Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States

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INTRODUCTION

Almost a decade ago, Professor Clyde Summers, the late and renowned legal comparativist, characterized many comparative labor law studies as purely descriptive in character—in short, a form of academic tourism lacking in social context and critical analysis.[1] He exhorted scholars interested in comparative labor and employment law to illuminate the values and premises of the systems they studied and to produce work aimed at improving formal law and practice in their home countries.[2] Summers identified employment discrimination as an area especially ripe for comparative study. Such work could reveal the depth of each country's commitment to employment equality.[3]

This Article takes up that task by focusing on a central labor market concern—that of aging and the workplace—in two countries with a common legal heritage. More specifically, this Article compares age discrimination law and practice in the United Kingdom (U.K.) and the United States (U.S.) to discern convergences and divergences in legal doctrine, the law's normative underpinnings, and societal outcomes. In an earlier article, using the "decent work" construct created by the International Labour Organization (ILO),[4] the authors concluded, along with their colleague Andrew Frazer, that the global economic crisis negatively affected the quality of work for older workers in the U.K. and the U.S., making employment for them "more fragile, inconstant, and insecure."[5] This Article assesses age discrimination law and its basic assumptions and similarly concludes that neither country adequately protects its aging workforce from age bias. Therefore, changes in the law are needed to effectively shield older workers from employer actions that result in economic vulnerability and involuntary

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1. Clyde Summers, *Comparative Labor Law in America: Its Foibles, Functions, and Future*, 25 COMP. LAB. L. & POL'Y J. 115, 115–19 (2003).

2. *Id.* at 119–20.

3. *Id.* at 125.

4. Decent work is an obligation undertaken by ILO member states requiring the promotion of four interrelated pillars: employment promotion, social protection, social dialogue, and fundamental rights. Susan Bisom-Rapp, Andrew Frazer & Malcolm Sargeant, *Decent Work, Older Workers and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States*, 15 EMP. RTS. & EMP. POL'Y J. 43, 46 n.10 (2011) [hereinafter Bisom-Rapp, Frazer & Sargeant, *Decent Work, Older Workers*]. This article also referenced conditions in Australia.

5. *Id.* at 48.

retirement.

A comparative study of British and American age discrimination law is useful because both countries are presently grappling with high youth unemployment, aging populations, higher than usual older worker unemployment, and the increasing difficulty for many workers to secure a dignified retirement.[6] Moreover, despite the similarity of these challenges, each country at first blush appears to pursue age discrimination protection using a distinct model. Although both the U.K. and U.S. share a history rooted in English common law, age bias law in the U.K. adheres to what might be termed the "European approach." The U.K., as a member of the European Union (EU), is obligated to ensure that its law conforms to EU directives, which are binding yet flexible legal measures that member countries translate into national law.[7] While equal treatment has been a concern in Europe since the 1970s, particularly regarding gender equality,[8] there has been a proliferation of new anti-discrimination legislation at both the supra-national and national level in the last fifteen years, including several important EU equal employment opportunity directives.[9] The U.K.'s age discrimination prohibition, enacted pursuant to the EU's Framework Directive on Equal Treatment in Employment and Occupation ("Equal Treatment Directive" or "Directive"),[10] is relatively recent, dating to October 2006.[11] In fact, the country's Supreme Court issued its first decision on compulsory retirement in April 2012.[12] Thus, age discrimination law in the U.K. is in its formative phase.

One notable aspect of U.K. law that places it within the European approach is the broad reach of the protected class. In the U.K., workers ages 16 and up are shielded from age bias—a recognition that age-based stereotypes may adversely affect the young as well as the middle-aged

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6. *See id.* at 76–92 (describing conditions in the U.K.); *id.* at 92–114 (describing conditions in the U.S.).

7. ROGER BLANPAIN, SUSAN BISOM-RAPP, WILLIAM R. CORBETT, HILARY K. JOSEPHS & MICHAEL J. ZIMMER, THE GLOBAL WORKPLACE 397, 473 (2d ed. 2012) [hereinafter THE GLOBAL WORKPLACE].

8. The EU's first antidiscrimination law directive was adopted in 1975, and it relates to equal pay for men and women. *Id.* at 451. *See also* Council Directive 75/117, 1975 O.J. (L 45) 19 (establishing equal pay for men and women).

9. Gráinne de Búrca, *The Trajectories of European and American Antidiscrimination Law*, 60 AM. J. COMP. L. 1, 1–3 (2012).

10. *See infra* Part II.D (discussing the Directive's age exception to employment discrimination).

11. *See infra* notes 136–38 and accompanying text (discussing the Employment Equality Age Regulations of 2006).

12. *See infra* Part II.D.2 (discussing the U.K.'s compulsory retirement law). *See also* Malcolm Sargeant, *Shades of Grey*, 1 E-J. INT'L & COMP. LAB. STUD. 139, 139–43 (2012).

and elderly.[13] But in the U.S., age discrimination is conceptualized as a problem of older rather than younger workers. The protected class is defined as those who are at least 40 years old, leaving those under 40 without redress for age discrimination.[14] Even within the protected class, suits filed by chronologically younger class members challenging policies that favor their older counterparts are not cognizable.[15]

Another significant characteristic of U.K. law that aligns it with the European approach is the possibility of employer-justified compulsory retirement.[16] Professor Julie Suk recently examined the legal conclusions about, and the normative underpinnings of, mandatory retirement in Europe. In the EU, compulsory retirement is generally viewed as a justification for differential treatment on the basis of age so long as a given scheme is an appropriate and necessary means of achieving a legitimate aim.[17] The proffered jurisprudential rationale for mandatory retirement is that such programs may promote, among other things, older worker dignity and employment opportunities for the young. Suk describes the European approach as one "promoting a normative vision of the ideal life cycle."[18]

In contrast to the U.K., the long-standing prohibition of age discrimination in the U.S. generally renders mandatory retirement illegal. In enacting the Age Discrimination Employment Act of 1967 (ADEA),[19] Congress sought the eradication of a particular evil—employers' inaccurate stereotypes about the productivity and competence of older workers.[20] Under the ADEA, employees are to be evaluated individually on the basis of merit.[21] The American approach prohibits compulsory retirement programs in order to combat negative, age-based stereotypes about when and how older workers should exit

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13. *See infra* Part I.B (discussing age-based stereotypes).

14. *See infra* Part II.C.2 (discussing the age-protected class in the U.S.).

15. *See infra* notes 148–54 and accompanying text (discussing *General Dynamics Land Systems, Inc., v. Cline*).

16. *See infra* note 228 and accompanying text (explaining the possibility of employer-justified compulsory retirement in the U.K.).

17. Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75, 95 (2012).

18. *Id.* at 97. An example of the European approach to compulsory retirement is the recent case, *Hörnfeldt v. Posten Meddelande AB*, in which the European Court of Justice upheld Swedish national legislation permitting an employer to terminate an employee at the end of the month in which the employee reaches age 67. Case C-141/11, Hörnfeldt v. Posten Meddelande AB, 2012 *available at* http://curia.europa.eu/juris/liste.jsf?language=en&num=C-141/11.

19. 29 U.S.C. §§ 621–78 (2006).

20. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

21. *Id.* at 611.

the labor market.[22] European scholars opposed to compulsory retirement in their own countries cite the U.S. approach with approval.[23]

Nonetheless, over time, U.S. Supreme Court decisions have greatly weakened the ADEA's protections, making it difficult for plaintiffs to make out a prima facie case of age discrimination and easier for employers to defend against suit.[24] The Court decisions have also complicated the government's enforcement efforts.[25] Additionally, aggressive corporate downsizing, very laxly regulated in the U.S., increasingly sweeps older workers within its ambit, leaving them without employment at a point in their lives when finding replacement work is most difficult.[26] U.S. law at present is in no sense a model for other countries when it comes to protecting older workers. Many older American workers lawfully terminated by reductions in force find themselves involuntarily and prematurely retired, cast out of their jobs and unable to find alternative employment.[27]

Indeed, despite what may appear as great doctrinal contrasts, the age discrimination laws of the U.K. and the U.S. converge in many respects. Both systems view age stereotyping as an ill to be cured.[28] Both countries ultimately provide for inferior legal protections against age discrimination as compared to other forms of prohibited workplace bias.[29] Finally, both approaches to age discrimination render workers vulnerable in their later working years even though each nation's laws

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22. *See generally* W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985) (stating that under the ADEA, "employers are to evaluate employees . . . on their merits and not their age"); Suk, *supra* note 17, at 97–98 (arguing that while Europe has promoted a "normative vision of the ideal life cycle," the United States has produced a "concept of equality that prevents the state from interfering with individuals' ability to make" retirement decisions).

23. ROGER BLANPAIN, MEMOIRS OF ROGER BLANPAIN: "WHAT CAN I DO FOR YOU?" 105 (2009).

24. *See infra* Part II.E (discussing the onerous burden of establishing a prima facie case of disparate treatment under the ADEA).

