, forgetful, fossil, gaffer, geezer, hag, old fart, ornery, senile, witch, and wizened*” are just a few.¹¹ In striking contrast, there are virtually no pejorative words in the English language to describe the young or, even more emphatically so, the middle-aged!

Of course, evidence of dislike for the elderly is far more extensive than just a list of unpleasant words:

Epithets aside, it is readily apparent that in magazines, on television, in the movies, in consumer advertising, and in dialogues both public and private, the American populace is relentlessly instructed to aspire to those qualities typically associated with youthfulness: smooth skin, silky hair, sleekly muscled bodies, athleticism, sexual prowess, mental acuity. Physical attractiveness is in fact a virtually impossible characteristic for the elderly to be seen as possessing.

For the most part, the popular visual and print media dwell almost exclusively on the doings of the non-old: their romances, their avocations, their homes, their opinions, and so on. The sports events that entrance millions of spectators each week further convey the message—incidentally but nonetheless powerfully—that almost all our hero athletes share at least one trait: they are not old

Not surprisingly, older faces are rare in movies, magazines, and television (save for public affairs programs). Elders who are depicted in the popular entertainment media typically are presented either as victims or as being quirky, resistant to change, mentally slow, physically frail, sexually neutered,

in a society where most people did not live beyond age 50 or so).

¹¹ ELDERS ON TRIAL, *supra* n. 1, at 11.

forgetful, and/or cantankerous. In brief, old people almost invariably are portrayed as being at best pathetic and at worst distasteful or even loathsome. . . .¹²

Certainly, the foregoing exposition constitutes a grim, but unfortunately too accurate, collection of the negative images attached to the state of being old. But it is not only the elderly (an admittedly ill-defined group)¹³ who can experience deprivation for being too old. In the workplace not only men and women in their 60s and 70s may confront animus for being too old, but even those in their 40s and 50s may do so as well.¹⁴ In fact, in good measure it was because of findings regarding the difficulty particularly confronted by terminated workers in their 40s in securing new positions that in 1967 the United States Congress passed, and President Lyndon B. Johnson signed into law, the Age Discrimination in Employment Act (ADEA),¹⁵ which extends protection to those who are age 40 and older.

II. THE DEMOGRAPHIC DATA

A necessary backdrop to assessing the significance of age bias in the workplace are the data regarding the by-now exhaustively discussed baby boomers: the almost 76 million men and women born between 1946 and 1964 in the United States.¹⁶ Each year, starting in

¹² *Id.* at 10 - 11 (footnotes omitted).

¹³ *Supra* n. 8.

¹⁴ Indeed, a review of all the reported federal court decisions issued in one year – 1996 – addressing claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 - 633a, revealed that the large majority of plaintiffs were men and women in their 50s. See Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It is Today, Where It's Going*, 31 U. of Rich. L. Rev. 579, 599 - 606 (1997) [hereinafter *The Age Discrimination in Employment Act at Thirty*]. And, while rare, even a 30-year-old may be seen as too old when she applies for an entry-level position typically filled by newly-minted college graduates; and a 36-year-old may run up against the common city and state laws barring the hiring of prospective firefighters and police officers who are older than 35 or thereabouts. See note 9 *supra*.

¹⁵ 29 U.S.C. §§621 - 633a (2000).

¹⁶ In each of these years between 3.4 million and 4.3 million babies were born

2006, several million of these individuals turned, or will turn, age 60. By 2016 the first wave of surviving boomers will be celebrating their 70th birthdays.¹⁷ “By 2030, there will be about 71.5 million older persons, almost twice their number in 2005. People 65+ represented 12.4% of the population in the year 2005 but are expected to grow to be 20% of the population by 2030.”¹⁸

What about the demographic data regarding the workplace in particular? While during the twentieth century there was a steady decline in the numbers of American men and women who in their 60's remained working outside the home, the recent data reveal movement in the opposite direction.¹⁹ And it seems likely that this trend will continue, with a growing percentage of older individuals – particularly those in their 60's – remaining or seeking to remain in the employed workforce. Indeed, data collected by the United States Bureau of Labor Statistics support the prediction that the number of

in the United States (obviously with variations from year to year) – a total of 75.8 million. Baby Boomer Headquarters, *The Boomer Stats*, www.BBHQ.com (Dec. 17, 2008). Of course, not all of these individuals survived to adulthood, let alone middle or later age, nor will all those who are now alive survive to age 65 or 75 or the ages in between and beyond. (All anyone of course can be 100% confident about is that no matter their best efforts, every boomer eventually will die).

¹⁷ *Supra* n. 16 (these data do not include naturalized Americans who attain age 65 and beyond but who were born in other countries).

¹⁸ Administration on Aging, U.S. Department of Health and Human Services, A PROFILE OF OLDER AMERICANS: 2007 (2008) [hereinafter PROFILE OF OLDER AMERICANS], at 3.

¹⁹ *Id.* at 12:

In 2006, 5.5 million (15.4%) [of] Americans age 65 and over were in the labor force (working or actively seeking work), including 3.1 million men (20.3%) and 2.4 million women (11.7%). They constituted 3.6% of the U.S. labor force. About 2.9% were unemployed. Labor force participation of men 65+ decreased steadily from 2 of 3 in 1900 to 15.8% in 1985, and has stayed at 16% - 18% since then. The participation rate for women 65+ rose slightly from 1 of 12 in 1900 to 10.8% in 1956, fell to 7.3% in 1985, and has been around 8% - 10% starting in 1988. However, during the past decade, labor force participation has been gradually rising to the 2006 levels. This increase is especially noticeable among the population aged 65 - 69.

older workers as a percentage of the total American workforce is already increasing markedly and will continue to do so:

[T]he total labor force is projected to increase by 8.5 percent during the period 2006 - 2016, but when analyzed by age categories, very different trends emerge. The number of workers in the youngest group, age 16 - 24, is projected to decline during the period while the number of workers age 25 - 54 will rise only slightly. In sharp contrast, workers age 55 - 64 are expected to climb by 36.5 percent. But the most dramatic growth is projected for the two oldest groups. The number of workers between the ages of 65 and 74 and those aged 75 and up are predicted to soar by more than 80 percent. By 2016, workers age 65 and over are expected to account for 6.1 percent of the total labor force, up sharply from their 2006 share of 3.6 percent. . . .²⁰

And the Bureau goes on to comment as follows: “With the baby-boom generation about to start joining the ranks of those 65 and over, the graying of the American workforce is only just beginning.”²¹ Moreover, the nature of the employment of older workers also is changing, with a decrease in part-time participation and an increase in full-time work.²²

²⁰ See U.S. Bureau of Labor Statistics, OLDER WORKERS, www.bls.gov/spotlight (July 2008), at 9.

²¹ *Id.*

²² *Id.* at 3:

Since the mid-1990s there has been a dramatic shift in the part-time versus full-time status of the older workforce. . . . Between 1995 and 2007, the number of older workers on full-time work schedules nearly doubled while the number working part-time rose just 19 percent. As a result, full-timers now account for a majority among older workers: 56 percent in 2007, up from 44 percent in 1995.

There are a number of factors that are supporting and/or encouraging older men and women to continue working outside the home. For one, by virtue of statutory mandate, the normal age for retiring with full Social Security benefits has been slowly rising from age 65 – the age enshrined in the Social Security Act in 1935²³ – to age 67, the marker it will reach in 2022. Moreover, the Social Security Act was amended in 2000 to remove the earnings retirement test, i.e., the penalty imposed on people who both collected Social Security benefits starting at normal retirement age (as opposed to earlier retirement at age 62, 63, or 64) and continued to work.²⁴ The old version of the law provided that for every two dollars earned by an individual who elected to receive Social Security benefits while continuing to work, he would lose one dollar of Social Security benefit. But now there is no such penalty and so older men and women who attain the normal retirement age and at that point want to both apply for benefits and to continue working no longer are discouraged from doing so by this benefit reduction.²⁵ Most importantly, rising concerns about economic security no doubt are encouraging – even forcing – some older men and women who might have thought they would be better off financially by the time they reached the traditional retirement age of 65 to have second thoughts about giving up income-producing jobs.²⁶ This situation is painfully detailed in a review of a recent book concerning retirement:

²³ As to how this age became enshrined with little thought, see *ELDERS ON TRIAL*, *supra* n. 1, at 174.

²⁴ See Social Security Online, *Exempt Amounts Under the Earnings Test*, www.socialsecurity.gov (Dec. 19, 2008), for the current deductions regarding people who retire prior to the normal retirement age.

²⁵ See generally Hugo Benitez-Silva and Frank Heiland, *The Social Security Earnings Test and Work Incentives*, 26 *J. of Policy Analysis and Mgt.* 527 (2007). The normal retirement age (NRA) is dependent on when an applicant was born. For those people born between 1943 and 1954 it is age 66; for those born between 1955 and 1959 the age increases in two-month increments. Thus, a man born in 1955 has an NRA of 66 and 2 months; a woman born in 1956 has an NRA of 66 and 4 months; and so on. For those born in 1960 and later, the NRA is 67. Social Security Online, *Retirement Planner*, www.ssa.gov/retire2/retirechart.htm (Jan. 8, 2009).

²⁶ See *PUBLIC POLICY IN AN OLDER AMERICA – A CENTURY FOUNDATION GUIDE TO THE ISSUES* 24 (2006) (footnote omitted) [hereinafter *PUBLIC POLICY IN OLDER AMERICA*]:

Citing a plethora of actuarial studies, . . . [the authors] estimate that people who retire at age 65 today can expect Social Security to provide the equivalent of only 39 percent of their incomes after deductions for basic Medicare contributions. Those who plan to retire in 2030 can expect net benefits, similarly calculated, of only 30 percent of their incomes.

Current and future retirees would be ill-advised to rely on private-sector income supplements. In 1989, the authors report, 66 percent of American employers provided postretirement health care benefit programs. By 2006, that number had fallen to just 35 percent.

Worse, the rate at which Americans save for their nest eggs is abysmal. According to a Federal Reserve study in 2004, the “simulated,” or theoretically possible, savings in I.R.A.s and 401(k) plans owned by people ages 55 to 64 was \$314,000. The actual average savings, however, was just \$60,000.²⁷

And this was all before the economic collapse of the American economy, and the associated devastation visited on 401(k) plans, in the latter part of 2008! What was for some older men and women an issue of preference – ‘do I want to continue working or not?’ – has

The age at which individuals decide to retire will affect significantly what their incomes will be. . . .

One bright spot is that small delays in retirement age can mitigate shortfalls in retirement savings by a surprising amount. Given current life expectancy, each year retirement is delayed past age 62 reduces the household’s need for retirement savings by about 5 percent, and each extra year of work increases Social Security benefits by several percentage points. [(I Unfortunately, however, the very households that often have the lowest personal savings – notably blue-collar workers whose jobs require physical labor and the disabled – are least likely to delay retirement.)

²⁷ Harry Hurt III, *Who Wants to Retire Later? (Don’t Laugh)*, New York Times, Business Sec., p. 5 (July 20, 2008), reviewing Alicia H. Munnell and Steve A. Sass, *WORKING LONGER* (2008).

become for some, maybe many, a matter of necessity: 'I have to keep working.'²⁸

Another factor here is the health of old people. As a group, older men and women are healthier today than their counterparts 100 and even 50 years ago, and their ills likewise are more treatable and controllable than were the health problems of their predecessors.²⁹ Thus, more older men and women – particularly those who make up the *young-old*³⁰ – are able today to remain active, in contrast to their more physically debilitated predecessors.³¹ For example, “[w]hite men age 60 to 64 . . . are two and a half times less likely to suffer from a chronic illness than they were just over a century ago.”³²

²⁸ See Steven Greenhouse, *Working Longer As Jobs Contract*, New York Times, Special Section – Retirement, pp. 1, 8 (Oct. 23, 2008).

²⁹ See Alicia H. Munnell and Steven A. Sass, WORKING LONGER 20 - 34 (2008) [hereinafter WORKING LONGER].

³⁰ *Supra* n. 8 regarding this terminology.

³¹ As compared to those 75 and older, individuals between the ages of 65 and 74 report considerably fewer limitations regarding the ability to perform activities of daily living. See PROFILE OF OLDER AMERICANS, *supra* note 18, at 14. This is not to say, however, that the younger group was free of disabilities (although such disabilities would include such matters as impaired vision, which is easily correctable with eyeglasses, and other types of impairments that can be ameliorated with medications and/or devices such as canes):

Some type of disability (sensory disability, physical disability, or mental disability), was reported by 52% of older persons in 2002. Some of these disabilities may be relatively minor but others cause people to require assistance to meet important personal needs. Almost 37% of older persons reported a severe disability and 16% reported that they needed some type of assistance as a result. Reported disability increases with age.

In . . . [one] study which focused on the ability to perform specific activities of daily living (ADLs), over 28% of community-resident Medicare beneficiaries over age 65 in 2005 had difficulty in performing one or more ADLs and an additional 12.9% reported difficulties with instrumental activities of daily living. . . .

Id.

³² PUBLIC POLICY IN AN OLDER AMERICA, *supra* n. 26, at 25 (footnote omitted).

Another demographic factor relevant to the continuing participation in the American workforce of older individuals is their increasing longevity. People who survive to 65 have more future years left than was the case 100 years ago, or even 50: “‘About 19 percent of men and 33 percent of women who survive to age 65 will live to age 90 or older and have to support themselves for almost 30 years.’”³³ Other presentations of such data make the same point.³⁴

The changing nature of work in America also may have some role in older men and women remaining, or seeking to remain, in the workforce. Many of the physically demanding manufacturing jobs performed by millions of workers in the early and middle decades of the twentieth century are gone; they have been supplanted by less strenuous occupations, jobs that can readily be performed by older individuals who in the past might not have been able to handle (or were perceived as not being able to do so) more physically strenuous tasks.³⁵

Finally, the large percentage of women working outside the home today likely has some statistical consequences for an aging workforce. Unlike most men, women commonly leave the workplace for considerable periods of time to perform family responsibilities. When they enter or return to the paid workplace they are behind men of comparable ages in terms of accumulating pension benefits and salary,³⁶ and so they need to play catch-up (assuming they want to

³³ WORKING LONGER, *supra* n. 29, at 142.

³⁴ See Eric T. Sondergeld and Matthew Greenwald, *Public Misperceptions About Retirement Security* 15 (LIMRA International, Inc., the Society of Actuaries, and Matthew Greenwald & Associates 2005): “[T]here is an 82 percent chance that one member of a 65-year-old couple will survive to or beyond the male’s life expectancy of age 81 and a 71 percent chance of outliving the female’s life expectancy of age 84.”

³⁵ “Less than 8 percent of workers currently have physically demanding jobs, down from over 20 percent in 1950.” WORKING LONGER, *supra* n. 29, at 94.

³⁶ [N]early 30 percent of elderly non-married women, who represent a majority of households at older ages, are classified as poor or near poor. Some of these women were non-married and poor as they entered retirement; others were married and suffered a large drop in income when their spouse died. Thus women would be better off if they had stronger Social Security earnings records and their own employer pension benefits.

wind up matching the financial positions of their male counterparts). Accordingly, we may see women – as contrasted to men – more commonly working into their later years.³⁷ (On the other hand, there are reasons for concluding that this may not be the case: “Given their weaker attachment to the labor force, smaller financial incentives, tendency to coordinate retirement with their typically older husbands, the challenge for women to stay in the labor force is greater than that facing men.”)³⁸

III. AGE BIAS IN THE AMERICAN WORKPLACE

A. *The Age Discrimination in Employment Act of 1967 – Genesis and Overview*

In the early 1960s a groundswell of political support started to develop in the United States for addressing what had not hitherto been perceived as a national problem – discrimination in the American workplace directed against older workers. No doubt, this growing concern was spurred in considerable measure by a general heightening sensitivity to equality issues sparked by the efforts of ardent civil rights advocates fighting the racism afflicting millions of blacks, particularly in the Southern states. The legislative culmination of the civil rights struggle to combat racism occurred in part with the enactment at the federal level of the Civil Rights Act of 1964,³⁹ Title VII of which bans discrimination on the bases of race, color, national origin, religion, and sex in workplaces having 15 or more employees

Id. at 62.

³⁷ Without offering any reasons for the increases, the Administration on Aging has noted the following with regard to the participation of older women in the work force:

Between 1984 and 2004 the labor force participation rates for women aged 55-61 increased from 47% to 62% and for women aged 62 - 64 the rates have increased from 29% to 39% over the same period. During these years, the percentage of men aged 55 - 61 [and 62 - 64] in the labor force remained relatively stable (77% to 74%, respectively).

PROFILE OF OLDER AMERICANS, *supra* n. 18, at 15.

³⁸ WORKING LONGER, *supra* n. 29, at 88.

³⁹ 42 U.S.C. § 2000a *et seq.* (2000).

for 20 or more weeks of the calendar year in which the discrimination occurred, or in the calendar year preceding that year.⁴⁰

During the Congressional debates on the 1964 Act an effort was made to add age to the list of prohibited practices. While this strategy failed, the Congress did direct the Secretary of the United States Department of Labor to undertake a study to determine the extent of age bias in the workplace and to recommend such action as might be necessary. In his 1965 report the Secretary identified such bias in the workplace as a reality and identified as its victims workers in their 40's, as well as those of greater age. He asserted that the matter of age bias was a significant problem particularly insofar as hiring practices were concerned; and he recommended federal action.⁴¹ Two years later Congress responded by passing, as noted earlier, the Age Discrimination in Employment Act of 1967 (ADEA),⁴² a complex enactment made even more so by amendments added over the years since the Act's adoption.⁴³

The statute applies to middle-sized and large employers within the United States; to foreign companies doing business within the borders of the United States that are not otherwise immunized by treaties;⁴⁴ to American companies operating extraterritorially, insofar as their American employees are concerned;⁴⁵ and to American-controlled foreign enterprises operating outside the borders of the United States, albeit only with regard to American citizens.⁴⁶ It prohibits (subject to some key exceptions, some of which are discussed below) virtually all forms of workplace-related age-based decisions and actions. It also bars discriminatory advertising,⁴⁷ as well as retaliation both against individuals who seek to vindicate their

⁴⁰ 29 U.S.C. §§ 2000e - 2000e-17 (2000).

⁴¹ SECRETARY OF LABOR REPORT, *supra* n. 7.

⁴² 29 U.S.C. §§ 621 - 633a (2000). *See generally* Howard Eglit, 1 - 3 AGE DISCRIMINATION (2d ed. 1995, and annual supplements, 1996 - 2008) [hereinafter AGE DISCRIMINATION].

⁴³ *See generally* AGE DISCRIMINATION, *supra* n. 42.

⁴⁴ *See generally* Laird M. Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U. J. Intl. L. & Pol. 357, 374 (1987).

⁴⁵ 29 U.S.C. § 630(f) (2000).

⁴⁶ 29 U.S.C. § 623(h) (2000).

⁴⁷ 29 U.S.C. § 623(e) (2000).

own rights under the statute as well as those who help others to vindicate *their* rights.⁴⁸

The key prohibitory language of the statute provides as follows:

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .⁴⁹

This language obviously is sweeping in its scope. But like any law the ADEA was, and in its amended form continues to be, a product of political compromise. And so what Congress gave with one hand, so to speak – that is, seemingly comprehensive protection to older workers – it undercut to some degree by other provisions of the statute limiting the enactment's reach.