25. *See infra* Part II.E.

26. *See infra* notes 308–09 and accompanying text (noting the negative effects of corporate downsizing on older workers). *See also* Jessica Z. Rothenberg & Daniel S. Gardner, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, 38 J. SOC. & SOC. WELFARE 9, 21 (2011) ("The ADEA has been least effective at protecting older workers during periods of recession, downsizing, and economic restructuring.").

27. *See* Kelly Evans & Sarah E. Needleman, *For Older Workers, a Reluctant Retirement*, WALL ST. J., Dec. 8, 2009, at A17 (finding that many Americans are reluctantly forced into retirement); Motoko Rich, *For the Unemployed Over 50, Fears of Never Working Again*, N.Y. TIMES, Sept. 19, 2010, at A1 (reporting the difficulty of finding work for many unemployed Americans over the age of 55).

28. *See infra* Part I.B (comparing U.K. and U.S. efforts to eradicate stereotypes based on age).

29. *See infra* Parts II.A–B (discussing the legal protections provided by the U.S. and the U.K. against age discrimination).

arguably arrive there by a different route.[30] Carefully examining law in action—particularly how the law is deployed by employers—illustrates this latter point and reveals that neither country's commitment to employment equality on the basis of age is sufficient.

The deficiencies plaguing both systems are traceable to the incursion of a distinct economic imperative, applicable only to older workers, on what should be a civil or human rights approach.[31] In other words, both the U.S. and U.K. systems provide weakened protection from age discrimination in the supposed service of societal economic concerns.[32] Economic vulnerability would less frequently affect older workers if the U.K. and the U.S. followed an equal treatment approach grounded in human rights law—an approach equal to the prohibitions of discrimination on other bases, such as race and sex.[33] Consigning age discrimination to a lesser or inferior protected status will only ensure that the law will be limited in its ability to eliminate the harm it seeks to redress. Putting age on even footing with other forms of bias is a necessary cure in this respect.

Before advancing to this Article's legal analysis, Part I provides a brief review of the social science of age stereotyping, a phenomenon the age discrimination laws in the U.K. and the U.S. aspire to eradicate. Part I also highlights the seminal study that gave rise to age discrimination legislation in the U.S. and summarizes several decades of

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30. *See infra* Parts II.D–E (discussing the weaknesses in U.S. and U.K. legal protections for age discrimination).

31. *See infra* Conclusion (proposing a civil or human rights approach to remedying the deficiencies in both systems). The authors acknowledge that civil rights law, in particular employment discrimination law, incorporates economic concerns. Indeed, all labor and employment law exists to regulate the labor market, a site of economic activity. The focus of this Article, however, is on the greater willingness of courts and legislatures to allow economics to trump civil rights when interpreting or fashioning measures to eradicate age bias.

32. Malcolm Sargeant has previously made this point regarding the EU's Framework Directive on Equal Treatment in Employment and Occupation, Directive 2000/78/EC OJ L303/16 12.2.2000. *See* MALCOLM SARGEANT, AGE DISCRIMINATION: AGEISM IN EMPLOYMENT AND SERVICE PROVISION 20–24 (2011) [hereinafter SARGEANT, AGE DISCRIMINATION] (discussing the confusion in the European debate about age discrimination due to two distinct approaches to the problem: economic and human rights).

33. Unfortunately, a robust human rights approach to age discrimination continues to elude the international community. *See* U.N. Secretary-General, *Follow-up to the Second World Assembly on Ageing: Rep. of the Secretary-General*, ¶ 22, U.N. Doc. A/66/173 (July 22, 2011) [hereinafter 2011 *Follow-up to Second World Assembly*] ("[E]xplicit references to age in core international human rights treaties are scarce . . . ."). In fact, there is an international movement advocating the adoption of a United Nations Convention on the Rights of Older People to fill a gap in international law on the subject. *See* INPA ET AL., STRENGTHENING OLDER PEOPLE'S RIGHTS: TOWARDS A UN CONVENTION (2010), *available at* http://www.helpage.org/what-we-do/rights/strengthening-older-peoples-rights-towards-a-convention/.

research on ageism. Next, Part II offers a comparative analysis of the doctrinal law developed for the purpose of eradicating the use of age stereotypes in employment decision-making. Part II also considers societal outcomes, examining law in action and describing the ways in which many British and American older workers are rendered vulnerable. This Article concludes with recommendations to better protect aging employees and to assist American policymakers in drawing lessons from the British experience and vice versa.

I. A PROBLEM TO BE SOLVED BY LAW: AGEISM AND STEREOTYPING

A. Ageism

Age discrimination is a manifestation of ageism. Ageist attitudes continue to exist both in the U.K. and the U.S. In the U.K., for example, studies conducted by the Department for Work and Pensions revealed that "both negative and positive stereotypes of older persons [are] strongly held by significant segments of the population."[34] Similarly, numerous studies demonstrate "that many Americans hold inaccurate and negative stereotypes against older people[,] . . . viewing them as senile, sad, lonely, poor, sexless, ill, dependent, demented, and disabled."[35]

The first use of the word "ageism" is attributed to Dr. Robert Butler, who in 1969 wrote a short article about the strongly negative reaction of white affluent middle class residents to a proposal for a public housing project for the elderly poor in Chevy Chase, a neighborhood in northwest Washington, D.C.[36] He described ageism as "prejudice by one age group against other age groups."[37] A more comprehensive and contemporary definition is contained in a 2009 United Nations (U.N.) report on ageing, which describes ageism as encompassing systemic, negative stereotyping and discrimination or denial of opportunities on

34. U.N. Secretary-General, *Follow-up to the Second World Assembly on Ageing: Comprehensive Overview: Rep. of the Secretary-General*, ¶ 75, U.N. Doc. A/65/157 (July 21, 2010) [hereinafter 2010 *Comprehensive Overview*].

35. Richard L. Wiener & Stacie Nichols Keller, *Finding the Assumptions in the Law: Social Analytic Jurisprudence, Disability, and Aging Workers*, *in* DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY 1, 2 (Richard L. Weiner & Steven L. Willborn eds., 2011).

36. *See generally* Robert N. Butler, *Age-ism: Another Form of Bigotry*, 9 GERONTOLOGIST 243 (1969). Race and class also loomed large in the resistance of the middle class residents—who were white—to the plan to bring the elderly—who were mainly African American and poor—to their community. *Id.* at 243–46.

37. *Id.* at 243.

the basis of age.[38] The report notes that ageism "reinforces a negative image of older persons as dependent people with declines in intellect, cognitive and physical performance. . . . [O]lder persons are often perceived as a burden, a drain on resources, and persons in need of care."[39] Such perceptions render older people vulnerable and put "their rights at risk."[40]

While for some social scientists Dr. Butler's work marks the beginning of research on ageism,[41] a report published four years prior to it has had a far greater impact on age discrimination law in the U.S. National legislation prohibiting age discrimination in the U.S. was preceded by a year-long study published in 1965 under the direction of then Secretary of Labor W. Willard Wirtz.[42] The study, commonly known as the "Wirtz Report," was ordered by Congress in order to assess the need for age discrimination legislation.[43] The Wirtz Report found significant evidence of age discrimination in the American workplace resulting from unfounded assumptions about older workers.[44] Nevertheless, the Report distinguished beliefs about middle-aged and older workers from those affecting workers on the basis of race, religion, color, or national origin. Unlike prejudice based on those other characteristics, age bias was not typically driven by "dislike or intolerance."[45] In order to eliminate arbitrary age discrimination, the

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38. U.N. Secretary-General, *Follow-up to the Second World Assembly on Ageing: Rep. of the Secretary-General*, ¶ 24, U.N. Doc. A/64/127 (July 6, 2009) [hereinafter 2009 *Follow-up to Second World Assembly*].

39. *Id.*

40. *Id.*

41. *See, e.g.*, Todd D. Nelson, *Ageism: The Strange Case of Prejudice against the Older You*, *in* DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY 37 n.1 (Richard L. Weiner & Steven L. Willborn eds., 2011) ("I mark the beginning of research on ageism with the coining of the term 'age-ism' by Butler (1969).").

42. U.S. SEC'Y OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter WIRTZ REPORT]. The Report was undertaken in the wake of passage of Title VII of the Civil Rights Act of 1964, which bans employment decision-making on the basis of race, color, religion, national origin, and sex. *See id.* at 1 (stating that the Wirtz Report is presented in response to section 715 of the Civil Rights Act of 1964).

43. *See* Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 234 (2010).

44. WIRTZ REPORT, *supra* note 42, at 5–9; Kohn, *supra* note 43, at 234.

45. Smith v. City of Jackson, 554 U.S. 228, 232 (2005); WIRTZ REPORT, *supra* note 42, at 5–6. *See also* Howard Eglit, *Age Bias in the American Workplace—An Overview*, 99 J. INT'L AGING L. & POL'Y 99, 101 (2009) [hereinafter Eglit, *Age Bias*] ("[A]ge-based decision making typically is not an expression of the intense animosity that accompanies racism and its malignant compatriots . . . ."). As the Baby Boom generation ages and consumes increasing resources, it is possible that animosity against older people will increase.

Wirtz Report recommended national legislation.[46] Congress acted on the report's recommendation and passed the ADEA in 1967.[47]

Historical context is important for understanding the Wirtz Report. At the time of the study, many American employers had policies prohibiting the hiring of employees over a certain age.[48] These limitations, typically set from ages 45 to 55, appeared in employment advertisements, were communicated to applicants during the hiring process, and were conveyed to employment agencies.[49] In response, twenty states enacted laws prohibiting age limitations in hiring.[50] The Wirtz Report examined the practice of age-based hiring limitations among 540 employers, all of which at the time were located in states that had not adopted a legal prohibition of the practice. Employers explained the rationale for age limitations as tied to:

- Physical capability.
- A policy of promotion-from-within [and hence a restriction of hiring for entry level jobs to the young].
- Ability to hire younger workers for less money . . . .
- Pension plans (costs and provisions), and to a much lesser extent, costs of health and life insurance.
- Lack of skills, experience, or educational requirements.
- Limited work expectancy.
- Training costs and low productivity.
- Lack of adaptability and undesirable personal characteristics.
- Desired age balance in the work force.[51]

The Wirtz Report never made clear which of these explanations count as stereotypes—the report does not use the term "stereotypes"—and which might be legitimate concerns. Instead, it implies that at least some of the explanations are specious.[52] That the rationales in many cases are based on arbitrary assumptions about older workers is evidenced, noted the Report, by the fact that older worker performance

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46. WIRTZ REPORT, *supra* note 42, at 21–22.

47. Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. RICH. L. REV. 757, 762 (1997) [hereinafter Harper, *Doctrinal Impediments*] ("[T]he Wirtz Report provided the initiative for Congressional passage of the Age Discrimination in Employment Act of 1967.").

48. WIRTZ REPORT, *supra* note 42, at 6–7.

49. *Id.* at 6.

50. *Id.*

51. *Id.* at 8.

52. *See id.* ("It is apparent . . . that a great many age limitation policies are based in fact on considerations quite different from those offered as their explanation."); Harper, *Doctrinal Impediments*, *supra* note 47, at 758 ("[T]he [Wirtz] Report did not draw definitive conclusions about the actual explanations.").

is in the main "at least equal to [that of] younger workers"[53] and "the demonstrated willingness of so many American employers to consider older workers on their merits . . . and to hire them."[54]

There is a strong connection between the stated problem—stereotyping or unfounded assumptions—and its potential solution—law. Indeed, the Wirtz Report is a touchstone in American age discrimination jurisprudence, frequently discussed as evidence of Congress's legislative intent in enacting the ADEA.[55] As Professor Michael Harper notes, the Wirtz Report's goals are "reflected in Congressional statements in support of the [ADEA] and in the Act's statement of findings and purpose."[56] Moreover, as the U.S. Supreme Court has made clear, "Congress'[s] promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."[57]

Legal experts outside the U.S. consider the ADEA as the pioneering statutory law addressing the problem of age bias. (Some even reference the Wirtz Report in their writings.[58]) Ageism and stereotyping are also concerns in the U.K., where legislation aims to eliminate these group-based generalizations or beliefs.[59] Additionally, one finds mention at the supra and international level of the need to eradicate age stereotyping through legislative action.[60] Social scientific understanding of age stereotypes and their relationship to employment discrimination, however, has advanced considerably since the Wirtz Report.[61]

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53. WIRTZ REPORT, *supra* note 42, at 8.

54. *Id.* at 9.

55. For discussions of the Wirtz Report, see Smith v. City of Jackson, 544 U.S. 228, 232, 235 n.5, 238 (2005); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 587, 589–90 (2004); W. Airlines, Inc. v. Criswell, 472 U.S. 400, 409 (1985); EEOC v. Wyoming, 460 U.S. 226, 230–31 (1983).

56. Harper, *Doctrinal Impediments*, *supra* note 47, at 762.

57. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

58. *See, e.g.*, SARGEANT, AGE DISCRIMINATION, *supra* note 32, at 14, 24 (describing the U.S. as "a pioneer in introducing legislation against age discrimination" and discussing the Wirtz Report).

59. *See generally id.* at 2–4 (discussing stereotyping and noting that reducing it requires making discrimination unlawful).

60. *See generally* 2010 *Comprehensive Overview*, *supra* note 34, ¶¶ 72, 75, 99 (discussing ageist stereotypes and negative views of older persons, and noting that "age is a prohibited ground of discrimination" in the context of "discrimination against unemployed older persons in finding work").

61. While social scientific understanding of age bias has advanced, the literature in this area is less developed than the social scientific research on race, ethnicity, and gender. Wiener & Keller, *supra* note 35, at 2. Indeed, there is robust legal literature on the role of implicit bias, or unconscious prejudice, in employment decision-making and the way in which employment

B. Stereotyping

There is great evidence that negative age stereotyping exists. A stereotype is a generalization about a group that assumes all members exhibit certain traits or behavioral characteristics.[62] The assumption that all group members share traits and characteristics, when in fact one finds individual variance within a group, makes stereotypes inaccurate.[63] Although erroneous, negative, age-based stereotypes are triggered automatically and operate unconsciously, potentially "influenc[ing] conscious thought, behavior, and feelings toward older people."[64]

While it is unclear the extent to which negative age stereotypes are operative in the workplace and affect employment decision-making, Professors Scott Adams and David Neumark note that several insights emerge from studies conducted by industrial psychologists and gerontologists. We know, for example, that managers and coworkers draw on many older worker stereotypes in rating job applicants.[65] Whether age-related constructs ultimately play a part in hiring decisions is less certain because the results of the studies are mixed.[66] Some studies "find no significant effect of age in selection decisions,"[67] while other studies "find evidence that younger applicants are treated more favorably than older applicants."[68]

Studies also reveal the use of stereotypes in decision-making outside of hiring. One study, for example, found that "managers perceive older workers as less flexible and more resistant to change."[69] This study

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discrimination law fails to adequately account for this social psychological phenomenon. Most of this legal literature focuses on race and sex bias. *See, e.g.*, Samuel R. Bagenstos, *Implicit Bias, "Science," and Anti-Discrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477–78 (2007) (discussing the prevalence of unconscious bias based on race and gender); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1056–58 (2006) (explaining that implicit stereotypes may result in discrimination); Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 489 (2012) (discussing unconscious racial prejudice).

62. Nelson, *supra* note 41, at 37.

63. *Id.* at 37–38.

64. *Id.* at 43.

65. Scott J. Adams & David Neumark, *Age Discrimination in U.S. Labor Markets: A Review of the Evidence*, *in* HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 187, 189 (William M. Rodgers III ed., 2006).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 189–90 (summarizing findings of Benson Rosen & Thomas J. Jerdee, *Too Old or Not Too Old?*, 55 (6) HARV. BUS. REV. 97, 97–106 (1977)).

also found managers less willing to support training and career development for older workers, and less likely to offer promotion opportunities to older workers for "jobs requiring flexibility, creativity, and high motivation."[70]

Stereotyping may interact with other decision-making factors in complex ways. It may be that certain jobs are coded as "youth jobs" and more likely to be perceived as a poor fit for older workers.[71] Moreover, managers may be more likely to rely on stereotypes when they are preoccupied or busy with matters other than the decision at hand. Hence, age-biased decisions may be produced by statistical discrimination—managers using age as an arbitrary criterion due to the lack of time to obtain more individualized information about candidates.[72] In such cases, it is not animus driving decisions but merely "cognitive busyness" that results in bias against older workers.[73] This complexity helps explain why, although there may be evidence linking age bias and adverse employment outcomes, some studies "have difficulty ruling out alternative explanations."[74] One might imagine, as will be discussed further below, that legal concepts such as "but for" causation might be ill-suited to untangling the complexities of decision-making involving older workers.

Even so, it is clear that negative stereotypes about older adults—for example, that they suffer physical and mental decline, lack ambition, fear technology, and are resistant to change—are prevalent in society, deemed socially acceptable, and often internalized by older people themselves.[75] These perceptions are institutionalized in numerous ways: comic birthday greeting cards, television programming depicting older people in stereotypic ways, and advertising that characterizes many ordinary physical changes associated with aging, such as graying hair and wrinkling skin, as treatable maladies.[76] The money spent on

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70. *Id.* at 190.

71. *Id. See* Statement of Michael Campion, Professor of Mgmt., Purdue Univ., before the U.S. EEOC 1 (July 15, 2009) ("[T]here are perceptions that certain jobs should be held by workers of certain ages, and that age stereotypes are more influential when this perception does not match the candidate's (or incumbent's) age.").

72. Adams & Neumark, *supra* note 65, at 190.

73. *Id.*

74. *Id.* at 206.