Notably, the statute's scope is restricted to employers that have or had 20 or more employees for 20 or more weeks of the calendar year in which the alleged discrimination occurred or in the preceding calendar year.⁵⁰ The result of this formulation is that hundreds of thousands of small employers, and thus their employees, are not covered by the statute (and this scenario is replicated at the state level, since most analogous state anti-discrimination laws⁵¹

⁴⁸ 29 U.S.C. § 623(d) (2000).

⁴⁹ 29 U.S.C. § 623(a) (2000).

⁵⁰ 29 U.S.C. § 630(b) (2000).

⁵¹ Every state has adopted a fair employment practices statute; age is commonly included among the prohibited bases for employer decision making. See notes 172 - 175 and *accompanying text infra*.

likewise exclude small employers from their coverage).⁵² One explanation for this ‘free pass’, so to speak, for smaller employers seems to be that the drafters of the statute felt that small businesses would have difficulty in affording the financial costs they would confront if they from time to time were forced to defend against accusations by aggrieved individuals claiming to be victims of alleged unlawful age discrimination. In addition, there apparently was a prevailing notion that because in small business settings the workers, as well as the owners, likely would be working in close proximity, there ought to be some room for employers to be able to avert on-the-job friction by excluding undesired individuals – in this instance, older men and women – from these workplaces, no matter that the exclusion was for a less than laudable reason, i.e., bias based on age.

Even as to those employers that *are* covered by the ADEA, there are a number of provisions that allow actions and decisions based on age, after all, and so the ostensible rigor of the prohibitory language is compromised. For one, only individuals age 40 and over are protected by the statute, and so discriminatory actions such as the age-based refusal to hire a 39-year-old⁵³ or the age-based demotion of a 37-year-old are legally permissible under the federal Act.⁵⁴ This denial of coverage for those under age 40 resulted from the drafters’ understanding – in part guided by the earlier-noted report of the United States Secretary of Labor – that younger women and men in the workforce did not typically confront age bias and so were not in need of statutory protection.⁵⁵

⁵² As of 2004 the number of people employed in small businesses with one to 19 employees totaled approximately 22,000,000. United States Census Bureau, *Statistics about Business Size (including Small Businesses)*, <http://www.census.gov/epcd/www/smallbus.html> (Dec. 10, 2008).

⁵³ *Supra* n. 9.

⁵⁴ There are a few anomalous ADEA rulings in which plaintiffs under the age of 40 at the time of the alleged discrimination managed to finesse their way into protection under the statute. *See, e.g., Anderson v. Phillips Petroleum Co.*, 722 F. Supp. 668 (D. Kan. 1989); *Allen v. American Home Products, Inc.*, 644 F. Supp. 1553 (N.D. Ind. 1986); *see generally* 1 AGE DISCRIMINATION, *supra* n. 42, at § 3.02.

⁵⁵ SECRETARY OF LABOR REPORT, *supra* n. 7.

In addition, it is not a violation of the Act to use an age criterion “where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of its business.”⁵⁶ Thus, for example, if a private bus company that provides transportation services to schools has a policy barring the hiring of anyone over the age of 55 as a bus driver, it will not be liable under the ADEA if sued by a rejected 60-year-old if it can prove that (1) the normal operation of its bus service is to safely transport children and that (2) the state of being under age 56 is reasonably necessary to that function because older people are susceptible to sudden cardiovascular incidents, i.e., strokes and heart attacks, or that (3) it is impractical to individually test job applicants to determine who will and will not suffer a sudden cardio-vascular incident.⁵⁷ This BFOQ defense is generally narrowly construed both by the ADEA enforcement agency⁵⁸ and by the courts.⁵⁹ For example, cost savings, or profit enhancement, is not a legitimate BFOQ.⁶⁰ In other words, an employer cannot successfully argue that the normal operation of its business is to survive and therefore it should be able to pursue an age-g geared policy by, let us say, cutting the salaries just of employees ages 55 and over, who generally will be the more highly paid workers in the company, while leaving untouched the salaries of those under age 55. In contrast, safety arguments – such as that hypothesized vis-a-vis school bus drivers – are accorded particular deference by judges, who generally do not want to second-guess employers, lest it later transpire that the older job applicant who was placed into her job by court order, or the older terminated employee who was reinstated by judicial decree, subsequently causes a serious accident to occur.⁶¹ Another exception, discussed more fully below,⁶² allows differing treatment of people “where the differentiation is based on reasonable

⁵⁶ 29 U.S.C. § 623(f)(1) (2000).

⁵⁷ See generally 1 AGE DISCRIMINATION, *supra* n. 42, at §§ 5:2 - 5:14.

⁵⁸ See 29 C.F.R. § 1625.6 (2008).

⁵⁹ See, e.g., *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985).

⁶⁰ “The courts – with but one exception – have asserted that economic factors cannot be the basis for a BFOQ.” 1 AGE DISCRIMINATION § 5:10, *supra* n. 42, at 5-47 (footnote omitted).

⁶¹ See generally 1 AGE DISCRIMINATION, *supra* n. 42, at § 5:11.

⁶² See notes 133 - 142 and accompanying text *infra*.

factors other than age.”⁶³ Additional provisions legitimize other actions and decisions that might otherwise violate the statute’s prohibitions. For example, a differential in treatment regarding employees’ benefits will be legal if it is made in observance of the terms of a “bona fide employee benefit plan . . . where for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. . . .”⁶⁴ This provision reflects the empirically supported fact, more fully fleshed out below,⁶⁵ that certain benefits afforded employees – most prominently, employer-paid health insurance and life insurance – cost more for older workers than they do for younger ones.

Given these limitations on the prohibitory language of the ADEA (and there are others unique to this particular anti-discrimination statute)⁶⁶ it is correct to conclude that the ADEA is more tolerant of age-based decision making and actions by employers than is the Act’s analogue,⁶⁷ i.e., Title VII of the Civil Rights Act of 1964, accepting of decisions employers might attempt to make based on race, color, national origin, religion, and sex. This gap between the two statutes of course is consistent with the generally accepted (although not necessarily correct) assessment that age-based decision making merits a reduced level of condemnation because it is not the product of the intense dislike that motivates white bigots’ dealings with blacks, or that prompts people of one national origin to discriminate against people of differing origins than their own, or that stirs one sect of religionists to oppress those of another sect who subscribe to a different version of God than their own. The ADEA’s compromised rigor also reflects the generally accepted notion – albeit

⁶³ 29 U.S.C. § 623(f)(1) (2000); *see generally* Howard Eglit, *The Age Discrimination in Employment Act’s Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U. L. Rev. 155 (1986).

⁶⁴ 29 U.S.C. § 623(f)(2)(B) (2000).

⁶⁵ *See infra* Section III.C.2.a.

⁶⁶ *See* 1 AGE DISCRIMINATION, *supra* n. 42, at Ch. 5.

⁶⁷ It is clearly well-established that because the basic prohibitory language of the two statutes is virtually identical (save that one addresses age and the other addresses other characteristics, i.e., race, etc.), decisions rendered as to the one statute often afford persuasive guidance for interpreting the other statute. *See, e.g., Oscar Mayer & Co., Inc. v. Evans*, 441 U.S. 750, 755 - 758 (1978).

a flawed one when put forth in its most vigorous iterations, as discussed below – that older people are unable to perform as well as their younger counterparts in the workforce,⁶⁸ and so full-scale protection is not warranted. This acceptance of the view of older men and women as being somewhat impaired contrasts with the underlying premise of Title VII, which is that race, national origin, and skin color have absolutely no relationship to the ability to perform or contribute to society generally, and that religion⁶⁹ and gender⁷⁰ only very rarely do.

Flowing from the dictates of the particular statutory language of the ADEA are thousands of judicial rulings regarding claims arising under the statute. Many of these are technical and/or procedural in nature, responding to particular statutory verbiage.⁷¹ Most of the major substantive issues have been addressed – either by amendments made to the ADEA or by case law – and thereby have been more or less resolved, sometimes in a manner favorable to employers and sometimes to the victims. Thus, while the United States Supreme Court has not directly so held, it is generally accepted that the standard Title VII paradigm for establishing intentional discrimination on the basis of circumstantial evidence – a paradigm

⁶⁸ See *infra* Section III.C.1.

⁶⁹ An employee's religious beliefs may preclude him from working at certain times. For example, an observant Saturday sabbatarian will be unable to work from sundown Friday until sundown Saturday, and so this employee is less able to perform the job – at least in exactly the same way – than are her colleagues. Title VII requires the employer to reasonably accommodate the employee's religious need, provided such accommodation does not cause undue hardship for the employer. 29 U.S.C. § 2000e(j) (2000). If such hardship will occur, the employer may choose not to accommodate the employee's needs. Thus, if an employer must have the particular position filled on Saturdays, and the Saturday sabbatarian employee is the only person who can perform the job at issue, the employer will not be guilty of violating the statute by terminating the employee for his refusal to report for work. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

⁷⁰ Some jobs may only be performed by a person of a particular sex. For example, a movie producer casting the role of Cleopatra may refuse to hire males for the role. The producer can defend against a claim of discrimination by proving up a BFOQ defense (discussed *supra* in the context of age, see notes 56 - 61 and accompanying text), based in this instance on the need for authenticity on the part of the person playing the role of the Egyptian queen.

⁷¹ See generally 1 - 2 AGE DISCRIMINATION, *supra* n. 42.

set forth in *McDonnell Douglas Corp. v. Green*⁷² in 1973, and that comes into play in the great, great majority of both Title VII and age

⁷² 411 U.S. 792 (1973). In *McDonnell Douglas* the Court enunciated what has been reiterated thousands of times by lower courts as the formula for employment discrimination plaintiffs and defendants in Title VII and ADEA non-class actions cases involving only circumstantial evidence:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of . . . discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. The Court admonished that its model for the prima facie case was a flexible one: "The facts necessarily will vary . . . and the specification . . . of the prima facie proof required from . . . [a plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.*

Applying the McDonnell Douglas standard to the ADEA [in a non-denial-of-hire case], to prevail on an age discrimination claim, the plaintiff must show that: (1) she was at least forty years of age; (2) her job performance met the employer's legitimate expectations; (3) the employer subjected her to an adverse employment action; and (4) the employer had a continuing need for the services that the plaintiff rendered.

2 AGE DISCRIMINATION, *supra* n. 42, at 7-28. This formulation is not a rigidly fixed one. See *id.* at § 7:4. The establishment of a prima facie case creates a presumption of discriminatory intent. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). It then becomes the defendant's task to rebut this presumption. This simply amounts to the defendant bearing a burden of producing (as opposed to the more rigorous burden of proving) a legitimate nondiscriminatory reason for the complained-of decision or action. *Id.* at 255. If the defendant satisfies this very easy burden, the presumption of discrimination drops from the case. *Id.* To prevail, the plaintiff then must prove that the defendant's reason is a pretext for discrimination, which she may do "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. See generally 2 AGE DISCRIMINATION, *supra*, at § 7.4.

cases – is applicable in ADEA cases.⁷³ Discriminatory impact analysis, i.e., analysis that comes into play when an ostensibly age-neutral policy has a significantly adverse impact upon older people, has relatively recently been established by the Supreme Court in *Smith v. City of Jackson*⁷⁴ as being applicable to the ADEA, although its particular formulation in the ADEA context is so pallid that this analysis is of very little benefit to age discrimination claimants.⁷⁵ Preferences accorded to older people, while denied to younger workers, do not offend the statute.⁷⁶ Jury trials are, and always have been, available under the Act.⁷⁷ By reason of the Act's applicability only to employers with 20 or more employees, individual wrongdoers – such as bigoted supervisors who actually make the discriminatory decisions at issue – cannot themselves be held liable.⁷⁸ Relief from the statutes of limitations embodied in the Act for filing charges of discrimination with the federal enforcement agency, the Equal Employment Opportunity Commission (EEOC), and for filing lawsuits will be allowed by the courts only for persuasive equitable reasons.⁷⁹ The primary purpose of relief under the statute is to make the wronged plaintiff whole, i.e., to put her in the position she would have been in had the wrong never occurred.⁸⁰ Punitive damages (i.e., damages to punish the wrongdoer to an extent beyond just making the wronged plaintiff whole)⁸¹ and compensatory damages (i.e., damages

⁷³ “[E]very U.S. Circuit Court has embraced the prima facie case formulation devised in *McDonnell Douglas* as being applicable to ADEA-based claims.” 2 AGE DISCRIMINATION § 7:3, *supra* n. 42, at 7-22 (footnote omitted).

⁷⁴ 544 U.S. 225 (2005).

⁷⁵ *Infra* nn. 139 - 142 and accompanying text.

⁷⁶ *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004); *see generally* 1 AGE DISCRIMINATION, *supra* n. 42, at § 4.14.

⁷⁷ 29 U.S.C. § 626(c)(2) (2000).

⁷⁸ *See, e.g., Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674 (5th Cir. 2001); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 52 n.2 (7th Cir. 1995); *Smith v. Lomax*, 45 F.3d 402, 403n. 4 (11th Cir. 1995); *see generally* 1 AGE DISCRIMINATION, *supra* n. 42, at § 3:27.

⁷⁹ *See generally* 1 AGE DISCRIMINATION, *supra* n. 42, at § 6:31.

⁸⁰ *See, e.g., Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1212 (7th Cir. 1989); *Hansard v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 865 F.2d 1461, 1469 (5th Cir. 1989); *Rodriguez v. Taylor*, 569 F.2d 1231, 1238 (3rd Cir. 1977); *see generally* 2 AGE DISCRIMINATION, *supra* n. 42, at § 8.1.

⁸¹ *See, e.g., Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2nd Cir.

for pain and suffering)⁸² are not recoverable under the ADEA. Finally, just as hostile environment sexual harassment violates Title VII,⁸³ so does hostile environment age harassment violate the ADEA.⁸⁴

More generally, the case law reveals that age discrimination is a very difficult phenomenon to prove. Most plaintiffs who get to court lose.⁸⁵ Certainly some of these adjudicated claims by aggrieved job applicants, employees, and former employees simply are meritless. But reason suggests that both plaintiffs and their attorneys (particularly attorneys who handle cases on a contingent fee basis) are not going to invest much time and considerable amounts of money in pursuing claims that are hands-down baseless. Still, plaintiffs rarely prevail. Granted, employment cases classically involve two disputed versions of 'truth,' with the judge or occasional jury⁸⁶ being called upon to sift through conflicting evidence about events and decisions that they themselves of course did not witness

1984); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 872 (1st Cir. 1982); *Murphy v. American Motors Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978); see generally 2 AGE DISCRIMINATION, *supra* n. 42, at § 8:42. But see note 183 *infra* regarding liquidated damages.

⁸² See, e.g., *Pfeiffer v. Essex Wire Co.*, 682 F.2d 684 (7th Cir. 1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806 (8th Cir. 1982); *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981); see generally 2 AGE DISCRIMINATION, *supra* n. 42, at §§ 8:39 - 8:41.

⁸³ See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

⁸⁴ See, e.g., *Young v. Will County Dept. of Public Aid*, 882 F.2d 290 (7th Cir. 1989); *Spence v. Maryland Cas. Co.*, 803 F. Supp. 649 (W.D.N.Y. 1992), *aff'd*, 995 F.2d 1147 (2d Cir. 1993).

⁸⁵ See *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14; see also *infra* n. 97. The data regarding wins and losses are not very instructive because no doubt many valid claims of discrimination are settled by means of confidential agreements, and so they never wind up in court and thus never generate reported opinions that commentators can review and include in statistical data bases. See William J. Howard, *Arbitrating Claims of Employment Discrimination*, 50 Dis. Res. J. 40, at 43 - 44 (Oct. - Dec. 1995).

⁸⁶ There are some data that support the general notion subscribed to by the management bar that juries in ADEA cases (as opposed to those in other types of discrimination cases not involving older claimants) are particularly sympathetic to plaintiffs. See *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 655 - 656.

firsthand.⁸⁷ But this of course is nothing unique – in every case, no matter its nature, the judge and/or jury will not have firsthand knowledge of the events that culminated in a lawsuit. So the explanation must lie elsewhere. Whatever that explanation may be, certainly the statistics show that in the employment arena plaintiffs who wind up in court – both those invoking the ADEA and those seeking redress under Title VII – fare poorly.⁸⁸

Whether because of the fact that the data show that the large majority of age discrimination grievants who actually litigate their claims lose, or because age bias is particularly resistant to legal attack, age discrimination in the workplace persists. Before addressing the data confirming this, and before examining some of the underlying beliefs and factors that are operative in sustaining age bias, a more positive note must be sounded. Despite the weaknesses of the ADEA, it nonetheless is on balance a legal lever that no doubt has had some salutary deterrent force. Logic as well as a sense of the legal lay of the land, so to speak, support the conclusion that age discrimination in the workplace – at least its blatant manifestations – indeed has diminished over the past several decades following enactment of the federal age discrimination statute and the enactment,

⁸⁷ Actually, a major portion of ADEA cases are decided at the summary judgment stage; very few go to trial. See *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 637 - 639; see generally Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 Mo. L. Rev. 481, 551 - 555 (2008). Indeed, the heavy reliance on disposition by means of summary judgment in employment discrimination cases generally has been decried by several commentators. See, e.g., Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 23 B.C. L. Rev. 2034 (1993); Michael J. Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577 (2001); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555, 561 - 569 (2001). In that minority of cases in which plaintiffs survive the defendants' motions for summary judgment, typically the defendants will then be powerfully motivated to settle – so the general understanding is, at least – because of defendants' fear of juries being particularly sympathetic to ADEA plaintiffs. *Supra* n. 86.

⁸⁸ See Kevin Clermont, Theodore Eisenberg, and Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 Employee Rights & Empl. Policy J. 547 (2003); Howard Eglit, *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 645 - 664; see also note 97 *infra*.

as well, of its state statutory analogues.⁸⁹ Some empirical data also support this conclusion.⁹⁰

B. *The Continuing Prevalence of Age Discrimination in the Workplace*

It is a commonplace to identify the United States as being blessed (or cursed) with a populace having a strong bent for resolving disputes by going to court. In fact, this perception of American society as being particularly litigious is itself a matter of dispute.⁹¹ In any event, while the ADEA authorizes the Equal Employment

⁸⁹ As to state anti-discrimination laws, see notes 172 – 175 *infra* and accompanying text.

⁹⁰ See David Neumark and Wendy A. Stock, *Age Discrimination Laws and Labor Market Efficiency*, 107 J. of Political Econ. 1081 (1999). As later described by Professor Neumark, the study discussed in this 1999 publication supported, on the one hand, the pallid conclusion that “federal and state age discrimination laws boost employment rates of the entire group of protected workers, but only slightly.” David Neumark, *The Age Discrimination in Employment Act: A Retrospective and Prospective Assessment* 14 (2008) (paper on file with author of the instant article). But, as Professor Neumark further reported, “the employment rates of protected workers aged 60 and over were increased substantially (by about 6 percentage points).” *Id.* Accord Scott J. Adams, *Age Discrimination Legislation and the Employment of Older Workers*, 11 Lab. Econ. 219 (2004).