75. *See* EVE M. BRANK, DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY 99–101 (Richard L. Weiner & Steven L. Willborn eds., 2011) (noting that older workers may feel less deserving than others due to their age and may internalize ageist stereotypes that affect performance); JONATHAN HERRING, OLDER PEOPLE IN LAW AND SOCIETY 14 (2009) ("Fear of meeting ageist attitudes can affect the way older people behave and what they do. It also affects older people's attitudes about themselves.").

76. Nelson, *supra* note 41, at 40–41.

masking physical aging—whether through plastic surgery, Botox treatments, hair dying, or teeth whitening—evidences society's view that aging is a negative phenomenon.[77] These perceptions have real-world implications.

In fact, surveys indicate that age discrimination is perceived as a significant societal problem. In the U.S., for example, a 2007 survey showed that 60% of the workforce ages 45 to 74 believed that workers face age discrimination in the workplace.[78] Of those, 45% rated age discrimination as very common while 49% rated it as somewhat common.[79] Thirteen percent of the older workers surveyed reported that they were discriminated against within the past five years under several types of circumstances, such as failing to be hired, losing out on a promotion, facing layoff or discharge, being denied training, or being denied a pay raise.[80] Variation among those reporting discrimination tracked employment status, income, and education level. Respondents who were unemployed were three times as likely as those employed to report experiencing discrimination.[81] Those with lower household income were more likely than those with higher household income to report experiences of age bias.[82] Of note, workers with less education were less likely to report experiences of age discrimination than those with a college or post-graduate degree.[83]

In the EU, a 2009 survey of thirty countries (the twenty-seven EU member countries, plus Croatia, Macedonia, and Turkey) found that 58% of respondents believed that age discrimination was widespread, while 37% thought that it was rare.[84] The survey also found that there was a difference in perception according to age, with those ages 40 and over more likely to find age discrimination widespread.[85]

A more recent study in the U.K. concluded that age discrimination

77. *Id.* at 41; BRANK, *supra* note 75, at 98.

78. AARP, STAYING AHEAD OF THE CURVE 2007: THE AARP WORK AND CAREER STUDY 68 (2008). This finding represented a decline from the AARP's 2002 survey results, which reported that over two-thirds of older workers believed age discrimination was operating in the workplace. *Id.* Authors of the 2007 survey posited that "the more robust economy in 2007 might at least partly account for the more favorable shift." *Id.* Given that unemployment for older workers rose to historic highs during the 2008 global economic crisis and its aftermath, one might wonder whether perceptions among older workers have changed for the worse.

79. *Id.* at 69.

80. *Id.* at 73.

81. *Id.* at 78.

82. *Id.*

83. *Id.*

84. EUROPEAN COMM'N, DISCRIMINATION IN THE EU IN 2009, at 10 (2009).

85. *Id.* at 11.

and stereotyping continue to be rooted in British society, representing a problem for both old and young.[86] The 2012 research found that 79% of respondents perceived age discrimination as serious.[87] There were no differences between men and women in their responses, with about 33% reporting that they had experienced some age discrimination in the last year.[88] Interestingly, younger age groups were more likely to report age discrimination as being serious compared to older age groups.[89] Those under the age of 25 years were at least twice as likely to report having experienced age prejudice when compared to any other age group.[90]

Like the U.S. study, the U.K. study found a correlation between the employment status of individuals and those individuals' experience of age prejudice. According to the research, respondents who were employed full time and/or who were self-employed were less likely to have experienced prejudice compared with the non-employed or those employed only part-time. More specifically, "less than one-third (30 per cent) of respondents who were employed full-time said that they had experienced prejudice compared to over half (50 per cent) of respondents who were not employed."[91] This finding is intuitive, especially regarding older workers, since that group is more likely than younger workers to fall victim to long-term unemployment. Although less likely to lose their jobs, older workers have greater difficulty than their younger counterparts in finding replacement employment.

Notably, the 2012 report, which compared perceptions about people in their 20s with those in their 70s, found younger people subject to negative stereotypes.[92] People viewed those over 70 years old as more

86. DANIEL SWEIRY & MAXINE WILLITTS, DEP'T FOR WORK & PENSIONS, ATTITUDES TO AGE IN BRITAIN 2010/11, at 13 (2012), *available at* http://research.dwp.gov.uk/asd/asd5/ih2011-2012/ihr7.pdf.

87. *Id.* at 26.

88. *Id.* at 35–36.

89. *Id.* at 26–27.

90. *Id.* at 38. We express some concern about this survey finding, wondering, without being able to prove so empirically, whether young people's views are colored by the very high level of youth unemployment in the U.K. The disadvantage they suffer may be much more complex than a simple manifestation of age discrimination. Their disadvantage, for example, certainly reflects weak economic growth in the U.K. But perhaps young people read the inability of the economy to generate sufficient jobs for them as discrimination against the young.

91. *Id.*

92. One potential source of stereotypical attitudes stems from a lack of contact with young people. One survey found that when employers were asked about their assessment of the skills of young men living in the district of their company, there was a marked difference between those who employed young people and those that did not. For example, when asked about basic work discipline, 76% of those who employed young people thought the discipline of young men was

friendly, more competent, and having higher moral standards than people in their 20s.[93] These results reflect some hostility towards younger people (based upon age stereotypes).[94] The results are also at odds with a 2009 survey, which found a "clear stereotype that younger people are viewed as more capable" than their older counterparts.[95] The 2009 survey concluded that "people over 70 were stereotyped as warm but incompetent."[96] The 2012 survey, however, found younger people had an advantage over older people in terms of perceived acceptability as a boss.[97] When comparing their reaction to having a 30-year-old boss versus a 70-year-old boss, most respondents found both scenarios acceptable.[98] However, three times as many respondents deemed having a 70-year-old boss "unacceptable" compared with those who deemed having a 30-year-old boss "unacceptable."[99]

In sum, the U.K. and the U.S. share a common problem—the continuing existence of negative, age-based stereotypes. There is evidence that these stereotypes operate in the workplace, to the disadvantage of older workers, and, in the U.K. and perhaps in the U.S., to that of younger workers as well.[100] Additionally, in both countries, law is a chosen tool for combating the problem of age discrimination. In Part II below, this Article compares those tools—doctrinal law in both the U.K. and the U.S.—and reveals that both countries provide inferior protection against age discrimination in comparison to other

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good or reasonable, as compared with some 35% of those who did not employ young people. *See* Angela Canny, *What Employers Want and What Employers Do: Cumbrian Employers' Recruitment, Assessment and Provision of Education/Learning Opportunities for Their Young Workers*, 17 J. EDUC. & WORK 495, 508 (2004).

93. SWEIRY & WILLITTS, *supra* note 86, at 46.

94. Research on age bias against the young is sparse in the U.S. Adams & Neumark, *supra* note 65, at 200. This may be because at the federal level, the law only protects those aged 40 and older. Moreover, even within the protected age category, favorable treatment of older workers vis-à-vis their younger counterparts is not actionable. *Id.* One U.S. study found, however, that perceived age bias does not harm the psychological well-being of young adults, in part due to a perception that they will eventually experience upward social mobility as their chronological age increases. This finding contrasted with the perceptions of older adults, for whom age discrimination affected psychological well-being and group identification. Teri A. Garstka et al., *How Young and Older Adults Differ in Their Responses to Perceived Age Discrimination*, 19 PSYCHOL. & AGING 326, 331 (2004).

95. DOMINIC ABRAMS, TIINA EILOLA & HANNAH SWIFT, DEP'T FOR WORK & PENSIONS, ATTITUDES TO AGE IN BRITAIN 2004–08, at 71 (2009).

96. *Id.* at 72.

97. SWEIRY & WILLETTS, *supra* note 86, at 70.

98. *Id.*

99. *Id.* at 72.

100. There is some indication that negative age-based stereotypes disadvantage younger U.S. employees, though empirical research and surveys on the subject are sparse. *See supra* note 90 and accompanying text.

forms of prohibited workplace bias. While inferior legal protection is conceptualized somewhat differently in each country, it is the incursion of an economic imperative that weakens age discrimination law in both cases.

II. DIVERGING LEGAL DOCTRINE: COMPARING AGE DISCRIMINATION LAW IN THE U.K. AND U.S.

A. Age Discrimination Law in the U.K.

The "problem" of the ageing population in the U.K. is hardly new. The birth rate actually started to decline in the late nineteenth century.[101] This decline was accompanied by an increase in the life span of older adults. The proportion of men over age 65 and women over age 60 to the general population, for example, was 6.2% in 1901, 9.6% in 1931, 12% in 1941, and 13.5% in 1951.[102] Policy debate initially focused on the declining birth rate rather than the increasing numbers of older people. The latter slowly became an issue prior to and after World War II—as evidenced in 1942, for example, with the publication of a report by the Inter-Departmental Committee on Social Insurance and Allied Services, chaired by Sir William Beveridge ("Beveridge Report").[103]

The Beveridge Report surveyed the state of pensions and insurance provisions at the time, and made detailed recommendations for the future. In its analysis of the "problem of age," the Report stated that there were two particular issues.[104] The first issue, as reflected in the debate leading up to the adoption of the Employment Equality Age Regulations in 2006,[105] was the increasing number of pensioners in relation to the numbers of young people and those working. The second issue was that the consequences of retirement and old age were not uniform in all cases—for example, poverty affected some but not others.