But see Joanna N. Lahey, *How Do Age Discrimination Laws Affect Older Workers?*, Center for Retirement Research, Boston College (Oct. 2006). Ms. Lahey maintains that the ADEA may provide some benefit to older men who want to remain in their jobs and are able to rely on the Act to stave off undesired terminations. But in her view the statute has harmed older job applicants because it has made employers reluctant to hire such individuals, apparently (although she does not really explore this matter) for fear that such newly hired employees would be difficult to discharge if they did not work out as hoped. See also Richard A. Posner, *AGING AND OLD AGE* 329 (1995). The persuasiveness of Lahey’s data has been disputed, even while her critic did not reject the logical conclusion that the ADEA may have negative consequences for older individuals seeking to be hired. See David Neumark, *supra*, at 16.

⁹¹ Compare Patrick M. Garry, *A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA* (1997) (supporting litigiousness stereotype); Walter K. Olson, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) (*id.*) with Marc Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3 (1986) (disputing stereotype).

Opportunity Commission (EEOC) both to bring its own lawsuits and to sue on behalf of individuals who file charges of discrimination with the agency,⁹² the great majority of cases that are litigated are brought by individual grievants on their own initiative seeking legal redress from allegedly biased employers.⁹³ Of course, the hope has been – and it no doubt has been realized in some measure – that employers voluntarily will clean up their acts, so to speak, and thereby through their own actions remove operative age bias from their companies and factories.

Clearly, however, the American workplace is not yet discrimination-free. This arguably is evidenced, for one, by the thousands of age discrimination charges of discrimination annually filed with the federal agency charged with administering the ADEA – the EEOC.⁹⁴ These filings are statutorily required as a predicate to grievants ultimately seek judicial relief.⁹⁵ In theory the EEOC charge should spur the allegedly discriminatory employer to cease its wrongdoing and to provide relief, be it reinstatement or better working conditions or whatever, for the complainant, without her having to actually proceed on to the expensive and time-consuming task of suing in court. And in some instances such action on the part of the employer no doubt occurs. However, in many instances the EEOC filings turn out to be largely matters of ritual; they rarely result

⁹² 29 U.S.C. § 626(b) (2000); *see generally* 1 AGE DISCRIMINATION, *supra* n. 42, at §§ 6:60 - 6:64.

⁹³ The EEOC over the years has filed very few lawsuits. The statistics regarding ADEA law suit filings by the EEOC from FY 2000 on are as follows: FY2000 - 33; FY2001 - 42; FY2002 - 39; FY2003 - 27; FY2004 - 46; FY2005 - 44; FY2006 - 50; and FY2007 - 32. U.S. Equal Employment Opportunity Comm'n, *EEOC Litigation Statistics FY1997 through FY2007*, <http://www.eeoc.gov/stats/litigation/html> (Dec. 15, 2008). (The federal fiscal year runs from October 31 through the following September 30).

⁹⁴ *See The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 669 n. 230. Over the past eight federal fiscal years (October 31 through the following September 30), ADEA filings with the EEOC have been as follows: FY 2001 - 17,405; FY 2002 - 19,921; FY 2003 - 19,124; FY 2004 - 17,837; FY 2005 - 16,585; FY 2006 - 16,548; FY 2007 - 19,103; and FY 2008 - 24,582. U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1997 Through FY 2007*, <http://eeoc.gov/stats/charges.html>. (Apr. 14, 2009).

⁹⁵ 29 U.S.C. § 633(b) (2000); *see generally* 1 AGE DISCRIMINATION, *supra* n. 42, at §§ 6:23 - 6:25.

in charging parties obtaining any kind of redress, either at the agency level or in court. Granted, many of these administrative charges lack legal merit, being filed by aggrieved employees and job applicants who erroneously believe themselves to be the victims of age discrimination or (to be cynical, but somewhat realistic) by individuals who know they do not have valid claims, but nonetheless hope to extract some sort of nuisance settlements from their allegedly discriminatory employers.⁹⁶ Moreover, even under the most generous characterization, these charges amount to no more than unproven allegations. Thus, they can at most be viewed only as *possible* indicators of wrongdoing. On the other hand – and this countervailing point merits particular emphasis, no doubt there are many people who indeed have valid claims but who do not file administrative charges with the EEOC, either because they are ignorant of their legal rights and/or because they do not have the courage or job security needed to risk challenging their employers and/or because they do not have the financial resources necessary to pursue their claims through to litigation and so they do not bother with the required predicate to suing, i.e., the charge of discrimination filed with, and processed by, the EEOC.

In sum, then, the numbers of charges annually filed with the EEOC – while noteworthy – do not really give an accurate picture as to the extent of ageism in the workplace. They may provide the observer with bases both for overstating the incidence of age bias as well as understating it.

A second piece of empirical data that perhaps more persuasively supports the conclusion that age bias continues to infest some American workplaces are the numerous cases decided every year by American courts. While it is true that in the majority of these

⁹⁶ The EEOC very rarely makes a determination that there is reasonable cause to believe a violation has occurred. The statistics for FY2000 and on are as follows: FY2000 - 8.2%; FY2001 - 8.2%; FY2002 - 4.3%; FY2003 - 3.2%; FY2004 - 3.3%; FY2005 - 4.1%; FY2006 - 4.3%; FY2007 - 3.9%; and FY2008 - 3.2%. U.S. Equal Employment Opportunity Comm'n, *Age Discrimination in Employment Act . . . FY 1997 - FY 2008*, <http://www.eeoc.gov/stats/adea.html> (Apr. 14, 2009). One perhaps might question whether these meager numbers accurately reflect the actual merits of the charges filed or whether they in some measure, at least, reflect inadequate EEOC investigations and/or the hostility of a given Administration to ADEA claimants.

cases the complainants, i.e., the people claiming to be the victims of violations of the ADEA lose, there are some plaintiffs each year who do prevail.⁹⁷ More importantly, no doubt there are grievants with

⁹⁷ See generally *The Age Discrimination in Employment Act at Thirty*, note 14 *supra*, at 645 - 662; see also Richard A. Posner, OLD AGE AND AGING 331 (1995). Specific data regarding the success or lack thereof of ADEA complainants who wind up actually litigating is not readily available, apart from the reviews of specific years addressed in the foregoing two sources, nor are the data available as to why the success rate is, to the extent one has data, apparently so low.

Other compilations of statistical data that exist are not helpful because they do not separate out ADEA cases from other employment discrimination rulings arising under other related statutes, most prominently Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17, the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, discussed *infra* at notes 192 - 196 and accompanying text. During the 17-year period running from 1990 through 2006, "civil rights" suits filed in federal courts by private complainants (including ADEA plaintiffs) claiming to be victims of discrimination in employment, housing, welfare, voting, and other contexts increased from 18,922 in 1990 to a high of 43,278 in 1997; by 2006 the total had fallen from the 1997 high down to 30,405. U.S. Dept. Of Justice, Bureau of Justices Statistics, *Civil Rights Complaints in U.S. District Courts, 1990 - 2006* at 1, 4 (Aug. 2008). During this 17-year period, civil rights cases involving employment discrimination (of which the ADEA complaints made up an unidentified portion) constituted about half of the filings. *Id.* at 2. Of the total group of civil rights cases (of which only a portion, as noted above, were employment cases), the percent of cases that produced a judgment, as opposed to those that were settled or dismissed, ranged from a high of 33.8% in 1990 to a low of 25.3% in 2003, back up to 28% in 2006. *Id.* at 5, Table 4. While the data do provide some breakdown as to the bases for dismissals, the data only distinguish between dismissals because of settlement, voluntary dismissals, cases dismissed for lack of jurisdiction and for want of prosecution, and a category designated as "Other." *Id.* Thus, there is no way of gleaning any insight from these data as to the judges' perceptions of the merits of the claims. Of the total of civil rights cases not dismissed, a small percentage went to trial – a maximum of 7.6% in 1990, ranging down to a low of 2.9% in 2004, and slightly up to 3% in 2006. *Id.* Of the 15,950 employment cases disposed of in 2006, 3.2% were concluded by a trial. *Id.* at 6, Table 5. (In the employment discrimination cases that went to trial, the percentage involving a jury increased from 40% in 1990 to 86% in 2006. *Id.*) Of that small percentage of civil rights cases that were terminated by trial, plaintiffs (and that means not just plaintiffs under the ADEA), won about one-third of the time. *Id.*

In sum, these numbers really provide very little enlightenment as to ADEA cases, in particular. The same unfortunately is true of other sources. See *e.g.*, Kevin M. Clermont, Theodore Eisenberg, and Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7

meritorious claims who secure settlements before they ever actually litigate their claims or in some instances before they even file administrative complaints with the EEOC, although their numbers are unknowable to outside observers because confidentiality clauses are standard aspects of such settlements.⁹⁸

Anecdotal evidence also supports the continuing prevalence of age bias in the workplace, as do – more importantly – formal (albeit somewhat dated) studies of workplace events:

[A] study published in 1993 by the Fair Employment Council of Greater Washington, Inc., relied upon a testing methodology whereby pairs of resumes – one for a hypothetical fifty-seven-year old and the other for a hypothetical thirty-two-year-old – were mailed to a random sample of 775 large firm and employment agencies nationwide. Even though the fictional job applicants' resumes set forth equal qualifications, the favorable response rate for older job seekers was 25.6% less than it was for the younger individuals in those instances where the companies actually had job vacancies. In similar vein, it was . . . reported in a [1996] popular journal, *Money Magazine*, that “[n]early five out of 10 executive search firms say that age is a ‘significant and negative factor’ to companies looking at job candidates ages 40 to 50, according to a 1996 survey by Exec-U-Net, a networking group for executives.”⁹⁹

Employee Rights and Employ. Policy J. 547 (2003); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 *Geo. L. J.* 1567, 1588 (1989) (reporting a 22.2% success rate by plaintiffs in employment discrimination cases).

⁹⁸ See William J. Howard, *Arbitrating Claims of Employment Discrimination*, *supra* n. 85, at 43 - 44.

⁹⁹ *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 670; see also American Assn. of Retired Persons, *BUSINESS AND OLDER WORKERS* 20 (1989); The Commonwealth Fund, *THE UNTAPPED RESOURCE, THE FINAL REPORT OF THE AMERICANS OVER 55 AT WORK PROGRAM* 50 (1993); Marc Bendick, Jr., Charles W. Jackson, and J. Horacio Romero, *Employment Discrimination Against*

C. *The Forces Animating Age Bias in the Workplace, and the ADEA Responses*

What accounts for age bias in the workplace? The orthodox wisdom disclaims the hatred, malevolence, and evil-mindedness that so often accompany the archetypal biases – racism, xenophobia, and religious fanaticism. Rather, more benign forces generate rejection of older men and women (even those in their 40's) as being “too old.” Indeed, this was pointed out in the earlier-noted 1965 report of the United States Secretary of Labor:

[W]e find no significant evidence of . . . the kind of dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job.

We do find substantial evidence of . . . discrimination based on unsupported general assumptions about the effect of age on ability . . . in hiring practices that take the form of specific age limits applied to older workers as a group.

We find that . . . [with regard to] decisions made about aging and the ability to perform in individual cases, there may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances.¹⁰⁰

In sum, age-based decisions made by, and actions perpetrated by, employers supposedly are not the consequence of evil motivation,¹⁰¹

Older Workers: An Experimental Study of Hiring Practices, 8(4) *J. of Aging & Social Policy* 25 (1996); B. Rosen and T.H. Jerdee, *THE PERSISTENCE OF AGE AND SEX STEREOTYPES IN THE 1990S: THE INFLUENCE OF AGE AND GENDER IN MANAGEMENT DECISION MAKING* (1995); Phillip Taylor and Alan Walker, *The ageing workforce: Employers' attitudes towards older people*, 4 *Work, Empl. & Socy.* 569 (1994).

¹⁰⁰ SECRETARY OF LABOR REPORT, *supra* n. 7, at 5.

¹⁰¹ While active age-based hatred no doubt is rarely implicated in interactions between older and younger individuals, whether in the workplace or in other

but rather are grounded – at least in good measure – on assumptions about the compromised abilities of older workers to perform. The bases for these assumptions require analysis.

1. *Older Workers' Ability to Perform*

Certainly a particularly common basis for negative decisions vis-a-vis older workers is the perception that these older individuals cannot adequately perform the jobs at issue. While there indeed are some correlations between older age and diminished job performance, the data must be assessed with caution. For one, despite general information about older workers as a group, the facts are that the individuals who make up that group vary both as to how each of them ages and how each adapts to aging. Thus, any generalization about *all* 65-year-olds is highly dubious as applied to any particular 65-year-old.

Second, the data – even as applied to older workers as a group – are mixed:

[D]epending upon whom one looks to, the data may be characterized as either unpersuasive or at the least ambiguous. Expressing the former view are two analysts who, having conducted a meta-analysis of the literature, concluded that there is very little by way of a meaningful relationship between age and job performance:

The relationship between age and job performance has long been of interest to

settings, the relationships between younger and older people are not necessarily always harmonious. Typically, however, some other animating force or issue other than age itself will be involved. For example, parents and adult children may argue bitterly and often, and they may even be totally estranged, but the operative forces here will not turn on age, but rather on family interactions. Or as discussed in the text, older workers may suffer at the hands of discriminatory employer decisions because of employer misperceptions about the ability of older men and women to perform the job. Still and all, there are going to be *some* instances when there simply is outright dislike of old people. As to the generative forces for such unadorned dislike, *see* ELDERS ON TRIAL, *supra* n. 1, at 23 - 55.

psychologists and industrial gerontologists . . . More recent studies either empirically evaluated the relationship using very large samples of data . . . or employed meta-analysis to integrate empirically the findings of many smaller studies. . . .

Collectively, these studies, which include more than 60,000 subjects, reveal an exceedingly weak relationship between age and performance. While this observation may be counter-intuitive, the large numbers of individuals on which the studies are based and the consistency of the results across reviews allow one to place substantial confidence in it.¹⁰²

Third, while there undeniably are health-related changes that correlate with advancing age, it is not clear that these age-related health factors adversely affect job performance.¹⁰³ In fact, a number of studies have shown a non-significant relationship.¹⁰⁴ Some studies actually show improved worker performance on the part of certain older employees, i.e., clerical workers and salespersons, both in terms of accuracy and steadiness of work output.¹⁰⁵ “Human resource managers typically give older workers high marks for their work ethic, collegiality, loyalty, and reliability in a crisis. . . .”¹⁰⁶ Older workers are also thought to bring another asset to the workplace –

¹⁰² *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 678 - 679, quoting Harvey L. Sterns and Michael A. McDaniel, *Job Performance and the Older Worker*, in *OLDER WORKERS: HOW DO THEY MEASURE UP? AN OVERVIEW OF AGE DIFFERENCES IN EMPLOYEE COSTS AND PERFORMANCES* 27, 29 (Sara E. Rix, ed. 1994).

¹⁰³ As to the possibility of seeking redress under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 (2000) *et seq.*, see notes 192 - 196 and accompanying text *infra*.

¹⁰⁴ Monroe Berkowitz, *Functioning Ability and Job Performance as Workers Age*, in *THE OLDER WORKER* 87, 105 - 106 (Michael E. Borus, Herbert S. Parnes, and Steven H. Sandell, eds. 1988) [hereinafter *THE OLDER WORKER*].

¹⁰⁵ *Id.*

¹⁰⁶ *WORKING LONGER*, *supra* n. 29, at 94 - 95.

their experience. But while this is no doubt true to some degree, “[t]he economic value of experience . . . tends to erode over time.”¹⁰⁷ Moreover, there are studies revealing a correlation between declining performance and advancing age for individuals in some occupations: printers, male production workers, factory workers, mail sorters, and air traffic controllers.¹⁰⁸

Fourth, absenteeism is less of a problem for older workers than it is for younger ones. But the flipside of the evaluative coin is that this better performance of oldsters is offset by the fact that when absences occur for health-related reasons, older workers are off the job for longer periods of time than are younger ones.¹⁰⁹ But again, there is ambiguity. “Older workers are less ‘healthy’ than younger persons irrespective of how health is measured (e.g., by self-evaluations, by extent of disability, by functional limitations).”¹¹⁰ Fifth, and in a somewhat related vein, while the frequency rate for accidents is lower for older workers than for younger ones, the data show a strong positive correlation between increased age and the greater severity of on-the-job accidents.¹¹¹ But the same commentators add, if “the question is whether the job performance of middle-aged and older workers suffers from these age-related health factors, the evidence is considerably less clear.”¹¹²

Of great significance, also, in understanding the phenomenon of ageism in the workplace are the matters of worker motivation and intellectual capacity. The general stereotypes that hold sway are that increasing age is particularly accompanied by intellectual decline, as well as by diminished enthusiasm and creativity. However, the empirical data to a considerable degree dispute these stereotypes – and that is particularly so with regard to the matter of intellectual decline. “The key finding in terms of intelligence is that age-related declines are minimal for many intellectual functions.”¹¹³ Moreover,

¹⁰⁷ *Id.* at 98.

¹⁰⁸ THE OLDER WORKER, *supra* n. 104, at 105 - 106.

¹⁰⁹ *Id.* at 106 - 107.

¹¹⁰ Herbert S. Parnes and Steven H. Sandell, *Introduction and Overview*, in THE OLDER WORKER, *supra* n. 104, at 11.

¹¹¹ *Id.* at 107 - 108.

¹¹² *Id.*

¹¹³ Dorothy Fleisher and Barbara H. Kaplan, *Characteristics of Older Workers: Implications for Restructuring Work*, in WORK AND RETIREMENT:

“[w]hat is important to keep in mind is that, in the absence of illness, age-related declines in memory [, which understandably are often relevant to job performance,] may indeed be slight and have minimal affect on performance.”¹¹⁴ Learning ability, which often is related to successful work performance, is commonly thought to be a particular Achilles heel for older people. Again, the actual empirical data undermine in good measure the validity of the stereotypical view.¹¹⁵

Still, when all is said and done, the data – while undercutting the stereotype of decline – do not entirely debunk it.¹¹⁶ Moreover, and also on this less positive note, there does seem to be some correlation between age and motivation: older workers are less motivated to perform well than are younger ones, although the causes for this are unclear, as is the answer to the question whether this phenomenon is inevitable or only situational.¹¹⁷ In addition, and still on a less positive note, the authors of one study conclude that older workers exhibit diminished work effort and less than satisfactory relationships with co-workers and supervisors, the reason being that they believe themselves to have been thwarted in their ambitions for personal achievement and promotions to higher positions.¹¹⁸

POLICY ISSUES 140, 151 (Pauline K. Ragan, ed. 1980).

¹¹⁴ *Id.* at 152.

¹¹⁵ *Id.* at 152 - 153; see also WORKING LONGER, *supra* n. 29, at 96.

¹¹⁶ See, e.g., WORKING LONGER, *supra* n. 29, at 95 - 96.

¹¹⁷ Dorothy Fleisher and Barbara H. Kaplan, *Characteristics of Older Workers: Implications for Restructuring Work*, note 111 *supra* at 153 - 155. Some explanations can be ventured. The older worker is aware that he has relatively few years remaining before he retires and thus he has less incentive to shine, since given his short remaining tenure his chances for merit-based promotion are limited, as well as are likely opportunities for lateral moves to equivalent or better jobs with other employers. In addition, the older worker is less likely than his younger counterpart to be caught up in the notion that his identity and worth are dependent upon the luster of his employer's reputation, and so he has less drive to excel than does the younger employee, who believes that his own star will rise as the reputation of the organization with which he is associated improves. Third, the older worker is more confident and self-assured than the inexperienced employee, and so he is less likely to be driven to seek the prestige that comes with elevated positions, which in turn come with working harder and for longer hours.