Today, the proportion of older people in the population continues to increase. By 1990, those over the age of 65 years in the U.K.

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101. Michael Anderson, *The Social Implications of Demographic Change*, *in* 2 THE CAMBRIDGE SOCIAL HISTORY OF BRITAIN 1750–1950, at 1, 1 (Francis Michael Longstreth Thompson ed., 1993); SIMON SZRETER, FERTILITY, CLASS AND GENDER IN BRITAIN 1860–1940, at 1 (1996).

102. PAT THANE, OLD AGE IN ENGLISH HISTORY 333 (2000).

103. *See* SIR WILLIAM BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES 5–20 (1942) (introducing and summarizing the Beveridge Report).

104. *Id.* at 90–101 (discussing the "problem of age").

105. Employment Equality (Age) Regulations 2006, SI 2006/1031.

constituted 15.7% of the population. In 2010, this figure had reached 16.5%.[106] This is a problem throughout the EU, where the number and proportion of older people is expected to increase for the foreseeable future.[107]

Despite recognizing the issue of an ageing population, successive U.K. governments declined to take any regulatory action with respect to age discrimination. On numerous occasions prior to 2006, members of Parliament attempted to introduce modest measures against age discrimination in recruitment advertising. All of these measures were opposed by the government of the day, and all were, therefore, unsuccessful.[108] Eventually, in November 1998, the government introduced a voluntary *Code of Practice on Age Diversity in Employment*, which subsequent evaluations recognized as being unsuccessful.[109] Only one in three companies, for example, was aware of the *Code of Practice*, but, of these, only 23% had actually seen a copy.[110] More alarmingly, only 8% of companies expected to make changes as a result of the *Code of Practice*.[111] The surveys accompanying the evaluation revealed the stereotypical views held by many employers.[112] Employers were asked whether "specified

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106. *Population Age Structure by Major Age Groups, 1990 and 2010*, EUROSTAT, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Population_age_structure_by_major_age_groups,_1990_and_2010_(%25_of_the_total_population).png&filetimestamp=20111130143501 (last visited Oct. 17, 2012). Interestingly, the figures for the EU27 are even more dramatic, with the proportion of those over 65 years increasing from 13.7% in 1990 to 17.4% in 2010. *Id.*

107. *See Commission Green Paper, Confronting Demographic Change: A New Solidarity between the Generations*, COM (2005) 94 final (not published in the Official Journal) (predicting that there will be a 37.4% increase in the proportion of old people between 2010 and 2030).

108. These measures included proposed bills by Ms. Linda Perham MP in 1998, David Winnick MP in 1990 and 1996, Gwynneth Dunwoody MP in 1992, Baroness Phillips in 1989 (in the House of Lords), Barry Field MP in 1989, and Ann Clwyd MP in 1985. *See generally* JULIA LOURIE, EMPLOYMENT (UPPER AGE LIMITS IN ADVERTISEMENTS) BILL, HOUSE OF COMMONS RESEARCH PAPER 96/19, at 10 (Jan. 31, 1996), *available at* http://www.parliament.uk/briefing-papers/RP96-19 (listing the most recent bills banning discrimination on age grounds, none of which have made much progress).

109. *See* DEBORAH JONES, DEP'T FOR EDUC. & EMP., EVALUATION OF THE CODE OF PRACTICE ON AGE DIVERSITY IN EMPLOYMENT: INTERIM SUMMARY OF RESULTS (June 2000) [hereinafter INTERIM SUMMARY], *available at* https://www.education.gov.uk/publications/RSG/publicationDetail/Page1/RBX6/00. *See also* DEP'T FOR WORK AND PENSIONS, EVALUATION OF THE CODE OF PRACTICE ON AGE DIVERSITY IN EMPLOYMENT: FINAL REPORT 24–25 (Oct. 2001) [hereinafter FINAL REPORT], *available at* https://www.education.gov.uk/publications/RSG/publicationDetail/Page1/RBX21-01 (concluding that The Code is not likely to be successful on its own).

110. FINAL REPORT, *supra* note 109, at 22. Not surprisingly, awareness was much higher in large companies, where almost two-thirds knew about the Code of Practice. *Id.*

111. *Id.* at 23.

112. INTERIM SUMMARY, *supra* note 109, at 5 ("[S]tereotypical images of older and younger

attributes applied to older or younger workers, to both, or to neither. Stability, maturity, reliability, work commitment, and good managerial skills were the most frequently stated attributes of older workers, while ambition, IT skills, creativity, and a willingness to relocate were the most frequent attributes of younger workers."[113]

Regulation of age discrimination in employment finally came to the U.K. as a result of the EU's Equal Treatment Directive adopted in 2000.[114] It is doubtful that laws prohibiting age discrimination would have been enacted in the U.K. without this Directive. Indeed, the previous record of governments of both of the major political parties suggests that legislation would have been unlikely. The Directive was finally transposed into British law in October 2006 in the Employment Equality (Age) Regulations 2006.[115] As noted below, the weakness of the legislation in the U.K., and indeed of the Directive itself, is the wide latitude given for justifying exceptions. This breadth has the effect of making it more possible to objectively justify discrimination than measures tackling discrimination on different grounds.[116] Hence, one may view the U.K.'s embrace of age discrimination law as not only recent, but also somewhat reluctant.

B. Age Discrimination Law in the U.S.

In contrast, U.S. regulation against age discrimination has been on the books for over forty years. The possible prohibition of age discrimination was first raised during the debates over Title VII of the Civil Rights Act of 1964 (Title VII), the landmark American civil rights statute that bans employment discrimination based on race, color, religion, national origin, and sex.[117] Although age was not included as a protected characteristic under Title VII, Congress did ask the Secretary of Labor to study the issue, ascertain its nature and extent, and recommend possible solutions.[118] The Secretary's subsequent report,

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workers were reinforced by the responses to a pre-coded list of specified attributes.").

113. *Id.*

114. Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 (EC).

115. Employment Equality (Age) Regulations, *supra* note 105. These regulations, with the exception of Schedule 6, were incorporated into the Equality Act 2010, c.15, effective October 2010. The provisions of Schedule 6 concerning the procedures for enforcing the default retirement age of 65 years of age were abolished in 2011.

116. The Equality Act of 2010 referred to grounds of protection as "protected characteristics." The Act contains nine of these, but age, for example, is the only protected characteristic which allows justification for direct discrimination. *See* Equality Act, 2010, ch. 15, § 13(2) (U.K.).

117. 42 U.S.C. § 2000e–2000e17 (2006).

118. Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been,*

the Wirtz Report,[119] found that age bias in the workplace was a significant phenomenon meriting legal prohibition. The Report, however, found that this form of discrimination was less malicious and destructive than, for example, bias based on other Title VII-protected characteristics like race and religion.[120] For aging workers, the problem was not hostility but unsupported assumptions about aging and ability.[121]

In 1967, Congress enacted the ADEA, which bans employers from discriminating against employees "because of such individual's age."[122] Little debate preceded the enactment of the statute; legislative action to prohibit age discrimination garnered broad political support.[123] Thus, original Congressional support for age discrimination legislation was well-established and fairly wholehearted.[124]

Notwithstanding this broad-based support, the ADEA is often characterized as combating a lesser or different evil than those set forth in other employment discrimination laws. Commentators have noted that those people protected by the ADEA do not comprise a discrete and insular minority with immutable characteristics.[125] Rather, the group protected by age discrimination legislation is "an ever changing cohort

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Where It is Today, Where It's Going, 31 U. RICH. L. REV. 579, 581 (1997).

119. *See supra* Part I.A.

120. *See* WIRTZ REPORT, *supra* note 42, at 5–7.

121. *See id.* at 7 (noting that employers often set upper age limits based on preconceptions rather than relevant experience).

122. 29 U.S.C. § 623(a)(1) (2006).

123. Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 785 (1997).

124. Support for the Older Worker Benefit Protection Act in 1990 was similarly bipartisan and broad. Indeed, Congress passed the Act close to unanimously. Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Worker Benefits Protection Act*, 79 VA. L. REV. 1271, 1272 (1993) [hereinafter Harper, *Age-Based Exit Incentives*].

125. Issacharoff & Harris, *supra* note 123, at 781 ("Far from being discrete and insular, the elderly represent the normal unfolding of life's processes for all persons."). Age is an extremely complicated category and one of the most complicating factors is intersectionality. Aging produces different effects for different discrete and insular subgroups, as is undeniably evident in the U.S. (for example, during the global economic crisis and its aftermath). The recession produced greater unemployment for racial and ethnic minority older workers, those with limited education, and men. Bisom-Rapp, Frazer & Sargeant, *Decent Work, Older Workers*, *supra* note 4, at 98–99. *See generally* Lynn Roseberry, *Multiple Discrimination*, *in* AGE DISCRIMINATION AND DIVERSITY 16 (Malcolm Sargeant ed., 2011) (discussing the concept of multiple discrimination based on age and other protected characteristics). We do not assert that age is fully comparable with immutable characteristics such as race. But we argue that it should not be a second-class protected category—a type of bias prohibited by law on paper and yet a protection exceedingly difficult to invoke in practice.

of older workers."[126] Additionally, as in the U.K., in comparison with legal prohibition on other grounds, the ADEA is subject to "an unprecedented number of exceptions."[127]

The rationale for protecting older workers is frequently made by U.S. legal academics in economic terms—specifically, in terms of the life-cycle model of career employment.[128] Under the life-cycle theory, Professor George Rutherglen notes,

> [A]n employee's compensation at first exceeds his productivity because the employee receives on-the-job training from the employer. Although an employee's compensation gradually increases with seniority and with promotions, productivity increases even faster. At some point, the employee's productivity exceeds his compensation, so that the employer profits from the training that it has given to the employee. As the employee grows old, however, his productivity again sinks below his compensation. According to the life cycle theory of earnings, the employer's profits during the middle period should compensate it for its losses in the earlier and later periods.[129]

The ADEA aims to protect against opportunistic employer conduct that deprives older workers of deferred compensation at the end of their careers, when their productivity is supposedly below their compensation.[130] Taking this phenomenon at face value, American scholars have trained their sights on ways in which, in economic terms, the law falls short of that goal.[131]

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126. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 205 (2007) [hereinafter RUTHERGLEN, VISIONS OF EQUALITY].

127. George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 495 (1995) [hereinafter Rutherglen, *From Race to Age*] ("[The ADEA] established the first federal prohibition against discrimination based on age but also subjected this prohibition to an unprecedented number of exceptions.").

128. *See generally* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 11 (1993) (analyzing whether courts should find an employee is at will or protected by just cause).

129. Rutherglen, *From Race to Age*, *supra* note 127, at 500. The ADEA's enforcement procedures are modeled on the Fair Labor Standards Act. *Id.* at 496. *See also* Fair Labor Standards Act, 29 U.S.C. §§ 215–18, 251–61 (2006).

130. RUTHERGLEN, VISIONS OF EQUALITY, *supra* note 126, at 206 ("On the life-cycle theory of earnings, if an employer opportunistically discharges an employee late in his career, the discharge effectively deprives the employee of the postponed compensation for the middle period of his career when his productivity exceeded his pay. Laws against age discrimination are one means of preventing employers from taking advantage of their employees in this way.")

131. *See, e.g.*, Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*, 48 HASTINGS L.J. 511, 540–47 (1997) (explaining why the ADEA is ill-suited to prevent opportunistic downsizing of aging workers). *But see* Issacharoff & Harris, *supra* note 123, at 787–92 (arguing that in drafting the ADEA and its amendments, Congress insufficiently understood the life-cycle model and the vulnerability of late career employees).

Although modeled after Title VII,[132] over time, and due in part to an incomplete reform of Title VII by Congress in 1991,[133] the U.S. Supreme Court has dismantled a unified approach to employment discrimination law doctrine in favor of an approach that considers legal rules applying to age discrimination as less prominent and less important than rules covering other forms of discrimination.[134] In the U.S., age discrimination law rules are harder for plaintiffs to operationalize than is the legal doctrine applicable to race, color, religion, national origin, and sex.[135]

The discussion below evaluates divergent legal doctrine in the U.K. and the U.S. More specifically, these Subsections discern how the law in each country falls short of achieving a central goal of age discrimination legislation—the elimination of negative, age-based stereotypes in the workplace—while privileging employers' economic incentives to displace more highly compensated older workers. In the U.K., the law's weakness turns on the number of potential grounds for justification. That is, given the law's very generally stated definition of justification, there are many possible exceptions to the principle of equal treatment on the basis of age—one of the most notable being the possibility of employer-justified compulsory retirement. In the U.S., the shortfall is more complicated, and turns on several factors: (1) an under-inclusive protected class; (2) a narrow, cramped interpretation of the principal evil the ADEA is designed to address; and (3) doctrinal requirements that weaken the ability of plaintiffs to make out a prima facie case of age discrimination and strengthen the ability of defendant employers to defend against suit.

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132. Issacharoff & Harris, *supra* note 123, at 785. The ADEA's remedies are modeled on the Fair Labor Standards Act. *See* RUTHERGLEN, VISIONS OF EQUALITY, *supra* note 126, at 215 ("[T]he ADEA borrows most of the remedial provisions of the FLSA.").

133. More specifically, Congress addressed mixed motive claims in Title VII cases when it amended that statute in 1991. Congress did not, however, simultaneously amend the ADEA. This has led the Supreme Court to construe Congress's inaction as disapproval of mixed motive claims in age discrimination cases. Michael Foreman, Gross v. FBL Financial Services—*Oh So Gross!*, 40 U. MEM. L. REV. 681, 687 (2010).

134. William R. Corbett, *Babbling about Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 688 (2010) ("[N]ot only is the Court requiring different structures for the ADEA and Title VII, but *Gross* is also the latest in a series of cases instructing that the ADEA portion of the tower is to be far less prominent than its Title VII counterpart.").

135. *See id.* at 708–19 (describing the Court's asymmetrical application of disparate treatment, disparate impact, and reverse discrimination theories in ADEA litigation, as compared with Title VII litigation). *See also* Carla J. Rozycki & Emma J. Sullivan, *Employees Bringing Disparate-Impact Claims under the ADEA Continue to Face an Uphill Battle despite the Supreme Court's Decisions in* Smith v. City of Jackson *and* Meacham v. Knolls Atomic Power Laboratory, 26 A.B.A. J. LAB. & EMP. L. 1, 8–9 (2010).

Section C examines the class protected by age discrimination in each country, while Section D evaluates a central weakness of the U.K.'s age discrimination law—the provision for objective justification—which is derived from the EU's Equal Treatment Directive. Subsection E then covers two key shortfalls of the U.S. system: the stingy interpretation of the ADEA's purpose and the doctrinal changes antithetical to plaintiffs' interests and beneficial to defendants.

C. A Case of Divergence: The Protected Class

1. The Protected Class in the U.K.

A significant difference between the U.K. and the U.S. is the size of the protected class. In the U.K., age discrimination legislation applies to all persons in the labor market (i.e., persons, normally 16 years and above, who are working or seeking work). Prior to 2006, workers who had reached the normal retirement age were deprived of some employment protections, such as the right to claim unfair dismissal and the right to redundancy (severance) payments.[136] The 2006 regulations introduced a default retirement age of 65, but this benchmark was subsequently abolished in 2011.[137]

Since the adoption of age regulations in 2006, the U.K. has not had a lower age limit for employment protection (as there is in the U.S.). This is important because ample evidence suggests that young people suffer from age discrimination, albeit with perhaps less severe consequences than with older people.[138] One analysis, for example, looked at the 16- to 19-year-old age group and those individuals' reasons for leaving their

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136. *See* Employment Rights Act 1996, ch. 18, §(§) 109, 156 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1996/18/enacted (establishing a right to claim unfair dismissal and right to severance payments).

137. *See infra* note 204 and accompanying text.

138. AGE POSITIVE, DEP'T. FOR WORK & PENSIONS, AGEISM: ATTITUDES AND EXPERIENCES OF YOUNG PEOPLE (2001), *available at* http://research.dwp.gov.uk/asd/asd5/rports2005-2006/agepos13.pdf. This survey found that the main types of age-related behavior that younger people experience were: age limits on job applications; younger people being treated differently from other (older) staff; talking (down) to younger people in a patronizing fashion and tone of voice; not appointing younger people because they are too young; not appointing younger people because they are too old; refusing access to training on grounds of age; making junior staff do all the menial tasks; "rites of passage" involving teasing and bullying; paying younger staff less than others who are doing equivalent work; excluding young people from pension arrangements; and restricting redundancy payments to years of employment after the age of 18. We distinguish many of the listed types of conduct from forms of age discrimination against younger people that are not controversial even if young people view the rules as unfair. For example, most states in the U.S. bar young people from obtaining a driver's license, typically until they are at least 16. Eglit, *Age Bias*, *supra* note 45, at 100. Yet such limitations are beneficial safety restrictions and thus, we believe, fully justifiable. *Id.*

last job.[139] Thirty-six percent of the group surveyed stated that they had voluntarily resigned. In contrast, the same analysis, when looking at why people in their 50s left their last job, found that only 8% had resigned voluntarily.[140] Whatever the actual reason for these resignations, the difference is perhaps explained by the confidence that young people have in finding alternative work, whereas for people in their 50s, leaving a job can often mean leaving the workforce altogether.