¹¹⁸ Timothy A. Judge, *et al.*, *Employee Age as a Moderator of the Relationship between Ambition and Work Role Affect*, Working Paper 20, Center for Advanced Human Resource Studies, Cornell Univ. (1994).

In sum, negative stereotypes regarding decline and lack of initiative no doubt are powerful impetuses for the adverse treatment accorded to some older men and women who are in, or are seeking to re-enter, the employed work force. And while these stereotypes – like most – are flawed, they still – like most stereotypes – are based on some degree of truth. Given some data establishing some declines in functional ability and advancing age, plus data regarding the longer, albeit rarer, absences from the job experienced by older workers, plus data showing the greater severity of on-the-job accidents suffered by older workers, plus data regarding diminished motivation, there is some warrant for the conclusion that “[t]here would seem to be some basis, of a statistical nature, for discrimination. . . .”¹¹⁹ And yet, the data are not so compelling as to justify wholesale exclusion or even uniform denigration of all older men and women as being unsuited for the workplace. Indeed, it has been opined by two astute students of workplace issues that “on the whole, employers are reasonably comfortable with the productivity compensation trade-off for employees aged 55 and over.”¹²⁰ In other words, these employers feel that they are getting their money’s worth from their older employees.¹²¹ The key, it would seem, for those employers who are attentive to improving the lot of older workers – whether because these employers are innately beneficent or are driven by legal concerns, i.e., liability imposed for violations of anti-discrimination laws, or both – is to work with the assets older workers bring to the workplace and to adopt policies and practices that mitigate the impact of the deficits.

A cautionary note *is* due here, however: implicit in the foregoing admonition about looking to the assets older workers bring to the workplace, and explicit in the statutes and case law that have developed in the United States, is the entirely appropriate proposition that employers are in no way required to hire, retain, or promote people who are not able to do the job at issue. In other words,

¹¹⁹ THE OLDER WORKER, *supra* n. 104, at 110.

¹²⁰ WORKING LONGER, *supra* n. 29, at 105.

¹²¹ But the same analysts caution that the fact “[t]hat employers are comfortable with their older employees and are less likely to displace them does not mean they are keen on retaining employees past their traditional retirement age.” *Id.*

rejection of age bias does not require acceptance of inadequacy or incompetence. The difficulty, of course, arises when in the context of a dispute between a grievant and an employer, one must determine whether it was either the individual's alleged lack of ability or the employer's alleged age animus that most accurately explains the employer's decision. It is the tension between these two typical polar rationales, and the difficulty that outside, after-the-fact observers – i.e., government enforcement agency personnel, lawyers, judges, and jurors – have in second-guessing employment decisions, that make for the voluminous body of judicial rulings addressing the ADEA.

2. *Older Workers and Employer Costs*

a. *Benefits*

A major factor that accounts for employer antipathy (or at least discomfort) regarding older workers is the matter of cost. Unlike Western European countries, the United States does not provide governmentally-funded health programs for the general population; rather, it is customary for health insurance to be a job benefit, paid for in whole or, more commonly, in part by the employer. Because health care costs have been expanding enormously year after year in the United States,¹²² and because health

¹²² National health spending grew in 2007 at the lowest rate in nine years, but mainly because prescription drug spending increased at the slowest pace since 1963, the government reported Monday.

But other types of health spending rose at a brisk pace, pushing the total to \$2.2 trillion, or 16.2 percent of the gross domestic product, a record. Spending averaged \$7,241 for each person. Total health spending rose 6.1 percent, compared with a 6.7 percent increase in 2006. . . .

Spending on hospital care rose 7.3 percent in 2007, to \$696.5 billion

Spending for doctors' services rose 5.9 percent in 2007, to \$393.8 billion. . . .

Out-of-pocket spending on health care increased 5.3 percent in 2007, to \$268.6 billion. . . .

insurance costs accordingly have become an increasingly large expense for employers, it is understandable that employers may find older employees to be increasingly less attractive in purely financial terms.¹²³ It has been asserted (without a breakdown as between men and women), that “[t]he 2003 cost of insuring workers in their early 60s was \$7,600, which was \$3,500 more than the cost of insuring workers twenty years younger.”¹²⁴

York Times, p. A17 (Jan. 6, 2009).

¹²³ See American Assn. of Retired Persons, BUSINESS AND OLDER WORKERS 16 - 17 (1989). Actually, in another study commissioned by the same organization, now known simply by the acronym AARP, the issue of health insurance costs was found to be of low-level concern at best:

[A]lthough many managers mentioned the cost of health care as being a major component of employment costs, few had strong opinions on whether these costs were significantly higher for older workers. Several noted that the additional costs for insuring an older worker would be partially offset by the fact that an older employee may not have dependents on his or her policy. Notably, some managers, especially those in larger companies, explained that they were relatively unconcerned about these costs, because the costs would not be incurred by their division or department, but would rather be absorbed into the company’s general overhead. Thus, age-related differences in health care costs were seen as a companywide issue, as opposed to a concern specific to an individual manager’s operating group.

Managers’ relative lack of opinion on and indifference to the issue of higher health care costs for older workers stands in contrast to the findings of other large surveys . . . which found that human resource managers believed that older workers had significantly higher health care costs and that rising health care costs were a major human resource concern. Other studies . . . have concluded that, in general, health care costs increase with age for working men and women, although [in one study the researchers] have shown in one corporate setting that self-selection by healthy older people to remain in the work force and the potential lack of dependents may offset age-related differences in health care costs otherwise expected.

VALUING OLDER WORKERS – A STUDY OF COSTS AND PRODUCTIVITY 10 (n.d.) (citations and footnote omitted).

¹²⁴ WORKING LONGER, *supra* n. 29, at 103.

More specifically, the data establish that the health insurance costs associated with older male workers are considerably higher than those generated by younger male workers, reflecting the fact that older males utilize health care more extensively than do their younger counterparts:

[In a 1993 report it was estimated] that in 1994 the average employer cost of insured males between the ages of 55 and 64 [would] be \$3,960 [,] compared to \$1,500 for workers 25 to 34. As a percentage of earnings, the health cost for the older male workers . . . [was expected to] be 14.5 percent, while employer expenditures for the younger male workers . . . [were] expected to be only 6.1 percent of salary.¹²⁵

The data regarding women are more ambiguous. One model, when applied, showed a steady correlation between increasing age and increasing health insurance costs for women, as well as men.¹²⁶ But some experts have estimated that the cost of insuring women workers ages 55 to 64 are, or should be, less than for those ages 35 to 54.¹²⁷

While not providing a solution for the higher overall insurance costs an employer may confront in paying for a group policy, particularly when a considerable percentage of its work force is older, the ADEA does ameliorate to some degree the consequence of the age/insurance cost correlation by means of an *equal cost/equal benefit* principle embodied in the Act.¹²⁸ By virtue of this provision, an employer will be insulated from liability for engaging in discrimination as long as it spends the same amount on health insurance coverage for each of its employees, even if that expenditure purchases less coverage for an older employee as contrasted with a younger one.¹²⁹

¹²⁵ Robert L. Clark, *Employment Costs and the Older Worker*, in *OLDER WORKERS: HOW DO THEY MEASURE UP? AN OVERVIEW OF AGE DIFFERENCES IN EMPLOYEE COSTS AND PERFORMANCES* 1, 17 (Sara E. Rix ed., 1994).

¹²⁶ *Id.* at 16.

¹²⁷ *Id.* at 17.

¹²⁸ 29 U.S.C. § 623(f)(2)(B)(I) (2000).

¹²⁹ Insofar as health insurance costs for retirees are concerned, the fact is that employers are not legally required to provide any such benefit. The Equal

Pension costs arising out of defined benefit plans also may put older workers at a competitive disadvantage, although decreasingly so. Under these plans the employer promises to pay its workers a specific amount in retirement benefits, which typically are computed according to formulae based on some combination of the retiree's length of service and his final salary, or the average of his last three

Employment Opportunity Commission (EEOC) initially proposed a regulation in 2003 which would allow employers that did provide such coverage to terminate it without running afoul of the ADEA once an employee became eligible for Medicare coverage or a State-sponsored retiree health benefits program. The need for this regulation flowed from a couple of factors. First, health insurance coverage was, and is expensive. Second, many people retire prior to age 65, when Medicare eligibility arises, and a number of employers commonly provide as a benefit for such retirees bridge coverage, that is, the employer pays (in whole or part) for the former employee's health insurance until the retiree becomes eligible for Medicare. However, the ADEA creates a problem, as the EEOC explained:

[As a result of a 2001 federal district court decision, *Erie County Retirees Ass'n v County of Erie*, 140 F. Supp.2d 466 (W.D. Pa. 2001),] . . . an employer who voluntarily provides its pre-age 65 retirees with a bridge to Medicare (with the intent to terminate all employer-sponsored retiree coverage at that time) can do so without ADEA implications only if the benefits provided by the bridge coverage are either the same as or less generous than those provided by Medicare. Stated otherwise, in every instance where employer-provided bridge coverage exceeds Medicare coverage, the employer would be prevented by the ADEA from ending its coverage when retirees become eligible for Medicare [since this would constitute a negative action based on age from the perspective of the Medicare-eligible retirees, whose benefit coverage would decrease]. The Commission is concerned that many employers will respond to this outcome, given the dramatic cost increases for retiree health benefits, not by incurring additional costs for retiree benefits that supplement Medicare, but rather by reducing or eliminating health coverage for retirees who are not yet eligible for Medicare.

Equal Employment Opportunity Comm'n, *Age Discrimination in Employment Act; Retiree Health Benefits, Notice of proposed rulemaking*, 68 Fed. Reg. 41, 542, 41, 546 (July 14, 2003).

The proposed regulation was challenged by AARP; it ultimately was upheld as being within the authority of the EEOC to issue in *American Association of Retired Persons v. Equal Employment Opportunity Comm'n*, 489 F.3d 558 (3rd Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1733 (2008).

or so years of salary prior to retirement. Under defined contribution plans, which today are far more common, the employer promises to contribute a specified periodic amount to the employee's pension plan, but it makes no promise as to what the final payout will be. Since, as discussed in the next subsection, older workers in many workplaces will receive higher salaries than their younger, more recently hired counterparts do, the amount of fixed pension benefits in the case of defined benefit plans for which the employer will be responsible can be reduced if senior workers are removed before their salaries inflate significantly. However, these plans are understandably becoming increasingly rare,¹³⁰ given their potential and actual negative financial ramifications for employers, and therefore are of lesser significance in this discussion. As for defined contribution plans, the equal cost/equal benefit principle discussed above applies here, so that the employer does not face liability as a result of differing pension pay-outs, so long as the employer contributes the same amount for both younger and older employees' pensions. Thus, the pension issue should not create any incentive for terminating, or refusing to hire, older workers in defined benefit plan workplaces. Otherwise, the ADEA addresses pension issues in a number of ways,¹³¹ but again, pension costs do not provide a legitimate basis for concluding that the pension costs for older workers exceed those attributable younger workers.

b. Salary Costs

Salary can be a particularly important factor in inclining employers to look with disfavor on older employees. Salary typically increases with time on the job. As a general matter a given 60-year-old worker – at least one who is not a new hire – will have been

¹³⁰ See David Neumark, *The Age Discrimination in Employment Act: A Retrospective and Prospective Assessment* 20 (2008) (paper on file with the author), citing Leora Friedberg and Anthony Webb, *Retirement and the Evolution of Pension Structure*, NBER [National Bureau of Economic Research] Working Paper No. 9999 (2003); Leslie E. Papke, *Quantifying the Substitution of 401(k) Plans for Defined Benefit Plans: Evidence from Ongoing Employers*, National Tax Association 89th Annual Conference on Taxation 136 (1997); see also U.S. Bureau of Labor Statistics, OLDER WORKERS 8, www.bls.gov/spotlight (July, 2008).

¹³¹ See 1 AGE DISCRIMINATION, *supra* n. 42, at §§ 5:38 - 5:43.

employed with a given employer for a longer period of time than will have been her 30-year-old colleague. It therefore follows that in a workplace where wages are not strictly keyed solely to the job performed, no matter who is performing it, this 60-year-old will be earning more than her younger counterpart, even if the two are performing the same functions in the workplace.¹³² It thus makes basic economic sense for employers to discard older, highly paid senior employees – particularly when their work product can be matched with no loss of quality or quantity by the less senior (and therefore likely younger) replacements.

The statutory language and the case law have joined together to make discharge based on salary by the cost-focused employer looking to reduce overhead perfectly legal – at least so long as it really is salary, and not age, which motivates the employer. More specifically, the ADEA allows an employer to act on the basis of “reasonable factors other than age,”¹³³ and so despite the typical positive correlation between older age and higher salary, a dismissal justified in the name of saving money by getting rid of more costly employees – a reasonable factor other than age – will not transgress the statute’s prohibition of age discrimination, even if most or all of the higher paid people who are discharged also happen to be the older people in the employer’s work force.

At one time, the foregoing conclusion was not so inevitable; some courts were willing to utilize an ‘age proxy’ analysis, whereby they would find a violation of the statute if a factor closely correlated with age (such as high salary) was utilized by an employer as a substitute, or proxy, for age itself. However, the viability of this mode of analysis was laid to rest by the United States Supreme Court in 1993 in *Hazen Paper Co. v. Biggins*.¹³⁴ This case involved a 62-year-old man who was discharged just weeks before his pension would have vested (that is, he would have had a legally protected guarantee of receiving that pension upon retirement) pursuant to the terms of the company plan, which provided for vesting upon the

¹³² See Rachel Floersheim Boaz, *The 1983 Amendments to the Social Security Act: Will They Delay Retirement? A Summary of the Evidence*, 27 *Gerontologist* 151, 154 (1987).

¹³³ 29 U.S.C. § 623(f)(1) (2000).

¹³⁴ 507 U.S. 604 (1993).

completion of ten years of employment with the company. Since seniority – that is, ten years on the job – correlated with age (after all, a 25-year-old would not have accumulated ten years of employment with the company), there was – according to the lower courts – a legally significant correlation between age and pension vesting, and so the company’s firing of Biggins to avoid the vesting of the pension was tantamount to discrimination on the basis of age. The Supreme Court disagreed and in overturning the lower courts’ rulings for Biggins pretty much demolished age-proxy analysis:

Disparate [i.e., discriminatory] treatment [analysis] . . . captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age. . . .

When the employer’s decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. . . . On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service [– a factor which is typically correlated with pension eligibility –] with a particular employer. Yet an employee’s age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of workers as defined by the ADEA . . . may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily “age-based.”¹³⁵

¹³⁵ *Id.* at 610 - 611.

Applying these insights, the Court concluded that Biggins was not the victim of age discrimination because “[t]he prohibited stereotype (‘Older employees are likely to be ____’) would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age.”¹³⁶

The Supreme Court’s 2005 holding in *Smith v. City of Jackson*¹³⁷ that disparate impact (which is generally termed in European Union countries indirect discrimination) analysis applies in the ADEA context does not offer any support for a departure from the *Hazen Paper* distinction between age bias, on the one hand, and salary-based decision making on the other. Inasmuch as impact analysis has been a very controversial part of American discrimination law and because in theory it has (or had) the potential for being of significant benefit for victims of age bias, some further explanation is due. This entails first looking to the ADEA’s sister statute, Title VII of the Civil Rights Act of 1964.¹³⁸

More than three decades ago the United States Supreme Court established that an employer can be found liable for having violated Title VII if it uses an ostensibly neutral policy or test that has a significantly adverse impact upon members of one of Title VII’s protected classes, i.e., persons defined in terms of race, color, national origin, religion, or sex. Thus, for example, if an employer utilizes a weight-lifting test as a criterion for deciding who to hire, and significantly more women than men fail the test, the employer may be held liable (if it fails to prove that the test is job-related and serves business necessity).¹³⁹ The fact that the employer was not at all motivated by discriminatory intent in establishing this weight-lifting requirement is irrelevant. In its seminal 1971 impact decision, *Griggs v. Duke Power Co.*,¹⁴⁰ the Court explained the rationale undergirding employer liability in a disparate impact situation:

¹³⁶ *Id.* at 612.

¹³⁷ 544 U.S. 225 (2005).

¹³⁸ It is well established that Title VII precedents are of persuasive analogical guidance for ADEA courts. *See supra* n. 67.

¹³⁹ 42 U.S.C. § 2000e-2(k)(1)(A)(I) (2000).

¹⁴⁰ 401 U.S. 424 (1971).

The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, 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.

. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.¹⁴¹

Now, turning to the age context, suppose that an employer has a policy of firing any employee once she attains sufficient tenure – let us say 25 years – to be eligible for a salary of \$100,000. Suppose, further, that this policy has a significant negative impact on older workers, since typically only older workers will have the requisite years on the job to have reached the \$100,000 salary level. While classic disparate impact analysis seemingly could lead to the conclusion that our hypothetical employer has utilized a legally impermissible policy because of its adverse impact on older employees, the *Smith* Court fashioned a reconstruction of impact analysis severely limiting the utility for plaintiffs of such analysis under the ADEA.¹⁴² Pursuant to this analysis, the discharge of an

¹⁴¹ *Id.* at 429 - 431.

¹⁴² The *Smith* Court held that the standards set forth in a 1989 Title VII ruling, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), applied to disparate impact claims litigated under the ADEA. *Wards Cove*, a pro-employer ruling, was in part repudiated by the Congress fairly soon after its issuance by means of the Civil Right Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991), which amended Title VII. That legislation did not, however, amend the ADEA and so a key question after the 1991 enactment was whether the pro-employee changes

older employee because of her elevated salary will qualify as a reasonable factor other than age and so her disparate impact argument will fail.

made to Title VII could be read by courts into the ADEA by means of judicial construction. See Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 Wayne L. Rev. 1093 (1993). Ultimately, the *Smith* Court ruled in the negative.

It was the *Wards Cove* formulation that in significant measure was held by the *Smith* Court to be applicable in the ADEA context. Thus, an ADEA defendant needed only to satisfy a burden of production, rather than proof, in responding to the plaintiff's prima facie claim. In contrast, under Title VII, as amended, the defendant bears the much heavier burden of *proving* an affirmative defense once the plaintiff establishes a prima facie disparate impact claim.

Further weakening the utility of disparate impact analysis for age discrimination plaintiffs, the *Smith* Court in one key respect spurned even the pro-employee *Wards Cove* formulation and devised an especially easy burden of production for ADEA defendants. Under *Wards Cove* "the dispositive issue . . . [was] whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer" 490 U.S. at 659. "[T]here . . . [was] no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.* But the *Smith* Court, looking to the unique ADEA provision, 29 U.S.C. § 623(f)(1), that allows employers to rely upon reasonable factors than age – a provision absent from Title VII – ruled that an employer needed only to produce evidence that its challenged policy or practice was reasonable. This is a standard clearly easier to satisfy than establishing that the challenged practice "in a significant way" serves the employer's legitimate goals. The *Smith* Court wrote as follows: "It is . . . in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U.S. at 239. In striking contrast to this very mild burden of production imposed upon an ADEA defendant in a disparate impact case (and a burden even easier, as noted, than that imposed by the pro-employee formulation in *Wards Cove*), under the amended Title VII a defendant must *prove* that its "challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). This disparity regarding burdens subsequently was negated by the Court's ruling in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. ____ , 128 S. Ct. 2395 (2008), in which the Court held that it is the defendant that invokes the RFOA provision which bears a burden of proof, after all. However, this burden – while of course more onerous than a burden of production – still does not entail proving business necessity, as is required under Title VII, but only requires proof that there was a reasonable factor other than age (such as salary) for the employer's complained-of decision or action.

D. *Constitutional Analysis Regarding Age in the Workplace*

By far the great majority of federal court rulings addressing age discrimination in employment involve interpretations and applications of the ADEA, which applies to employers both in the private and public sectors. But grievants who work for state and local governmental employers also can look to the Equal Protection Clause set forth in the United States Constitution's Fourteenth Amendment,¹⁴³ a clause that is inapplicable to private employers. (A comparable guarantee has been read by the Supreme Court¹⁴⁴ into the Due Process Clause of the Fifth Amendment,¹⁴⁵ which applies only to the federal government.) A review of the equal protection case law is useful because it provides insights into the thinking that has animated the United States Supreme Court as to the proper, or at least acceptable, role of age in the workplace (in the absence of legislatively enacted limits on the use of the age factor).¹⁴⁶ As this analysis will disclose, the Equal Protection Clause actually affords less protection to governmental employees than they can secure under the ADEA.¹⁴⁷

¹⁴³ U.S. Const., amend. XIV, § 1.

¹⁴⁴ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁴⁵ U.S. Const., amend V.

¹⁴⁶ See generally Howard Eglit, *Of Age and the Constitution*, 57 Chi-Kent L. Rev. 859 (1981) [hereinafter *Of Age and the Constitution*].

¹⁴⁷ The individual rights guarantees of the United States Constitution set floors, rather than ceilings. Thus, a state or local governmental body may choose to extend greater protection to individuals than does the Constitution. Conversely, they may not mandate less protection for individuals than the United States Constitution affords them. However, the issue becomes somewhat more complicated insofar as Congress is concerned. In the context of rejecting the proposition that the ADEA was an appropriate exercise of Congress's authority under § 5 of the Fourteenth Amendment to enact legislation implementing the due process and equal protection guarantees of the amendment set forth in § 1 of the amendment, the Court pointedly noted, in deciding *Kimel v. Florida Board of Regents*, 528 U.S. 62, 86 (2000), that "[t]he Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard . . ." (The ADEA has been upheld as a valid exercise of Congress' power under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983)). The consequence of *Kimel* is that the ADEA cannot be deemed to constitute an

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Added to the Constitution in 1868, the initial and primary focus of the amendment was the protection of the newly-freed slaves,¹⁴⁸ who found that the freedom secured for them by the North’s victory in the Civil War quickly was being compromised after the war’s end by a host of hostile statutes and practices adopted and imposed in the vanquished southern states. For 100 years the Equal Protection Clause was invoked almost exclusively in the context of challenges to discrimination imposed because of race or national origin, the latter characteristic being seen as persuasively analogous to race.¹⁴⁹ Starting in the 1960’s and continuing even today to a limited extent, the provision’s reach has been broadened beyond race issues by a sometime rights-oriented Supreme Court. But while expansion of the clause has been achieved in the last 30 years or so, most notably with regard to legal condemnation of gender discrimination,¹⁵⁰ the efforts to invoke the provision as a protector for those victimized by age discrimination has failed.

There are four key decisions, three of which involved people deemed too old to be allowed to remain in their jobs. (With regard to minors, the courts typically have viewed them as not being entitled to

abrogation of States’ sovereign immunity, an abrogation that only could be established if the statute were a valid exercise of § 5 authority.

¹⁴⁸ See, e.g., *Butchers’ Benevolent Assn. of New Orleans v. Crescent City Livestock Landing and Slaughter-House Co.* (Slaughterhouse Cases), 83 U.S. 36 (1872).

¹⁴⁹ See *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁵⁰ Until the 1976 ruling in *Craig v. Boren*, 429 U.S.190 (1976), a minimum rationality test was used to assess the constitutionality under the Equal Protection Clause of gender classifications, see *Goesaert v. Cleary*, 335 U.S. 464 (1948), although a signal that a possible doctrinal change was imminent was provided by the Court’s striking down of such a classification in *Reed v. Reed*, 404 U.S.71 (1971). In *Craig* the Court held that in order for a gender classification embodied in a statute or policy to survive, the defender of that statute or policy bore the burden of proving that the interest being served was an important one and that the means used to achieve that interest, i.e., the statute or policy at issue, had to be substantially related to that interest. Subsequently, the Court has added some apparent heft to this test: the defendant, so the Court has stated in some cases, must put forth an “exceedingly persuasive justification” for that important interest. *United States v. Virginia*, 518 U.S. 515, 534 (1996) (no citation by Court for the quote).

the full array of constitutional protections afforded adults, based on “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”¹⁵¹ *Massachusetts Board of Retirement v. Murgia*¹⁵² is particularly significant because it first set forth the analytical parameters to which the succeeding decisions have adhered.

Murgia involved a state police officer who was forced upon attaining age 50 to retire, in accordance with a state mandatory retirement law. The police officer argued that the statute should not be measured pursuant to the commonly used very low level of judicial scrutiny that merely asks if there is any “reasonably conceivable state of facts that could provide a rational basis” for the law at issue.¹⁵³ Rather, Officer Murgia urged the Court to apply the same heightened level of judicial scrutiny utilized by the courts in assessing laws making distinctions on the bases of race and national origin.¹⁵⁴ In other words, and to use the standard legal parlance, he argued that age was a *suspect* classification.¹⁵⁵

The Court responded by first noting some of the criteria it had devised for identifying suspect classes: “[A] suspect class is one ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”¹⁵⁶ The Court then applied these criteria to age classifications and deemed them undeserving of suspect status:

¹⁵¹ *Bellotti v. Baird*, 443 U.S. 622, 633 - 634 (1979) (citations omitted).

¹⁵² 427 U.S. 307 (1976); see generally Howard Eglit, *Mandatory Retirement, Murgia, and Ageism*, in *EMPLOYMENT DISCRIMINATION STORIES* 259 (Joel Wm. Friedman, ed. 2006).

¹⁵³ See, e.g., *Federal Communications Comm’n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); see also *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

¹⁵⁴ Pursuant to this strict scrutiny, the burden is on the defender of the law to prove that the law serves a compelling governmental interest and that the means used to achieve that interest – i.e., the law in question – is necessary, or the least discriminatory. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972).

¹⁵⁵ See generally *Of Age and the Constitution*, *supra* n. 146.

¹⁵⁶ 427 U.S. at 313.

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [O]ld age does not define a “discrete and insular” group . . . in need of “extraordinary protection from the majoritarian political process.” Instead, it marks a stage that each of us will reach if we live out our normal span.¹⁵⁷

On balance, it seems correct to conclude that Murgia and his lawyers indeed were overreaching: the analogy between the classic suspect group for which the Equal Protection Clause was originally designed – i.e., African-Americans – and those deemed “too old” was, and is, too tenuous a one to be persuasive. There is no long and tragic history of adverse treatment of older people that at all parallels the enormous injustices heaped upon blacks and certain ethnic minorities in the United States.¹⁵⁸ Nor have elders (and certainly not those short of elder status, such as 50-year-old Murgia himself) been subjected to a host of politically and socially imposed disabilities.¹⁵⁹

¹⁵⁷ *Id.* at 313 - 314.

¹⁵⁸ As to historians’ assessment of the role and treatment of the elderly over the centuries in the United States, see W. Andrew Achenbaum, *OLD AGE IN THE NEW LAND* (1978); David Hackett Fischer, *GROWING OLD IN AMERICA* (expanded ed. 1978); Carole Haber, *BEYOND SIXTY-FIVE* (paperback ed. 1983); cf. Thomas R. Cole, *THE JOURNEY OF LIFE* 48 n.1 (paperback ed. 1993): “Although historians have spilled a good deal of ink debating the power and status of old age in early America, we do not yet have enough empirical data – especially outside of New England – to justify strong generalizations.” For a more global discussion, see George Minois, *HISTORY OF OLD AGE* (1989).

¹⁵⁹ Still, the *Murgia* Court’s assessment of the level of judicial scrutiny properly due age classifications merits some criticism. See *Of Age and the Constitution*, note 146 *supra*. Moreover, the Court played somewhat fast and loose by addressing the treatment of the “aged,” since Office Murgia was only 50 when he lost his job and so he hardly qualified as a member of that group. Of course, his relative youthfulness actually cut against his legal claim, since

A few years after *Murgia* the Supreme Court upheld a mandatory retirement requirement imposed on United States Foreign Service officers in *Vance v. Bradley*.¹⁶⁰ Here, the Court justified the requirement with an additional rationale not used in *Murgia*: forcing people out when they reached the age of 60 was perfectly reasonable because there was a need to make room for younger people who wanted to move up in the ranks. Another post-*Murgia* explanation for the Court's turning its back on age discrimination is a strategic one, as revealed in *City of Cleburne v. Cleburne Living Center*,¹⁶¹ which arose out of the city's refusal to issue a special-use permit to allow the construction and operation of a group home for the mentally retarded in a neighborhood that was not zoned for such entities. The Court rejected the claim that the policy, which allegedly discriminated against the mentally retarded, should be seen as embodying a quasi-suspect classification that, so it was argued, should be subjected to more than the usual minimal judicial examination. In doing so the *Cleburne* Court invoked as justification the proverbial 'slippery slope' argument commonly employed in American legal reasoning:

[I]f the large and amorphous class of the mentally retarded were deemed quasi suspect, . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative response, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only *the aging*, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.¹⁶²

individuals of his vintage had, and have, even less of a valid basis for claiming a history of discrimination and/or political powerlessness than do the elderly.

¹⁶⁰ 440 U.S. 93 (1979).

¹⁶¹ 473 U.S. 432 (1985).

¹⁶² *Id.* at 445 - 446 (emphasis added).

While the Court did not so state in 1976 when it decided *Murgia*, likely the same ‘slippery slope’ concern lurked in the background there: had it opened the door to special consideration under the Constitution for the “aged,” inevitably other groups would have and could have claimed like consideration – an eventuality the Court no doubt did not relish in 1976 when Officer Murgia was before it any more than it did in 1985 in *Cleburne*.

The final key Supreme Court decision is *Gregory v. Ashcroft*,¹⁶³ in which the Court addressed a mandatory retirement provision contained in a state constitution that required judges to leave the bench at age 70. At the time judicial officers in the state of Missouri initially were appointed by the governor; thereafter, they could seek to stay in their positions by submitting themselves to the electorate for a retention vote. Each of the plaintiffs in *Gregory* had been retained by the voters, but because of the state constitutional provision they eventually had to give up their positions upon turning age 70. These judges thus were somewhat different than employees. The latter keep their jobs at the sufferance of their supervisors and generally may be terminated either arbitrarily or, if protected by contract or statute, for good cause, whereas the judges who were the litigants in *Gregory* retained their positions by means of election by the voters. Even so, the Supreme Court’s willingness to uphold the state constitutional provision and thereby rule against the judges is instructive because it added to the *Murgia* and *Vance* analyses another common argument for the legitimacy of age as a basis for decision making in the workplace, i.e., the difficulty of making individualized determinations of competence:

“The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system”; “the statute . . . draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not”; “mandatory

¹⁶³ 501 U.S. 452 (1991).

retirement increases the opportunity for qualified persons . . . to share in the judiciary and permits an orderly attrition through retirement”; . . . any one of these explanations is sufficient to rebut the claim that “the varying treatment of different groups or persons . . . is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the actions were irrational.”¹⁶⁴

In sum, the United States Supreme Court (whose nine justices of course are life-tenured¹⁶⁵) has consistently rejected constitutionally-based attacks on the use of age in the workplace. All that the Court has required, from *Murgia* to the present day, is that an employer’s decision or action be minimally rational, and as an examination of the case law both within the age discrimination context as well as other settings reveals, this is a test that almost always is satisfied.¹⁶⁶ Indeed, the Supreme Court’s rulings demonstrate that this test is so extremely deferential to the decision maker (the employer, for our purposes here) that the decision will be upheld if any conceivable rational basis for it can be conjured up – if not by the decision maker itself, then by the court on behalf of the decision maker.¹⁶⁷ Why is this so? Do American courts – led by the Supreme Court – harbor some special hostility when it comes to extending constitutional protection to the too-old?

The ready answer is ‘no.’ Ageist animus is not at work here. Rather, the better explanation for the Supreme Court’s dismissive attitude vis-a-vis age classifications would seem to lie in the Court’s understanding of its role in American society. While this court, as

¹⁶⁴ *Id.* at 471 - 472, quoting *O’Neil v. Baine*, 568 S.W.2d 761 (Mo. Sup. Ct. 1978), and *Vance v. Bradley*, 440 U.S. 93 (1979).

¹⁶⁵ As of December, 2008, the nine justices ranged in age from 88 (Justice Stevens), 75 (Justice Ginsberg), 72 (Justice Scalia), 71 (Justice Kennedy), 70 (Justice Breyer), 69 (Justice Souter), 60 (Justice Thomas), 58 (Justice Alito), down to age 53 (Chief Justice Roberts).

¹⁶⁶ See Erwin Chemerinsky, CONSTITUTIONAL LAW 623 (2d ed. 2005): “The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. . . . The result is that it is rare for the Supreme Court to find that a law fails the rational basis test.”

¹⁶⁷ See ELDERS ON TRIAL, *supra* n. 1, at 127.

well as the lower federal courts which take their lead from it, have the power to overturn federal, state, and municipal laws, they actually exercise that power reluctantly.¹⁶⁸ This is in part because the power of judicial review is seen as being anti-democratic: it puts life-tenured federal judges in the position of second-guessing the popularly elected legislators who draft our legislation, and the popularly elected presidents, state governors, and city mayors who sign these legislative exercises into law. Absent very strong historical/social/political reasons for overturning a given statute, the courts will uphold it and thereby demonstrate respect for, and commitment to, the majoritarian democratic process that produced that enactment. And so, with regard to laws dealing with age the Supreme Court has in effect said: ‘There is not enough here to warrant our overruling the democratic process and supplanting our vision of a good society for that embodied in the laws imposing some sort of burden – typically, in the past, mandatory retirement – on older men and women.’ Implicit in this judicial posture is the further notion that if a given use of age in the workplace is to be condemned, that condemnation should come through the democratic process, i.e., through legislation. And, in fact, that is exactly what has happened. Older workers have been able to prevail politically by reason of the force of their own numbers, the political attractiveness of their cause, and their ability to garner support from other groups.¹⁶⁹ Thus, as

¹⁶⁸ To this end, the courts have been instructed by Supreme Court decisions to follow certain avoidance principles, so as to avoid deciding constitutional questions unless a decision is strictly necessary. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 - 348 (Brandeis, J., concurring) (1936); see generally Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C.L. Rev. 1003 (1994).

¹⁶⁹ The generally accepted, albeit flawed, mythology seems to be that older men and women vote as a bloc, and unblinkingly use the ballot box to foster their own interests at the expense of the young. See generally *ELDERS ON TRIAL*, *supra* n. 1, at 30 - 31. The data, however, do not bear out this myth of a monolithic voting bloc of older men and women. See, e.g., Robert H. Binstock, *Aging, Politics, and Public Policy*, in *GROWING OLD IN AMERICA* 325 (Beth B. Hess and Elizabeth W. Markson, eds. 1991); Robert H. Binstock, *Politics*, in *ENCYCLOPEDIA OF AGEISM* 250 (Erdman B. Palmore, Laurence Branch, and Diana K. Harris, eds. 2005). This is not to say, however, that the elderly, as a group, do not have very significant political clout – both actual and perceived. See generally *ELDERS ON TRIAL*, *supra*, at 31; Howard Eglit, *Health Care Allocation for the*

earlier noted, every state, as well as the federal government, has adopted legislation severely limiting the use of age in the workplace, even to the extent at the federal level of the ADEA's ultimately being amended in 1986¹⁷⁰ to outlaw by legislative action in most situations the very age-based mandatory retirement that the United States Constitution, as interpreted by the Supreme Court in *Murgia, Vance*, and *Gregory*, tolerates.¹⁷¹

IV. OTHER LAW-BASED APPROACHES TO AGE BIAS IN THE WORKPLACE

The primary foci of this paper's discussion of legal issues concerning age bias in the workplace are the ADEA, the United States Constitution, and the case law developed under them. But there are some other relevant legal directives and theories that merit some passing discussion here, as well.

A. State and Local Anti-Discrimination Laws and Ordinances

Most immediately on point are the fair employment practice state laws that exist in every state.¹⁷² (There are also local municipal ordinances in some instances that provide protection to the claimed

Elderly: Age Discrimination by Another Name?, 26 Hous. L. Rev. 813, 825 (1989); Sherry J. Holladay and W. Timothy Coombs, *The Political Power of Seniors*, in HANDBOOK OF COMMUNICATION AND AGING RESEARCH 383 (Jon F. Nussbaum and Justine Coupland eds. 2004). Some have bitterly deplored their supposed power. See, e.g., Phillip Longman, BORN TO PAY (1987); William Neikirk, *The Over-65 Gang is Overpowerful*, Chicago Tribune, § 7, p. 3 (Nov. 29, 1987); Eric Schurenberg and Lani Luciano, *The Empire Called AARP*, 17 Money 128 (Oct. 1, 1988); see also Sandra Day O'Connor and James R. Jones, *What We Owe Our Young*, Washington Post, p. A19 (June 16 (2008) (retired Justice O'Connor and former Ambassador and Congressman Jones were the honorary co-chairs of the Youth Entitlement Summit, an assembly of what the authors of the Post op-ed piece described as youth activists that convened in Washington, D.C., on June 16 and 17, 2008).

¹⁷⁰ Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2, 100 Stat. 3342, at 3342.

¹⁷¹ *Supra* n. 147.

¹⁷² See generally Cara Yates, *Application of State Law to Age Discrimination in Employment*, 51 A.L.R.5th 1 (1997).

victims of age discrimination.)¹⁷³ These state laws not only are integrally procedurally connected to the ADEA,¹⁷⁴ but they stand as independent and alternative routes for seeking redress. For a variety of reasons, grievants' attorneys often do not focus on these fora. In some states (perhaps all) the agencies that enforce these statutes are underfunded and understaffed. Some attorneys feel that federal courts are more hospitable to, and more attuned to, discrimination issues, although certainly the small percentage of plaintiffs who prevail in the federal setting¹⁷⁵ cuts against this perception. Some attorneys are inclined by virtue of their law school training to go to the federal agency and thence to the federal courts; in other words, most law school courses (and certainly virtually all law school course textbooks) on employment discrimination focus exclusively, or close thereto, on the federal anti-discrimination statutes and thus either intentionally or coincidentally bias the students in these courses against utilizing state laws and state agencies.

B. Tort Law

Tort law offers another avenue for age discrimination plaintiffs. Most specifically, the tort of intentional infliction of emotional distress, also known as the tort of outrage, often is included as a separate count in the federal court complaints filed by plaintiffs seeking redress in the first instance under the ADEA.¹⁷⁶ Of course such a tort claim also may be pursued independently in state court.¹⁷⁷ Historically, tort liability would not lie absent bodily harm,

¹⁷³ See Chicago, Illinois, Human Rights Ordinance, § 2-160-010 *et seq.*; Cook County, Illinois, Human Rights Ordinance, Ordinance No. 93-0-13; Johnson County, Iowa, Human Rights Ordinance, Ordinance 12-28-06-01.