The consequences of protecting the U.K.'s younger population from age discrimination is exemplified in *Wilkinson v. Springwell Engineering*, where an 18-year-old claimant was awarded £16,000 compensation for being subject to age discrimination.[141] The claimant, who was hired by a small engineering company in January 2007 to replace her aunt (who was a much older worker), was terminated in March of the same year. The Tribunal found that the employer adopted stereotypical assumptions regarding the relationship between experience, capability, and age on the one hand, and lack of experience, incapability, and youth on the other.[142] The claimant stated that she had been told that her employment was being terminated on the grounds that she was too young for the job. The Tribunal accepted her version of the events and awarded compensation, which included a sum of £5000 for injury to feelings.

There have also been other cases at the European Court of Justice ("CJEU") regarding employment policies that weakened the employment rights of young people in order to improve their employability (i.e., in the hopes of making them more attractive to employers). In *Kücükdeveci v. Swedex*, a reference from the German court, Swedex dismissed a 28-year-old employee after ten years of service. However, a rule had existed that—for the purposes of calculating the notice period—allowed the employer to ignore all service before the age of 25 years.[143] Similarly, in *Hütter v. Technische Universität Graz*, a reference from the Austrian court, there had existed a rule concerning an incremental scale of pay for civil servants based on

139. EMPLOYERS FORUM ON AGE, AGE AT WORK (2005), *available at* http://www.efa.org.uk/publications.php?action=search&category=19.

140. *Id.* at 45.

141. L. Wilkinson v Springwell Eng'g Ltd., Case Number 2570420/07, Newcastle Employment Tribunal (Oct. 11, 2007), 3, *available at* http://employment.practicallaw.com/0-380-9782 (last visited Dec. 2, 2012).

142. *Id.* at 10.

143. Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG, 2 C.M.L.R. 33, ¶¶ 13–15 (2010).

their length of employment.[144] Employment before the age of 18 years, however, did not count towards this pay scheme. In both cases, the claimants alleged that they were subjected to age discrimination. The CJEU upheld their complaints despite the good intentions of those who adopted the rules in order to help young people into employment. Thus, the European approach to age discrimination is broad and recognizes that assumptions about age not only adversely affect middle-aged and older workers, but also employees near the beginning of their working lives.

2. The Protected Class in the U.S.

In the U.S., the protected class is narrowly defined, and the type of age bias prohibited is more unitary. As originally enacted, the ADEA protected only those between the ages of 40 and 65—employees deemed middle-aged through what was then seen as retirement age.[145] In 1978, Congress increased the ceiling to age 70, but in 1986 removed the ceiling for most workers.[146] At present, the protected class under the ADEA is comprised of individuals aged 40 and above. Narrowly defining the protected class—those 40 years of age and over—is in accord with one of the main purposes of the Act: "to promote employment of older persons based on their ability rather than age."[147]

Yet, even within the defined class, protection runs in one direction: towards older employees. In *General Dynamics Land Systems, Inc. v. Cline*,[148] the employer and union agreed to eliminate retiree health benefits for those presently employed but subsequently retired, except for "then current workers at least 50 years old."[149] Current employees ages 40 to 49 sued, claiming that the provision of the collective bargaining agreement discriminated against them on the basis of age.[150] Referencing the Senate and House hearings that preceded the votes on the ADEA, and interpreting the ADEA's preamble, the Supreme Court held that Congress, when enacting the statute, was moved by the plight of older workers vis-à-vis their younger counterparts, but not vice

144. Case C-88/08, David Hütter v. Technische Universität Graz, 2009 E.C.R. I-05325, ¶¶ 7, 14.

145. *See generally* D. Aaron Lacy, *You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination under the ADEA*, 26 BERKELEY J. EMP. & LAB. L. 363, 368 (2005).

146. *Id.* at 368–69.

147. 29 U.S.C. § 621(b) (2006).

148. 540 U.S. 581 (2004).

149. *Id.* at 584.

150. *Id.* at 585.

versa.[151] Writing for the Court's majority, Justice Souter noted that Congress's findings and statements of purpose reveal that the adverse effects of aging increase over time and that the legislators' concern was for the disadvantaged condition of older workers relative to their younger counterparts.[152] Moreover, on the basis of "common sense," the Court categorically rejected the possibility that younger workers suffer at the their elders' expense.[153] Reference to "age discrimination," claimed Justice Souter, is "naturally understood to refer to discrimination against the older."[154] Thus, reverse discrimination suits by younger workers within the protected class are not cognizable.

Judicial "common sense" notwithstanding, discrimination against the young does occur in the U.S., although the frequency of the phenomenon is unclear. For example, a study published in 2011 by the Business and Professional Women's Foundation surveyed 662 women born between the years 1978 and 1994.[155] Almost 50% of those surveyed had observed or experienced gender bias; of these women, 51% reported generational discrimination based on youth.[156] This result corroborated prior findings that young women, in particular, suffer from age discrimination.[157] Anecdotal accounts also indicate that, in tough economic times, workers in their 20s and 30s, who may *lawfully* be singled out based on age, are at greater risk of layoff.[158] Such accounts are buttressed by the higher unemployment rate of younger workers.[159] Additionally, there is some job competition between workers ages 65 years old or over and 16- to 19-year-old workers in industries such as food preparation and serving.[160] One

151. *Id.* at 588–90.

152. *Id.* at 590.

153. *Id.* at 591.

154. *Id.*

155. *See* BUS. & PROF'L WOMEN'S FOUND., FROM GEN Y WOMEN TO EMPLOYERS: WHAT THEY WANT IN THE WORKPLACE AND WHY IT MATTERS FOR BUSINESS 5 (2011) (stating that the purpose of the survey was to understand what women needed to be successful in the workplace).

156. *Id.* at 7.

157. *See generally id.* (noting that younger women are more likely than older women to be subjected to age discrimination). One wonders whether some of the bias experienced by young women is based on potential or actual pregnancy or caregiving responsibilities of younger women. The study did not address this question.

158. *See* Dana Mattioli, *With Jobs Scarce, Age Becomes an Issue: More Young Workers are at Risk of Layoffs as Employers Grow Wary of Letting Older Employees Go*, WALL ST. J., May 19, 2009, http://online.wsj.com/article/SB124270050325833327.html (stating that employers are attempting to circumvent age-discrimination lawsuits by adopting a "last one in, first one out" policy as a means of conducting layoffs).

159. *Id.*

160. Michael McDonough & Andy Cinko, *Elderly Workers Overtake Teens in Job Search: Chart of the Day*, BLOOMBERG (July 12, 2010), http://mobile.bloomberg.com/news/2010-07-

might assume that these are jobs where stereotypes that disfavor the young come into play.

What explains the divergence between the European and American approaches to the class protection under age discrimination legislation? One possible reason is the existence of a viable political movement on one side of the Atlantic and the relative absence of such agitation on the other. Young people in the EU—although perhaps not so much in the U.K.—are willing to take to the streets to protest actions they perceive as inimical to their interests in the labor market.[161] While the Occupy Wall Street movement recently captured the imagination of many youths in the U.S.,[162] agitation by the young over age discrimination simply has not existed.[163] Another possible reason is that, in the EU, age was introduced as one of a number of protected characteristics in the same piece of legislation. Hence, there is largely a uniform approach to protection against discrimination (except for Article 6 of the Equal Treatment Directive,[164] which will be explored below). Regardless of the cause, failing to protect workers under 40 from age discrimination, and restricting the protections available to those 40 and up by prohibiting reverse discrimination suits, are deficiencies in U.S. age discrimination law. These aspects of U.S. legislation limit the efficacy of law as a tool to eradicate age stereotyping.

D. The U.K.'s Exceptions to the Rule: Objective Justification for Differential Treatment Based on Age

As noted above, the EU's Equal Treatment Directive was the impetus for passing age discrimination regulations in the U.K. in 2006.[165] U.K.

12/u-s-workers-over-65-overtake-teens-for-first-time-since-48-chart-of-day.

161. *See* Joseph A. Seiner, *Understanding the Unrest of France's Younger Workers: The Price of American Ambivalence*, 38 ARIZ. ST. L.J. 1053, 1055 (2006) (stating that French youth staged a series of violent protests based on the belief that they were being "used and tossed aside").

162. The Occupy Wall Street movement began in September 2011 in New York City's Zuccotti Park. Initially, about 1000 demonstrators occupied the park on a twenty-four-hour basis, in order to demonstrate their outrage over the global economic crisis, "bank bailouts, high unemployment, and the increasing income disparity between the highest earners and everyone else." Sarah Kunstler, *The Right to Occupy—Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989, 990 (2012). The movement quickly spread to many other cities and towns, with occupations in parks lasting days and weeks. *Id.* at 991–92. The protests inspired a national conversation about the proper role of the government and rising income inequality. *Id.* at 990–92.