¹⁷⁴ Even if the grievant does pursue redress under the ADEA, the federal statute requires that recourse initially be pursued at the state law level. 29 U.S.C. § 633(b) (2000). See generally 1 AGE DISCRIMINATION, *supra* n. 42, at § 6:8.

¹⁷⁵ *Supra* n. 97 and accompanying text.

¹⁷⁶ See generally 1 AGE DISCRIMINATION, *supra* n. 42, at § 6:37.

¹⁷⁷ For that matter, ADEA claims also may be litigated in state court. See, e.g., *Chapman v. City of Detroit*, 808 F.2d 459, 463 (6th Cir. 1986); *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11 (1984); *Eagleburger v. Fort Sanders Regional Medical Center*, 677 S.W.2d 455 (Tenn. Ct. App. 1983).

and so the infliction of unintended emotional distress was not compensable absent some bodily harm being experienced by the claimed victim. But, as the law developed the intentional infliction of emotional distress that was likely to result in illness or other bodily harm came to be recognized as giving rise to liability. And, more importantly here, the civil wrong known as the tort of intentional infliction of emotional distress eventually came to be recognized as a basis for liability even without any bodily harm being caused or resulting from the wrong. The sticking points in establishing liability, not just in the discrimination arena, but generally, flow from the requirements that (1) the conduct giving rise to such liability must be outrageous, and (2) the emotional distress of which the plaintiff complains must be severe in nature. Plaintiffs rarely are able to satisfy one or the other, or both, of these requirements,¹⁷⁸ which are set forth in Section 46 of the RESTATEMENT (SECOND) OF TORTS.¹⁷⁹ The commentary accompanying the RESTATEMENT emphasizes that outrageousness is a particularly high hurdle for a claimed victim to surmount:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the

¹⁷⁸ See the cases collected in the periodic supplements to the RESTATEMENT (SECOND) OF TORTS § 46 (1965).

¹⁷⁹ RESTATEMENT (SECOND) OF TORTS (1965) § 46 provides: “(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” While § 46, published in 1965, only purports to be a summary of then-existing state law, its provisions have been pretty much embraced by state courts as articulating the requirements that plaintiffs must satisfy.

case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"¹⁸⁰

Given the difficulties of fashioning a winning tort claim, it is more likely that an individual who has been subjected to abuse will pursue under the ADEA a harassment claim, which is certainly cognizable under the statute.¹⁸¹ However, there is a countervailing factor here. Unlike the situation in a tort case, there can be no recovery under the ADEA for compensatory damages, that is, damages for pain and suffering.¹⁸² Nor can a prevailing plaintiff in an ADEA action recover punitive damages,¹⁸³ which again are available in tort actions. The availability of compensatory and punitive damages in tort counsel plaintiffs to include in their complaints the tort cause of action for intentional infliction of emotional distress, even recognizing the difficulty of prevailing on that claim.

A classic and tragic case in which the rare plaintiff succeeded with this tort claim is illustrative. At least in terms of reported cases, this ruling – *Wilson v. Monarch Paper Co.*¹⁸⁴ – presents a scenario of employer abuse leading to dreadful consequences that thankfully has been rarely, if ever, matched (at least insofar as reported judicial rulings are revelatory). Even so, it shows the potential for very significant damages that an egregious enough situation can create. The plaintiff was awarded \$3.4 million in his suit, in which he

¹⁸⁰ RESTATEMENT (SECOND) OF TORTS, § 46, Comment d., at 73 (1965).

¹⁸¹ *Supra* n. 84 and accompanying text.

¹⁸² *Supra* n. 82 and accompanying text.

¹⁸³ *Supra* n. 81 and accompanying text. Liquidated damages are available in an amount equal to back pay when it can be proved that the defendant willfully violated the ADEA or acted in reckless disregard of the statute. 29 U.S.C. § 626(b) (2000). *See generally* 2 AGE DISCRIMINATION §§ 8:30 - 8.38. Of course, if the plaintiff recovers no back pay, i.e., the amount of compensation plus benefits she would have received had she not been wrongfully treated, there will be no basis for a liquidated damages award since two times zero equals zero. And even if there is a back pay award, if it is meager in amount, the liquidated damages award – assuming the plaintiff can establish the requisite willfulness on the defendant's part – will likewise be small.

¹⁸⁴ 939 F.2d 1138 (5th Cir. 1991).

claimed that he was both the victim of age discrimination in violation of the ADEA and that he had been subjected to the tort of intentional infliction of emotional distress. Of the total award, \$312,000 was for the ADEA age discrimination claim; \$847,000 constituted damages directly due to the defendant's intentional infliction of emotional distress. The remainder – \$2.25 million – was awarded as punitive damages arising out of the tort.

Wilson had been hired by the defendant company at the age of 48 in 1970. By 1981 he had risen to the dual positions of vice-president and assistant to the president of the company. In that same year a new 42-year-old president was brought in to run the company. The new president immediately began to ostracize Wilson, with the encouragement of the president of Monarch's parent company. Things quickly went drastically downhill for Wilson. Initially, he was demoted – he was placed in the position of an entry level supervisor, which required only one year's experience in the paper business.¹⁸⁵ As the court noted, "Wilson, with his thirty years of experience in the paper business and a college degree, was vastly overqualified and overpaid for that position."¹⁸⁶ He soon was being subjected to harassment and verbal abuse by his supervisor at the warehouse – Paul Bradley, a man who had previously been Wilson's subordinate. Things got even worse, as the court detailed:

Finally, Wilson was further demeaned when he was placed in charge of housekeeping but was not given any employees to assist him in the housekeeping duties. Wilson, the former vice-president and assistant to the president, was thus reduced finally to sweeping the floors and cleaning up the employee's cafeteria, duties which occupied 75 percent of his working time.¹⁸⁷

By the fall of 1972 Wilson was suffering respiratory problems due to the dusty conditions in the warehouse and the stress caused by the harassment to which he was being subjected. In early January,

¹⁸⁵ Although his pay remained the same, his benefits were reduced.

¹⁸⁶ 939 F.2d at 1140.

¹⁸⁷ *Id.* at 1140 - 1141.

1983, he was diagnosed as suffering from reactive depression and as being possibly suicidal as a result of the on-the-job stress. His condition deteriorated and in March, 1983, he was involuntarily hospitalized with a psychotic manic episode. (Prior to the difficulties at Monarch that started with the new president coming in in 1981, Wilson had not had any history of emotional illness.) The court described Wilson's next several years:

Wilson's emotional illness was severe and long-lasting. He was diagnosed with manic-depressive illness or bipolar disorder. After his first hospitalization for a manic episode, in which he was locked in a padded cell and heavily sedated, he fell into a deep depression. The depression was unremitting for over two years and necessitated an additional hospital stay in which he was given electroconvulsive therapy (shock treatments). It was not until 1987 that Wilson's illness began remission, thus allowing him to carry on a semblance of a normal life.¹⁸⁸

So much for the facts. In its discussion leading up to the conclusion that the trial court jury's award should be affirmed, the Court of Appeals for the Fifth Circuit sought to walk a careful line – expressing support on the one hand for the exercise of managerial discretion in the workplace, while on the other expressing appreciation for the abuses that that discretion may occasion. In this vein, the court first made a verbal bow to the interests of the employer:

The facts of a given claim of outrageous conduct must be analyzed in context, and ours is the employment setting. We are cognizant that “the work culture in some situations may contemplate a degree of teasing and taunting that in other circumstances might be considered cruel and outrageous.” *Keeton*,

¹⁸⁸ *Id.* at 1141.

et al., *Prosser & Keeton on Torts* (5th ed. 1984 & 1988 Supp.) We further recognize that properly to manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees. *Id.* We also acknowledge that it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit, i.e., “constructively” to discharge the employee. In short, although this sort of conduct often rises to the level of illegality, except in the *most* unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes “extreme and outrageous” conduct [which is the standard required in Texas to establish the tort of intentional infliction of emotional distress].¹⁸⁹

Here, the court actually concluded that most of the adverse treatment directed against Wilson did not reach the requisite level of extreme and outrageous conduct:

Wilson argues that substantial evidence of outrageous conduct supports the jury’s verdict, including: (1) his duties in physical distribution were assigned to a younger person; (2) Bisbee [the new president] deliberately refused to speak to him in the hallways of Monarch in order to harass him; (3) certain portions of Monarch’s long-range plans expressed a desire to move younger persons into sales and management positions; (4) Bisbee wanted to replace Wilson with a younger person; (5) other managers within Monarch would not work with Wilson, and he did not receive his work directly from Bisbee; (6) he was not offered a fully guaranteed salary to transfer to Corpus Christi; (7) he was assigned to Monarch’s Houston warehouse as a supervisor, which was “demeaning”; (8) Paul

¹⁸⁹ *Id.* at 1143.

Bradley, the Warehouse Manager, and other Monarch managers, referred to Wilson as old; (9) Bradley prepared a sign stating “Wilson is old” and, subsequently, “Wilson is a Goldbrick”; and (10) Monarch filed a counterclaim against Wilson [for libel and slander] in this action. . . .

. . . We hold that all of this conduct . . . is within the “realm of an ordinary employment dispute,” and, in the context of the employment milieu is not so extreme and outrageous as to be properly addressed outside of Wilson’s ADEA claim [that is, by means of a tort claim].¹⁹⁰

Even so, the court affirmed. For there was one more piece of this workplace scenario that did rise to the level of outrageousness that the tort of intentional infliction of emotional distress requires:

Wilson, a college graduate with thirty years experience in the paper field, had been a long-time executive at Monarch. His title was Corporate Director of Physical Distribution, with the added title of Vice-President and Assistant to the President. He had been responsible for the largest project in the company’s history, and had completed the project on time and under budget. Yet, when transferred to the warehouse, Wilson’s primary duty became housekeeping chores around the warehouse’s shipping and receiving area. Because Monarch did not give Wilson any employees to supervise or assist him, Wilson was frequently required to sweep the warehouse. In addition, Wilson also was reduced to cleaning up after the employees in the warehouse cafeteria after their lunch hour. Wilson spent 75 percent of his time performing these menial, janitorial services. . . .

¹⁹⁰ *Id.* at 1144 - 1145.

. . . We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete. The evidence, considered as a whole, will fully support the view, which the jury apparently held, that Monarch, unwilling to fire Wilson outright, *intentionally and systematically* set out to humiliate him in the hopes that he would quit. A reasonable jury could have found that this employer conduct was intentional and mean spirited, so severe that it resulted in institutional confinement and treatment for someone with no history of mental problems. Finally, the evidence supports the conclusion that this conduct was, indeed, so outrageous that civilized society should not tolerate it.¹⁹¹

C. *The Americans with Disabilities Act*

A third avenue of potential recourse turns out to be unavailable, after all. One might envision looking to the Americans with Disabilities Act (ADA)¹⁹² as another route to redress for individuals who have been subjected to adverse employment decisions. This enactment is directed, obviously, to discrimination based on disability, and given that there is a correlation between disabilities and advancing age¹⁹³ there may be occasions when an

¹⁹¹ *Id.* at 1145.

¹⁹² 42 U.S.C. §§ 12101 *et seq.* (2000).

¹⁹³ Indeed, the very first finding set forth by Congress in the original act, prior to its being amended in 2008 by the ADA Amendments Act of 2008, Pub. L. No. ___, 122 Stat. 3553 (2008), noted this correlation: “The Congress finds – (1) that some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older. . . .” 42 U.S.C. § 12101(a) (2000). The 2008 Act removed this finding, but not because Congress no longer agreed with the age/disability correlation. Rather, the 2008 Act amended the original language as a means to express

older individual who has confronted an adverse employment decision may be able to pursue a claim of disability discrimination under the ADA in addition to, or in lieu of, an age discrimination claim under the ADEA. However, the ADA claim clearly would have to be based on an employer decision arising out of the plaintiff's disability because age *per se* is expressly rejected as constituting a disability for purposes of the ADA.¹⁹⁴ Moreover, and in any event, there are some data derived from claims pursued under state statutes suggesting that coupling an age claim with a disability claim actually produces negative results for grievants.¹⁹⁵ (There are also data revealing that

Congress's rejection of the Supreme Court's reliance upon the specific number of 43 million as a basis for limiting the reach of the ADA when it decided *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999). See Comm. on Education and Labor, U.S. House of Reps., *ADA Amendments of 2008*, Rept. 110-730, Part 1, 110th Cong., 2d Sess. 7 - 8 (2008)). The *Sutton* Court had looked to the finding regarding 43 million people as justification to exclude from protection individuals whose disabilities were corrected or mitigated by medications, prosthetics, and/or other types of ameliorative devices or treatments that resulted in amelioration such that their impairments, when considered in a mitigated state, were not sufficiently limiting to qualify as disabilities under the ADA. The *Sutton* Court reasoned as follows: "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings." 527 U.S. at 487. (See *supra* nn. 102 - 119 regarding the ability of older men and women to perform in the workplace).

¹⁹⁴ The report of the Senate Committee on Labor and Human Resources regarding the ADA specifically set forth the view that age in and of itself was not intended to be considered an impairment falling within the reach of the statute. Comm. on Labor and Human Resources, S. Rep. No. 116, *The Americans with Disabilities Act*, 101st Cong., 1st Sess. 22 (1989). However, the committee did assert that medical conditions often associated with age, such as hearing loss and osteoporosis, could be deemed to be impairments within the scope of the statute. *Id.*

¹⁹⁵ See David Neumark, *The Age Discrimination in Employment Act: A Retrospective and Prospective Assessment* (paper prepared for AARP's Public Policy Institute (June, 2008) (on file with the author):

Using state laws, Stock and Beegle (2004) . . . find that for disabled individuals aged 40-64, when the two types of laws are combined, the employment affect is negative (i.e., reduces employment) compared to an age discrimination law alone [footnote omitted]. . . . Again, though, workers aged 65 and over are not examined. However, Stock and Beegle present results for

regardless of the matter of age, ADA plaintiffs generally have fared very poorly in the federal courts.)¹⁹⁶

V. WHAT THE FUTURE HOLDS

The stars are pretty much aligned in a configuration that does not auger well for older men and women in the workforce. The number of older individuals is growing enormously – the baby boomers are upon us. This means that those who want to remain in the workforce confront the facts that they likely will constitute a surplus¹⁹⁷ – certainly as contrasted to the numbers of their

this age group that do *not* distinguish the disability status of the individual, and they find marginally significant evidence of employment reductions overall and relative to 40 - 64-year-olds.

Thus, there is some likelihood that the increasing share of older and disabled individuals in the population, coupled with the availability of disability-related discrimination claims for a growing share of workers protected under the ADEA, could undermine some of the potential beneficial effects of the ADEA as the population ages.

Id. at 25 - 26, citing Wendy A. Stock and Kathleen Beegle, *Employment Protections for Older Workers: Do Disability Discrimination Laws Matter?*, 22 *Contemp. Econ. Policy* 111 (2004).

¹⁹⁶ See Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 *Ohio St. L. J.* 239 (2001).

¹⁹⁷ It is often observed that for a period of time there is going to be a shortage of younger workers, and so large numbers of older individuals will be needed to offset this shortfall of younger men and women. This idea is of questionable validity, however. For one, this perception is premised on “the notion that the economy will grow at its historical rate.” *WORKING LONGER*, *supra* n. 29, at 110. If this were to be the case, “[e]mployers would clearly need to scramble to find enough workers” *Id.* But there certainly is no guarantee that such growth will occur. And indeed there are good reasons (including, in the short term and at the time this paper is being written, the dire contraction of the American economy) to question the certainty of such future growth. *Id.* A second factor here is that the labor shortage notion ignores the fact that “U.S. employers increasingly operate in a global economy and respond to swings in the global, more than the domestic, supply of labor.” *Id.* Given the vast numbers of workers in India, China, Vietnam, and elsewhere, shortages of labor in the United States can be readily offset by shipping jobs overseas where the labor pools are large and cheap. There is a third factor, as well:

counterparts who in past decades remained in the workforce.¹⁹⁸ And more than that, they will constitute a surplus of workers who generally earn more than their younger counterparts, whether or not they are more productive than those younger folks. Moreover, the data show that typically these older, pricier workers indeed are, on balance, not more productive than their younger colleagues and arguably may even be less so – although the data are mixed and the productivity gap, if it exists, may or not be a significant one, depending upon the job involved.¹⁹⁹

Another factor inimical to the interests of older workers and job applicants is the undercurrent of old-ageism throughout American society. Older men and women may not confront the blatant, brazen manifestations of age-based dislike, condescension, and disrespect that were seen (certainly not always, however) in workplaces 40 and even 30 years ago. But ageism still exists, and it is a barrier with which older workers and job applicants must contend, in contrast to their younger counterparts who are already in the workforce or are, or will be, seeking to enter the workforce.

Exactly how this demographic phenomenon of burgeoning numbers of older men and women, when combined with the reality of old-ageism, will intersect in the work place is as difficult to predict today as it was 11 years ago, when this author made the following observations:

It takes no predictive skill to conclude that given the burgeoning numbers of older workers, employers which are disposed to engage in age-biased decision

Older workers tend to be in older industries and occupations, where employment is growing slowly or even declining. Young workers seek employment in fast-growing sectors; old workers tend to be employed in sectors that were fast growing when they were young but might not be growing any more. . . . Rather than contribute to an economy wide labor shortage, the impending wave of retirements in such occupations should bring staffing levels closer to equilibrium levels.

Id. at 112.

¹⁹⁸ *Supra* n. 12.

¹⁹⁹ *See* WORKING LONGER, *supra* n. 29, at 92 – 100.

making are going to have an enormous available pool of age-qualified targets for those decisions.

Of course, numbers themselves are not determinative. They cannot tell us, after all, whether the frequency of age discriminatory actions and decisions in the workplace will remain static, or change. Nor, if change in the rate of occurrence of such actions and decisions is to occur, can the demographic data confirm in which direction – up or down – that change will go. We can venture some informed speculation, however. One might predict, for example, that the growing numbers of older workers may have the salutary effect of changing lingering negative attitudes. Or maybe the ‘baby bust,’ e.g., the decline in the birth rate that followed the baby boom [in the years 1946 - 1964], combined with other trends – such as increasing numbers of ill-educated immigrants entering the American work force – will make older men and women more attractive in the employment market. Perhaps the merits of older men and women simply will come to be valued more. Or – and indeed this may well be the most likely scenario – perhaps the same misperceptions and negative attitudes that exist today (to greater or lesser degrees, depending upon whose ox is gored and who is doing the goring) will persist. At bottom, of course, these are all realistic, but currently unconfirmable, possibilities.²⁰⁰

Pessimism is probably most properly warranted, a posture confirmed by a recent commentator, as well as an expert he quotes:

Even as workers in their 40s, 50s and 60s accept having to work years longer than anticipated, many companies are laying off employees amid the

²⁰⁰ *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 667 - 668 (footnote omitted).

economic downturn. This often means that older workers are pushed out first, because they are usually the highest-paid employees.

“You have 401(k) plans going into the tank and the cost of health insurance rising, so many people see they need to work longer,” said Karen Ferguson, director of the Pension Rights Center, an advocacy group for retirees in Washington. “At the same time, many employers don’t have money to hire people, and they’re getting rid of their more expensive employees, so it’s kind of a perfect storm.”²⁰¹

There is one further matter, at first blush arguably much more mundane but in fact enormously important as a practical matter, that must be recognized here. That is the fact – and this is nothing new and thus is independent of issues of demographic shifts as well as the rise or fall of old-ageism – that pursuing legal recourse typically is both a psychologically stressful²⁰² and financially expensive venture.

²⁰¹ Steven Greenhouse, *Working Longer As Jobs Contract*, New York Times, Special Section – Retirement, pp. 1, 8, at p. 1 (Oct. 23, 2008); *see also* Barbara Rose, *Greater pay putting older workers at risk*, Chicago Tribune, Business Sec., p. 2 (April 14, 2008). *But see* Jonathon Peterson, *Older workers becoming valued prize for firms*, Chicago Tribune, Business Sec., pp. 1, 4 (Sept. 10, 2007).

Data reported by the Bureau of Labor Statistics, as summarized in an article in the April 13, 2009, New York Times, revealed that “[w]orkers ages 45 and over form a disproportionate share of the hard-luck recession category – the long-term unemployed,” even though the same group had a lower overall unemployment rate in 2008 than did younger workers. Michael Luo, *Longer Periods of Unemployment for Workers 45 and Older*, New York Times, p. A11, at p. A11 (April 13, 2009).

²⁰² *See generally* Brenda Major and Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 285 (Laura Beth Nielsen and Robert L. Nelson, eds. 2005). The authors make the following observations, *inter alia*:

Why would people who believe that they are targets of discrimination be reluctant to report it? Evidence indicates that the reluctance stems from the belief that the costs of doing so will be too high. For example, women who are sexually harassed and who do not report it cite a number of reasons for not doing so, including anticipation of retaliation, fear of not being

It is easy enough, at least insofar as financial cost is concerned, to file with the EEOC a charge of unlawful discrimination. That can be accomplished by a lay person by simply filling out a form. Even if one fails to file the requisite counterpart charge with the relevant state anti-discrimination agency in one's jurisdiction,²⁰³ almost invariably the EEOC will have a worksharing agreement with that agency which will result in the EEOC on its own initiative transferring a copy of the federal filing to the state agency.²⁰⁴

But then the difficulties start to come to the fore. For one, the ADEA requires, appropriately, that the employer who is charged with wrongdoing promptly be notified of the charge.²⁰⁵ Thus, a degree of intestinal fortitude, so to speak, is required of the individual who, by filing a charge, 'makes waves' that will soon be known to her employer. (In the instance of an individual who complains of having been wrongfully discharged, she is no longer in the charged entity's workplace and so concern about alienating the boss should be diminished thereby.) The ADEA bans retaliation against someone who seeks to avail himself of the statute's protection,²⁰⁶ but realistically, employers and their employees can make life in the workplace uncomfortable for so-called 'troublemakers' without running afoul of that prohibition (which, to be complained of by the victim requires making *more* waves, in any event). Psychological stress aside, the fact is that actual enforcement in the courts of discrimination claims is almost completely dependent upon action by

believed, and not wanting to harm the harasser. . . .

People who report discrimination to authorities or the perpetrator report they often are targets of retaliation. . . . Experiments show that blaming outcomes on discrimination can damage perceptions of the blamer's character, even if he or she has a very good reason for making this claim.

Id. at 296 - 297.

²⁰³ 29 U.S.C. § 633(b) (2000).

²⁰⁴ See *Peters v. Fansteel, Inc.*, 736 F. Supp. 198 (N.D. Ill. 1990); *Agostine v. Iowa Beef Processors*, 35 F.E.P. Cas. (BNA) 328 (D. Neb. 1984); see generally 1 AGE DISCRIMINATION, *supra* n. 42, at § 6.25. Such agreements are authorized by 29 C.F.R. § 1626.10 (2008).

²⁰⁵ 29 U.S.C. § 626(d) (2000).

²⁰⁶ 29 U.S.C. § 623(d) (2000).

individual grievants, not the EEOC,²⁰⁷ and such enforcement is financially beyond the capacities of the great majority of people who might with some validity claim to be victims of wrongdoing. Justice costs. Even an ‘easy’ case involving just a couple of depositions and, if the case goes to trial, only a couple of days of testimony, will run into many thousands of dollars.

While the willingness of attorneys to represent such individuals on a contingent fee basis can ameliorate this problem (assuming the plaintiff does not have to still bear the costs of discovery, which can be exorbitant), in many instances the limited potential financial recovery should the grievant prevail will disincline attorneys to represent clients other than on some sort of straight fee basis.²⁰⁸ Moreover, the rather lackluster success of such grievants –

²⁰⁷ With regard to employment discrimination cases generally, Professor Selmi reported more than 10 years ago that “[p]rivate attorneys typically file 95% of the cases that end up in federal court” Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 Ohio St. L. J. 1, 6n.17 (1996).

²⁰⁸ The ADEA authorizes the award of attorney’s fees to prevailing plaintiffs. 29 U.S.C. § 626(b) (2000). See generally 2 AGE DISCRIMINATION, *supra* n. 42, at §§ 8:60 - 8:66. And there need not be proportionality between the plaintiff’s award and the fee award so long as the plaintiff recovers more than a nominal monetary amount. See, e.g., *Dunlap-McCuller v. Riese Organization*, 980 F.2d 153 (2d Cir. 1992); see generally 2 AGE DISCRIMINATION, *supra* n. 42, at § 8:64. Thus, even if a plaintiff were to recover only a small amount of back pay, that would not necessarily preclude a large fee award (so long as the basis for that award could be properly documented). Accordingly, Professor Selmi has argued that the low monetary value of employment discrimination cases should not act as a deterrent to private attorneys taking on such cases. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 Ohio St. L. J. 1, 32 - 40 (1996). However, because plaintiffs so frequently lose, both at the trial level and at the appellate level, see note 97 and accompanying text *supra*, the attorney’s decision to take on a case logically must in major respect turn on her assessment of the likelihood of prevailing, since of course there will be no fee award if the plaintiff loses.

Then, too, there is the matter of settlement; it may be that a case that is of low value will be more easily settled than one involving a claim for a large amount of back pay, plus liquidated damages equal to that back pay award. (Liquidated damages are available in an amount equal to back pay when it can be proved that the defendant willfully violated the ADEA or acted in reckless disregard of the statute. 29 U.S.C. § 626(b) (2000). See generally 2 AGE DISCRIMINATION §§ 8:30 - 8.38). There is no clear answer to the settlement

at least those who wind up actually being able to stay in court²⁰⁹ – likewise creates a disincentive for contingent fee attorneys to take on any clients save those with what look to be surefire winning claims, or at least very, very strong, claims.²¹⁰

So one can talk all one wants about theory, about demography, about statutorily- and constitutionally-based claims. But the bottom line to this discussion is that most people just cannot afford to seek those remedies. That, unfortunately, is the grim reality check on all this.

So, after all, the United States has made commendable strides in recognizing, addressing, and combating age discrimination in the workplace. At the risk of sounding chauvinistic, one can venture that the United States indeed has done more than any other country. So despite the problems, there is much to applaud in terms of success, as well.

question insofar as the issue of the encouragement or discouragement of litigation is concerned. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, *supra*, at 34 - 39.

²⁰⁹ *Supra* n. 97 and accompanying text.

²¹⁰ Judge Richard A. Posner has reasoned that because, according to his analysis, recoveries in denial-of-hire cases are, or will be, less than those in termination cases, the attorney fee awards in the former will be less than those in discharge cases, thereby increasing the disincentive for lawyers to take on denial-of-hire clients. Richard A. Posner, *OLD AGE AND AGING* 332 - 333 (1995).

ANTI-DISCRIMINATION – SOME OBSERVATIONS FROM DOWNUNDER, THE AUSTRALIAN EXPERIENCE ON AGE DISCRIMINATION¹

“Do not cast me off in time of old age; when my strength fails,
forsake me not,” Psalms 71.9.

INTRODUCTION

While legislation is in place in Australia to combat age discrimination, the actual impact of the legislation would appear to be minimal and age discrimination can still be found in a number of areas, not the least being employment and goods and services.

This paper will examine the effectiveness of age discrimination legislation, the difficulties associated with proving discrimination, and offer an explanation as to why so few cases are reported and dealt with by the relevant tribunals and courts.

Australia has a federal system of government, comprising six states and two territories. Age discrimination legislation can be found at both the federal and state/territory levels. State legislation prohibiting age discrimination preceded the Commonwealth legislation.² Under the Commonwealth legislation, discrimination is prohibited in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information.³

There is also complementary state legislation prohibiting discrimination on the basis of age. In the largest state, New South Wales, the legislation explicitly declares

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² The Commonwealth Act came into force in June 2004 *Age Discrimination Act* 2004 (Cth). Earlier state legislation such as in NSW proscribed age discrimination generally from Jan 1, 1993, see *Anti-Discrimination Act* 1977, s.49ZU.

³ *Age Discrimination Act* 2004, Part 1, s. 3(a).

compulsory retirement unlawful.⁴ It also prohibits discrimination in offers of employment and terms of employment.⁵

DEFINITION

Age discrimination can be either indirect or direct.

According to section 14(1) of the *Age Discrimination Act 2004* (ADA) direct discrimination occurs if:

- (a) the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different age; and
- (b) the discriminator does so because of:
 - (i) the age of the aggrieved person; or
 - (ii) a characteristic that appertains generally to persons of the age of the aggrieved person; or
 - (iii) a characteristic that is generally imputed to persons of the age of the aggrieved person.

Indirect discrimination is defined in section 15(1) of the ADA and occurs if:

- (a) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and
- (b) the condition, requirement or practice is not reasonable in the circumstances; and
- (c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.

It is worth noting that pursuant to ss(2), the burden of proving that the condition, requirement or practice [referred to in ss(1)b] is reasonable in the circumstances lies on the discriminator.

AGE DISCRIMINATION AND EMPLOYMENT

All Australians, regardless of their age, have the right to expect access to appropriate employment, training and learning services so they can get the support and assistance they need. Employment can contribute to

⁴ *Anti-Discrimination Act 1977* (NSW) s.49ZV.

⁵ *Anti-Discrimination Act 1977* (NSW) s.49ZYB.

*mental and emotional wellbeing in later life and provide additional retirement savings. Older people should be able to exercise a choice about whether to continue in paid employment past traditional retirement age.*⁶

Whilst the above sentiments are obviously supportive and encouraging of older persons in the workforce, they are, it would appear, in fact, far from the reality of the situation.

A 2004 study conducted in New South Wales found that of the 1.523,000 older people⁷ living in that state, 5.3% were unemployed, 5.4% worked part-time but would have preferred to work longer hours and 8% who were not in the workforce indicated that they would still like paid work.⁸ The Report found that older persons who were either underemployed or unemployed, but wanted to be part of the paid workforce, made greater use of government services.

The 2004 study followed an earlier study conducted by the Ministerial Advisory Committee on Ageing in 2002.⁹ In the 2002 study the results highlighted what has already been noted in previous studies: that mature age workers who lose employment, for example either through redundancy or retrenchment are much less likely to be re-employed than younger persons. Furthermore, the status of unemployment often affected the self-esteem, confidence, physical and mental health, not to mention financial circumstances and their quality of life in long term retirement.¹⁰

⁶ [Australian Government, *Your Work*,
http://www.seniors.gov.au/internet/seniors/publishing.nsf/Content/Your+Work](http://www.seniors.gov.au/internet/seniors/publishing.nsf/Content/Your+Work) (accessed April, 24, 2009).

⁷ Older people were defined as 65 years of age and older.

⁸ Ministerial Advisory Committee on Ageing, *Paying the Price: The Impact of Mature Aged Unemployment on Government Services*, 5, http://www.maca.nsw.gov.au/_data/assets/pdf_file/0019/141535/Paying_the_price.pdf (June 2004).

⁹ Ministerial Advisory Committee on Ageing, *Too Young to Go: Mature Age Unemployment and Early Retirement in NSW*, http://www.maca.nsw.gov.au/_data/assets/pdf_file/0004/141538/Too_Young_to_Go.pdf (December 2001); Ministerial Advisory Committee on Ageing, *Counting on Experience: A Review of Good Practice in the Employment of Mature Workers*,

http://www.maca.nsw.gov.au/_data/assets/pdf_file/0020/141527/Counting_on_experience.pdf (December 2001).

¹⁰ *Paying the Price*, *supra* n. 9, at 7.

THE IMPACT ON GOVERNMENT

Of particular concern to governments is the impact on the economy that will arise from the increase in services required by older persons and the financial burden imposed on the working population. While it is estimated that those persons over the age of 65 years currently comprise 13% of the population, this percentage is set to rise dramatically to about 26% of the population by 2051. At the same time the proportion of those in the workforce (those aged 15 – 64) is anticipated to drop from 67% in 1999 to 59% in 2051.¹¹

One option open to Government is to increase the age before a person is eligible to receive the Age Pension. This view is supported by Knox, who argues that we can no longer sustain an age pension age of 65 (an entitlement age that has not changed in a century), when our life expectancy has increased by 45% in the last four decades.¹²

Knox argues that an increase in the pension age is not solely prompted by the desire to reduce government expenditure, but rather the need to change our focus on a definitive age for retirement and the subsequent eligibility to receive the age pension. He is of the view that a defined retirement age does not generally exist. He attributes this in part to age discrimination legislation, skill shortages and the Government's transition to retirement opportunities, such as tax concessions and access to superannuation.¹³ He sees the benefits of increasing the age pension eligibility as threefold; a deferral of receiving benefits, leading to an accumulation of superannuation and the subsequent additional investment earnings; additional contributions by employers, and in some cases by employees; and thirdly our life expectancy in retirement is decreased and therefore our funds are required for a shorter period of time.¹⁴

He is also cognizant though of the importance of maintaining the current preservation age of 60 [with regards to

¹¹ David Lundberg & Zaniah Marshallsay, *Older Workers' Perspectives on Training and Retention of Older Workers*, 9, www.ncver.edu.au/research/proj/nr5012.pdf (2007).

¹² Knox, D. 'Pensions for Longer Life – Linking Australia's pension age with life expectancy', Committee for Economic Development of Australia, 2007, Information Paper 89, p. 3.

¹³ *Id.* at 10.

¹⁴ *Id.*

access to superannuation] as he acknowledges that some people cannot work past the age of 60 years.¹⁵

Once again though this presupposes that older persons are still employed or capable of employment. Government policy positively encourages older Australians to continue working. Changes to pension and superannuation eligibility have increased the required ages for access to pension and superannuation¹⁶ thus delaying for many intended retirement age. Financial incentives to continue working include taxation benefits for Mature Age Workers and a pension bonus scheme¹⁷ for those who continue in employment after the pensionable age. But there are also significant disincentives to continue working particularly when it comes to compensation for work injuries for older workers.¹⁸ At the governmental level, continued employment diminishes Government expenditure on old age pensions and the taxation burden on those who continue in employment.

EMPLOYMENT AND FUNDING RETIREMENT

Continued employment provides seniors with greater opportunities for economic independence and the ability to fund their own retirement.

The capacity of seniors to have a comfortable retirement is seriously affected by unemployment. In relation to baby boomers (born 1946-1964), there are two distinct groups; those with high incomes still in employment and those on low incomes who have retired early.¹⁹ In relation to *individual* baby boomers who have retired early, the cohort aged 50-59, have little or no income; retired *couples* (50-59) fare little better

¹⁵ *Id.*

¹⁶ See below footnotes 23, 24.

¹⁷ Despite this, applicants for old age pensions are generally not aware of the Scheme and there are a number of conditions to be met. See 'Pension Bonus Scheme' at

http://www.centrelink.gov.au/Internet/Internet.nsf/payments/pension_bonus.htm.

¹⁸ See, for example, the Commonwealth Act providing that income maintenance is not available to an employee injured at age 65, *Safety, Rehabilitation and Compensation Act* (1988) (Cth) s.23.

¹⁹ AMP.NATSEM, *The Lump Sum: Here Today, Gone Tomorrow*, 5, http://www.amp.com.au/dafiles/AU%20Retail/AU%20Retail/Files/StaticFiles/183337_natsem_issue7_lump_sum.pdf (March 2004).

with just on half having an annual income less than \$20,000 but the position is considerably improved if one partner is employed.²⁰ Baby boomers not in employment are the poorest.

Respondents to an international survey in 2007 regarded 57-59 years as an ideal retirement age with most retiring at age 59.²¹ Voluntary early retirement is affected by changes in the labour market, income security and government policies such as pension eligibility,²² and ability to access superannuation funds.²³ Those in jobs with defined pension benefits are more confident about when they will retire.²⁴ It is difficult to obtain evidence whether those who retire prior to the nominal retirement age of 65 do so because of age discrimination in retrenchment and redundancy or in hiring practices.

Evidence from Canada and the United States suggests that about 15% of older persons were forced into early

²⁰ Based on the HILDA Survey, wave 2, *See Id.*

²¹ *See* AXA, Retirement Scope 2007: Retirement, A New Life After Work?, 11-12,

http://www.retirement-scope.axa.com/lib/rs/uploads2/asiapacific/australie/AXA_Report_australia_2007.pdf (January 2007). *See also* AARP, *International Retirement Security Survey*,

<http://assets.aarp.org/rgcenter/general/irss.pdf> (July 2005). The Australian Bureau of Statistics (ABS) reports that the average age of retirees in the period 1999-2005 was 61.5 for men and 58.3 years for women; reasons for retirement were eligibility for superannuation or pension (34%), disablement (26%), dismissal, redundancy or no work available (11%). The average age of intended retirement is 62 years, *ABS Year Book Australia 2007* at 166-167.

²² Old age pension eligibility is 65 for men and for women 63 (gradually rising to 65 by 2013); the minimum superannuation retirement age is 55, see The Australian National University, Centre for Economic Policy Research, Discussion Paper by D Cobb-Clark, S Stillman, "The Retirement Expectations of Middle-Aged Individuals" Discussion Paper No 540 December 2006 discussing the Household Income and Labour Dynamics in Australia (HILDA) Survey at 5; D Warren, U Oguzoglu "Retirement in Australia: A Closer Look at the Financial Incentives" Melbourne Institute Working Paper Series, Working Paper No 24/07.

²³ For contributors born before July 1, 1960, superannuation can be accessed at age 55. It increases to age 60 for those born after June 30, 1964. See Australian Government, *Transition to Retirement*, <http://www.ato.gov.au/super/content.asp?doc=/content/74219.htm> (accessed May 29, 2007). After July 1, 2007 superannuation benefits are not taxable.

²⁴ Deborah Clark-Cobb & Steve Sullivan, *The Retirement Expectations of Middle Aged Individuals*, 3, <http://econrssi.anu.edu.au/pdf/DP540.pdf> (December 2006).

retirement by their employer.²⁵ It is unknown what proportion of these forced retirements might be the product of unlawful age discrimination. Many of those retiring anticipate that they will work after retirement but the reality is that very, very few will actually work.²⁶ Australian survey respondents thought that a person would be fit to work until 66-67²⁷ and like the US, Canadian and UK respondents, were very strongly of the view that people over 65 are good workers.²⁸ This suggests that older citizens want to continue to work and believe they have the capacity to do so. Ill health and disability are clearly impediments.²⁹

Discrimination is only a small part of the picture. In order to have older workers continue to actively participate in the workforce, the emphasis should be on opportunities for life long learning, skills training, and the like. Australia like many countries is experiencing a skills shortage. Older workers themselves want retraining in such things as computing skills, professional development courses and skills training in their particular field.³⁰ They see special value in training that is “in-service, in-house, one-on-one and practical-oriented training methodologies” utilising the skills of older workers as “role models and mentors”.³¹

THE IMPACT OF AGE DISCRIMINATION ON THE INDIVIDUAL

However, there is light at the end of the tunnel, albeit only a pencil torch at this stage! According to Rolland³² “Companies are looking at older workers {45 and over} as a

²⁵ See *Retirement Scope*, *supra* n. 22 at 15. The same questions were not asked in Australia, *ibid* at p.15.

²⁶ In Australia 62% anticipate working but only 8% actually do; USA 58% hope to work, only 16% do, see *Retirement Scope*, *supra* n. 22 at 17. See also Lundberg, *supra* n. 12, (70% of survey respondents want to do some work in retirement).

²⁷ Retired persons thought that 66 was the right age and those who had not retired thought that 67 was the right age, see *Retirement Scope*, *supra* n. 22 at 21.

²⁸ Over 90% of retired and non retired persons in USA, UK, Canada and Australia thought so, see *Retirement Scope*, *supra* n. 22 at 23..

²⁹ See Clark-Cobb, *supra* n. 25.

³⁰ See Lundberg, *supra* n. 12 at 37.

³¹ See Lundberg, *supra* n. 12 at 37.

³² Professor Louise Rolland, Centre for Business, Work and Ageing at Swinburne University, Melbourne.

viable, more stable source of labour”. Rolland notes a trend towards employment of older persons, particularly in the customer service industry with remuneration between \$37,000 - \$38,000 per annum. Rolland argues that provided the working conditions are flexible and training is offered, many older workers are prepared to remain in “entry-level” positions for long periods of time even though the remuneration may be/is considerably lower than what they previously earned.³³

This view is supported by other research which advocates policy changes aimed at encouraging older men (in particular) to take on part time work or full time lower paid positions as a means of reducing the impact on social security systems.³⁴

However, much of the research is particularly focused on those older persons whose educational level is generally lower. Whether older professionals would be quite so willing to take on an entry level position in customer service is debatable.

Monroe³⁵ believes that while some older³⁶ “employees” are content to take on positions involving less responsibility many people in this age cohort are still interested in “climbing the career ladder.”³⁷ It is, however, quite understandable that many workers would wish to further their career prospects when one considers that they still have approximately twenty years remaining, before they are eligible for the age pension!

This raises the further issue, that most, if not all, of the literature pertains to older workers who are unskilled or semi-skilled. The question begs asking, “Do older professionals who are retrenched or made redundant also require re-skilling?” There is much anecdotal evidence to suggest that many professionals, in particular older women, “no longer fit the image” created by their employer and subsequently become the victim of a “restructure.”³⁸ If many of these women are single divorced female baby boomers then unplanned unemployment

³³ As cited in Steve Packer, *Changing Faces: How Older Workers are Solving Workforce Issues*, Wavelength, 5, http://www.aon.com.au/pdf/general/publications/wavelength/edition_on_e_2007.pdf (2007).

³⁴ Carey, as cited in Lundberg, *supra* n. 12 at 13.

³⁵ A director in a company which specializes in mature age employment

³⁶ Here, older is defined as 45 years of age and older.

³⁷ Parker, *supra* n. 35 at 5.

³⁸ A proposal to research discrimination against older professional females is currently in progress.

perhaps ten years before their eligibility to receive the age pension, will have a catastrophic financial and social impact on their lives.

This view is reinforced by Austen and Birch who refer to the fact that when considering that 50% of Australian marriages end in divorce, women, even if they are able to access their husband's superannuation [as part of a property settlement] have little chance of adding to the pool of money. This is due to the fact that they themselves may have been absent from the workforce for extended periods of time usually raising children and they may also have a limited ability to re-enter the workforce.³⁹ (Not the least of the contributing factors being their age.)

Notwithstanding the above, research has demonstrated that older workers more often meet the expectations of older clients, who in many cases prefer to deal with someone more their own age.⁴⁰ This is particularly so in areas such as financial advice. Monroe notes that it is within the financial industry, banking, financial services and insurance, more than in other areas, that there is a growing awareness amongst employers of the need to retain and attract older workers. This trend would appear to have been a result of the downsizing which occurred in the 1990s with the subsequent result that while the shareholder/customer base has aged, the industry demographics have now become "too youthful."⁴¹

ADVANTAGES OF MATURE AGE WORKERS

Earlier research undertaken in 2001 highlighted the following advantages of composite mix of young and older workers:

- Avoidance of skills shortages

³⁹ Siobhan Austen & Elisa Birch, *The Working Lives of Women and Their Retirement Incomes*, Women's Economic Policy Analysis Unit, Curtin University of Technology, 12,

http://espace.library.curtin.edu.au:1802/view/action/singleViewer.do?dvs=1238292793153~604&locale=en_US&search_terms=000014879&application=DIGITool-3&frameId=1&usePid1=true&usePid2=true (January 2001).

⁴⁰ Parker, *supra* n. 34 at 5.

⁴¹ *The Working Lives of Women and Their Retirement Income*, *supra* n. 40.

- Maintenance of core skills, networks and corporate experience
- Reductions in staff turnover, and associated training and recruitment costs
- Maximisation of recruitment potential, by not artificially limiting the field of candidates to those within a certain age
- A better match with the age range of the customer base
- Being better placed to respond to changing circumstances, the peaks and troughs of the business cycle
- Having access to mentoring and coaching skills, for younger staff
- Avoiding loss of skilled staff with detailed company knowledge to a competitor.⁴²

BARRIERS TO MATURE AGE EMPLOYMENT

Notwithstanding the research demonstrating the advantages of retaining and recruiting older workers, there are still a number of barriers facing mature age workers. Generally these would appear to relate to the attitudes towards older people and their contribution, or lack thereof, to the workforce. It is these attitudes which underpin discrimination and limit participation in the workforce by older persons.⁴³

Once a mature age person has been retrenched or is out of the workforce, then their chances of gaining meaningful employment diminish considerably. According to Bittman et al the Survey of Employment and Unemployment Patterns (SEUP) showed that for those job seekers in the 55-59 age bracket, 65% had failed to find employment in a two year period. The comparable rate for those job seekers whose ages were 20-44 years was 20%.⁴⁴

The literature indicates that the largest barrier to employment of older workers is the attitude of employers, the

⁴² *Counting on Experience*, *supra* n. 10 at 13.

⁴³ Lundberg, *supra* n. 12 at 14.

⁴⁴ Michael Bittman, Mardi Flick & James Rice, *The Retirement of Older Australian Workers: A Study of Employers in a High Growth Industry*, Social Policy Research Centre, University of New South Wales, 8, <http://www.sprc.unsw.edu.au/reports/SPRC%20REPORT%206%2001.pdf> (December 2001).

community and younger workers.⁴⁵ Older workers are perceived as “less productive, adaptable and trainable”; they are “soft targets” for redundancy.⁴⁶ It is unknown what proportion of these forced retirements might be the product of unlawful age discrimination. Older workers themselves say that supervisors and younger staff should undergo training to help overcome ageist attitudes.⁴⁷ It is, however, not clear whether this type of training is sufficient to change ingrained attitudes.⁴⁸

AGE DISCRIMINATION IN THE PROVISION OF SERVICES

i. Health

In the area of services, it is also difficult to determine how far older Australians suffer discrimination. There is, however, significant evidence in relation to medical services provided for older citizens. Cancer is a disease of old age. In relation to breast cancer, the evidence from United States is that 50% of women with breast cancer are 65 years and older; 35% of these are over 70.⁴⁹ The literature suggests that older women are not getting adequate treatment for breast cancer and that the range of treatments offered diminish with age.⁵⁰ Research on the benefits of aggressive cancer treatment for older women is hampered by the lack of older women as trial subjects.⁵¹

⁴⁵ Lundberg, *supra* n. 12 at 9, 32, 37.

⁴⁶ Parliament of Australia, Australia's Ageing Workforce, <http://www.aph.gov.au/Library/pubs/rn/2004-05/05rn35.pdf> (March 7, 2005), Australian Human Resources Institute Conference, Melb. 2001, cited in Lundberg, *supra* n. 12 at 37.

⁴⁷ Lundberg, *supra* n. 12 at 37.

⁴⁸ Rob Ranzijn, Ed Carson & Anthony Winefield, Barriers to Mature Aged Re-Employment: Perceptions About Desirable Work-Related Attributes Held by Job-Seekers and Employers, 8(7) *Intl. J. of Organisational Behaviour* 559,

<http://www.usq.edu.au/extrfiles/business/journals/HRMJournal/InternationalArticles/Volume%208/Vol8No7Ranzijn.pdf>

⁴⁹ David Litvak & Rajeev Arora, Treatment of Elderly Breast Cancer Patients in a Community Hospital Setting, 141 *Archives of Surgery* 985, <http://archsurg.ama-assn.org/cgi/reprint/141/10/985.pdf> (2006).

⁵⁰ Litvak, *supra* n. 50.

⁵¹ *Older Women Have Worse Survival from Breast Cancer*, Science Daily, <http://www.sciencedaily.com/releases/2006/01/060118095845.htm> (Jan. 19, 2006).

There is also evidence that although older women continue to have access to screening, the reminder service in Australia is not continued after the age of 70.⁵² It appears quite inconsistent to recognise that screening is desirable for older women but effectively discourage its use. The American Cancer Society advises that mammograms should continue to be offered if the older woman does not have serious, chronic health problems.⁵³ It is recognised that screening is largely reserved for mature aged women. BreastScreen Australia⁵⁴ advises:

. . . [i]n 1992, the National Health and Medical Research Council (NHMRC) undertook a review of mammography screening for women under 50 years of age and found that there is insufficient evidence to conclude that screening the population of women under 50 years of age by mammography will reduce mortality from breast cancer. The NHMRC review resulted in a statement that there is insufficient evidence to advise women under 50 years of age to have routine mammography.⁵⁵

It should be noted, however, that while “recruitment strategies and publicity materials” target asymptomatic women between the ages of 50-69 years, mammography screening is available to women aged 40-49 and 70 years of age and older.^{56 57} Furthermore, the Policy states that “The age range for screening

⁵² Verbal communication with spokesperson from Cancer Institute NSW 18th October 2007.

⁵³ American Cancer Society, *Updated Breast Cancer Screening Guidelines*, http://www.cancer.org/docroot/NWS/content/NWS_1_1x_Updated_Breast_Cancer_Screening_Guidelines_Released.asp (accessed Oct. 8, 2007).

⁵⁴ BreastScreen Australia is a joint state/territory/federally funded national mammography program.

⁵⁵ BreastScreen Australia ‘Policy on Breast screening women aged 40 – 49 years.’ Australian Government, *BreastScreen Australia Program*, <http://www.cancerscreening.gov.au/internet/screening/publishing.nsf/Content/br-policy-40-49> (accessed Oct. 16, 2007).

⁵⁶ *Id.*

⁵⁷ However, older women, unlike those targeted in the recruitment and publicity materials, are not sent a regular reminder notice of the due date of their next mammogram.

women will continue to be monitored and reviewed as new evidence becomes available.”⁵⁸

Bias against older citizens has been observed in relation to cancer treatment generally.⁵⁹ Yet healthy seniors can equally benefit from aggressive treatment.⁶⁰ At the end of life, there is evidence that the very elderly are usually not given access to palliative care in a hospice.⁶¹ In the United Kingdom, there has been frank acknowledgement that the health care system is “riddled” with discriminatory practices against older patients.⁶² Surprisingly, these are rarely matters for litigation or administrative review. In Australia, research is required to determine whether similar lack of access to medical services by older Australians exists here.

ii. *Other Services*

Age discrimination is not confined to employment and health issues. In 2004 the Law and Justice Foundation of NSW released its report ‘Access to Justice and Legal Needs – The Legal Needs of Older People in NSW’.⁶³ In the report examples were given of issues relating, in particular to insurance. A number of the complaints related to the fact that as the person aged they were either denied travel insurance or the premiums were consistently higher for older persons than their younger counterparts.⁶⁴

In a recent submission to Government⁶⁵ the Human Rights and Equal Opportunity Commission (HREOC)⁶⁶ also

⁵⁸ *Id.*

⁵⁹ H B Muss, *Older Age – Not a Barrier to Cancer Treatment*, 345 *The New England J of Medicine* 1128-1129 (2001).

⁶⁰ *Id.*

⁶¹ See R Dobson “Age discrimination denies elderly people a ‘dignified death’, *Br Medical J*, Jun 2005, vol 330 p.1288.

⁶² A Tonks, “Age discrimination must stop, says royal college” *British Medical Journal* 1994, vol 308 p.1319.

⁶³ The full report can be accessed at

<http://www.lawfoundation.net.au/report/olderinfo>.

⁶⁴ Law and Justice Foundation of NSW, *Access to Justice and Legal Needs – The Legal Needs of Older People in NSW*, 245, [http://xml.lawfoundation.net.au/ljf/site/articleIDs/6FFEB98D3C8D21F1CA25707E0024D3EB/\\$file/older_law_report.pdf](http://xml.lawfoundation.net.au/ljf/site/articleIDs/6FFEB98D3C8D21F1CA25707E0024D3EB/$file/older_law_report.pdf) (December 2004).

⁶⁵ The Federal Government House of Representatives Standing Committee on Legal and Constitutional Affairs recently conducted an

gave examples of age discrimination that had occurred in the insurance industry.

Two examples cited by HREOC were in relation to travel insurance and reflected the same concerns expressed in the Law and Justice Foundation Report. However, in these instances, the older persons had complained to HREOC and the discriminatory behaviour on the part of the insurers was addressed to the satisfaction of the complainants.

WHY DON'T OLDER PEOPLE COMPLAIN?

HREOC, in their submission, referred to above, noted that since the introduction of the *Age Discrimination Act* they had received 748 enquiries from people in relation to the person being “too old” and 23 enquiries in relation to compulsory retirement. During the same period they received 184 complaints relating to age discrimination, the overwhelming number of the complaints related to age discrimination in employment.⁶⁷

However, the paucity of actual complaints lodged is not a true indication of the level of discrimination against older people. Citing one of the comments made in the Law and Justice Foundation Report “Older Australians tend not to come forward with complaints. It’s a generational sort of thing . . .”⁶⁸

Inquiry into the Legal Needs of Older People. The Inquiry attracted in excess of 160 submissions and public hearings were held in several locations. The full report can be accessed at

<http://www.aph.gov.au/house/committee/laca/olderpeople/report.htm>.

⁶⁶ Since the introduction of the Age Discrimination Act in 2004 the responsibilities of HREOC relate to the promoting of understanding of, and compliance with the Act; inquiring into complaints of age discrimination, and attempting to conciliate them; disseminating information about age discrimination and the avoidance of it; undertaking research and community education to promote the objects of the Act; intervention, with the Court’s leave, in proceedings involving issues of age discrimination; and the granting of temporary exemptions to the Act., as cited in their submission to the Inquiry, accessed at

<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub92.pdf>.

⁶⁷ Human Rights and Equal Opportunity Commission, *Inquiry into Older People and the Law*, 14,

<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub92.pdf> (Dec. 15, 2006).

⁶⁸ *Access to Justice and Legal Needs*, *supra* n. 65 at 251.

When considering the above comment we should be mindful that of the older generation many of them have lived through the Great Depression and the Second World War, in other words life has been tough and complaining was often not considered either appropriate or as a means of redress. Additionally, while younger generations may be only too aware of the fact that they are being discriminated against and are prepared to take action, older people may not even realise that they are the victims of discrimination, particularly in respect of age discrimination.

However, in situations where the older person is aware of the discrimination some may be of the view that it is better to just step aside and not pursue any form of relief in respect of the discriminatory actions. For a generation not used to complaining it is not uncommon to hear comments such as the following, which were highlighted in the above mentioned report.

They'll often feel the need, more than other people, to say, 'I'm not the sort of person that ordinarily complains. I wouldn't ever have thought that I would have to do this—I've always been a really loyal and hard-working sort of person', because they're quite embarrassed about having to come and make a complaint... as a generalisation, younger people have a greater sense of entitlement and can make a complaint without feeling like they need to apologise for it.⁶⁹

Of equal importance is the fact that as we age we may not possess the requisite mental, emotional and physical stamina "to take on" an employer or an organisation providing goods or services. This is of particular note in age discrimination matters because by its very nature the process involves self advocacy on the part of the aggrieved person and during conciliation processes there is the base line expectation that both parties are equal. Many older persons, as noted above, do not have the requisite skills for self advocacy and the stamina to confront, throughout a conciliation process, an employer be they small business or corporate firm.⁷⁰

⁶⁹ *Id.* at 252.

⁷⁰ *Id.* at 257.

This presupposes, of course, that the older person suffering the discrimination possesses the finances to follow through with a complaint of age discrimination, and perhaps even more importantly knows what to do and where to go to seek advice and redress. This situation is compounded by the fact that anti-discrimination laws, as mentioned earlier, are found at both state and federal level.

While the present younger generation have grown up with the concept of Legal Aid and/or Community Legal Centres, the same cannot be said of older persons. For example, many older women are not aware of the existence of community legal centres and the services that they can offer.⁷¹ Equally, in many situations they have no idea how to access information through the myriad of government departments. One suggestion to assist older people navigate the maze of government bureaucracy is for the implementation of a one stop shop which can either assist the older person address their complaint or refer them to the relevant department.⁷²

RECOMMENDATIONS

In reviewing the literature and available data on why older people do not complain about age discrimination it becomes readily apparent that for the reasons outlined above the legislation does not appear to effectively address the issue of age discrimination against older people. Walt is of the view that legislation can in effect encourage employers to discriminate in more covert ways and that legislation alone is insufficient to eradicate age discrimination in the workforce and that what may be required is a “concerted effort to change people’s mindset and attitudes.”⁷³

The legislation may act as a punitive measure against the discriminator, if discovered, however, there appears little incentive for employers, in the first instance, to actively engage in the recruitment and retention of older workers. Furthermore, the complexity of both state and federal legislation and the limited available resources to assist the aggrieved person

⁷¹ *Id.* at 253.

⁷² *Id.*

⁷³ Walt, A., *Age Discrimination in Labour Law: A Comparative Inquiry*, Centre for International and Comparative Labour and Social Security Law, Publication Series 1/2003 p111.

means, in effect that many older persons give up because the situation is “all too hard”.

While some measure of success can be achieved by changing the attitudes and mindsets of the community, about the value of older persons, as members of the community it is a slow and laborious process. However, in the situation of employers the punitive stick may need the addition of the incentive of a carrot. Such a carrot could be in the form of government rebates payable to employers who employ or retain older workers.

One initiative funded by the Australian Government is the Wise Workforce Program. This program assists businesses in the development and implementation of age positive policies and practices with an overall goal of increasing the employment of mature age workers and thereby decreasing the anticipated skill shortage within the workforce.⁷⁴ As the program only commenced in mid 2007 it is too early to evaluate the effectiveness of it at this stage.

Other very recent initiatives, this time by three of the State Governments, include the introduction of free legal services to older persons. As the services are free and have already received wide publicity, it is hoped that those older persons who have experienced age discrimination will, at last, have an affordable and accessible avenue to not only find out about their rights but also obtain assistance in addressing them.

⁷⁴ Commerce Queensland ‘Silver Lining for the growing Skills Shortage’ accessed at

<http://www.commerceqld.com.au/www/index.cfm?pageid=1115>.