163. Seiner, *supra* note 161, at 1084, 1093–94.

164. Council Directive 2000/78, *supra* note 114, at art. 6.

165. *See supra* notes 103–07 and accompanying text (describing the events leading up to the adoption of the Framework Directive on Equal Treatment in Employment and Occupation in the EU).

age discrimination law is influenced both by the Directive and by the CJEU's rulings on the age aspects of the Directive in regard to national law.[166] The CJEU cases not only involve U.K. law, but also, potentially, law in other EU member states. Accordingly, this Article discusses cases that arose in countries other than the U.K. More specifically, the Subsection below examines the Directive and the CJEU's seminal age discrimination case from Germany, *Mangold v. Helm*.[167] The Subsection then turns to CJEU and U.K. case law regarding compulsory retirement—the most significant, and to older workers the most threatening, exception to the prohibition on age discrimination.

1. The Equal Treatment Directive and *Mangold*

Colm O'Cinneide notes that the prohibition of age discrimination in the Equal Treatment Directive was greeted with "a general (if vague) welcome across the EU."[168] Many assumed that the EU would embrace a prohibition on age discrimination akin to that adopted in jurisdictions such as the U.S. Moreover, age discrimination legislation was seen as a way to both advance equality and human rights and promote the EU's Employment Strategy, especially the goal of increasing the labor market participation of older people.[169] The Directive, however, prompted many questions that have required judicial consideration to answer.

Article 1 of the Directive articulates the principle of equal treatment on a number of grounds, including age. Equal treatment prohibits both direct discrimination and indirect discrimination[170] on those grounds.[171] The Directive, however, provides EU member countries with a number of broad exceptions to the equal treatment principle regarding age, including the opportunity to justify direct and indirect discrimination in certain cases.[172] Article 6 of the Directive, titled "justification of differences of treatment on grounds of age," provides that "differences of treatment because of age will not constitute age discrimination if . . .

166. The CJEU has jurisdiction to issue preliminary rulings on the interpretation of EU law when asked to do so by courts or judges of the Member States' national courts. THE GLOBAL WORKPLACE, *supra* note 7, at 395.

167. Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981.

168. Colm O'Cinneide, *Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age*, 2 REVUE DES AFFAIRES EUROPÉENNES 253 (2009–2010).

169. *Id.*

170. These types of discrimination are known as disparate treatment and disparate impact in the U.S. *See infra* notes 196–97.

171. Malcolm Sargeant, *The Default Retirement Age: Legitimate Aims and Disproportionate Means*, 39 INDUS. L.J. 244, 246 (2010) [hereinafter Sargeant, *Disproportionate Means*].

172. *Id.*

they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."[173] Thus, justifying differential treatment requires, first, identifying a legitimate aim or goal, and second, demonstrating that the means by which the aim is pursued are appropriate and necessary.

Article 6(1) then provides examples of justifiable differences in treatment:

> (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
>
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
>
> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.[174]

Despite these examples, the meaning of the term "legitimate aim" remains unclear. While the aim must relate to legitimate employment policy, the labor market, and vocational training objectives, this general terminology leaves the ultimate boundaries of age discrimination legislation to be determined by the courts.

Age discrimination is the only ground of discrimination in the Directive that has a specified list of areas where discrimination may be justified. Moreover, these broad exceptions potentially allow the concerns of the labor market—an economic imperative—to trump the right of workers to be free from age discrimination.[175] To the extent such actions are justifiable, the civil or human rights of older workers are deemed less significant than the supposed economic needs of greater society.

Indeed, the CJEU has shown an alarming readiness to accept the elimination of the rights of older workers as potentially justifiable, even in cases representing advances in European age discrimination jurisprudence. For example, the CJEU's formative age discrimination case, *Mangold v. Helm*, concerned an individual aged 56 years and

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173. Council Directive 2000/78, *supra* note 114, at art. 6(1).

174. *Id.*

175. Sargeant, *Disproportionate Means*, *supra* note 171, at 247.

employed on a fixed-term contract.[176] Under German law, indefinite term contracts with good cause protection are ideal. Consequently, and also due to an EU directive on fixed-term work,[177] German law places two limitations on fixed-term employment contracts: (1) a requirement that employers provide an objective reason justifying the term; or, alternatively, (2) the imposition of limits on the number of contract renewals (a maximum of three) and on total duration (a maximum of two years).[178] In what might appear as a surprise to an American reader, these restrictions, which were considered significant worker protections, did not apply to contracts with older people. German law permitted fixed-term contracts, even without the above restrictions, if the employee was aged 60 or over.[179] Thus, older workers could be kept in a perpetual state of limbo—living from contract to contract with no hope of ever being given an indefinite term.

For middle-aged workers, that situation changed for the worse in December 2000, when the Law on Part-Time Working and Fixed-Term Contracts ("TzBfG") was enacted. Paragraph 14(1) of the TzBfG reenacted a general rule whereby a fixed-term contract must be based on objective criteria.[180] Under paragraph 14(2), in the absence of an objective reason, the maximum total duration of the contract is again limited to two years, and, subject to that limit, up to three renewals.[181] However, according to paragraph 14(3) of the TzBfG, the "conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship begins."[182]

Mr. Mangold later claimed injury when the minimum age for the removal of protection was lowered to 52 years.[183] In 2003, Mangold entered into a fixed-term employment contract with Helm, a lawyer. This contract expressly noted that the contract duration was based on the statutory provision removing protection for older workers. The litigants agreed "that there was no reason for the fixed term of this contract" other than the fact that Mangold was more than 52 years old and the statutory provision "ma[d]e it easier to conclude fixed-term

176. Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981, ¶ 20.

177. *Id.* ¶¶ 3–5.

178. *Id.* ¶ 18.

179. *See* Beschäftigungsförderungsgesetz [Law to Promote Employment], Apr. 26, 1985, BGBL. I, ¶ 1, amended Sept. 25, 1996.

180. *Mangold*, 2005 E.C.R. I-9981, ¶ 18.

181. *Id.*

182. *Id.* (internal quotation marks and citation omitted).

183. *Id.* ¶ 19.

contracts . . . with older workers."[184] Mangold challenged the German statutory law as unjustified age discrimination.[185]

According to the German government, the purpose of the legislation was to help unemployed older workers find work, in light of the difficulties this group typically encounters when seeking employment.[186] The CJEU viewed the legitimacy of this economically driven aim as unassailable.[187] As the Court noted, "An objective of that kind must as a rule . . . be regarded as justifying, 'objectively and reasonably' . . . a difference of treatment on grounds of age . . . ."[188]

But the legislation ran afoul of the Equal Treatment Directive for a different reason. The court held that the means of accomplishing the aim were not appropriate and necessary because, inter alia, the result of the measure was to effectively remove protection, with regard to fixed-term contracts, from all workers who reach age 52 and *not just those* who were searching for work.[189] Thus, the court concluded on grounds of proportionality that the measure conflicted with European Community law. Yet the court's acceptance of the economically based argument—that in order to help unemployed older workers it is permissible to provide them with lesser employment protections than their younger counterparts—remains. The willingness to allow this economic imperative to interfere with the principle of equal treatment is clear, even in a case lauded by some and criticized by others for its description of the age discrimination prohibition as a fundamental norm of European law.[190]

2. U.K. Age Discrimination Legislation, Justification, and Compulsory Retirement

The U.K.'s Equality Act 2010 (the age provisions of which were originally adopted in 2006) now contains the provisions necessary to tackle age discrimination in employment.[191] Since then, there has been a steady increase in complaints of age discrimination at employment tribunals. For example, between 2010 and 2011, litigants filed 6800 complaints with employment tribunals on the grounds of age, an increase of 5200 from the previous year and 3800 from the year before

184. *Id.* ¶ 21.
185. O'Cinneide, *supra* note 168, at 261.
186. *Mangold*, 2005 E.C.R. I-9981, ¶ 59.
187. *Id.* at [60]–[61].
188. *Id.* at [61].
189. *Id.* at [64].
190. *See* O'Cinneide, *supra* note 168, at 261–62.
191. *See supra* note 115 and accompanying text.

that.[192]

The legislation, however, allows for some exceptions to the principle of non-discrimination, including the possibility of objectively justifying direct discrimination.[193] Schedule 9 of the Act is also devoted to exceptions relating to age, such as benefits based on length of service, the national minimum wage, and redundancy (severance) payments, which are also linked to length of service.[194]

Age is the only protected characteristic in British equality law where it is possible to justify direct discrimination[195]—a type of discrimination analogous to "disparate treatment" in the U.S.[196] Regarding all the other unlawful grounds of discrimination, it is only possible to justify indirect discrimination, which is akin to the theory of "disparate impact" discrimination in the U.S.[197] The reason for this disparity may be because of the potential number of specific exceptions required if there were not a permissible general exception. Of course, having a general exception may lead to unforeseen consequences. The Code of Practice issued by the U.K.'s Equality and Human Rights Commission merely states that: "A different approach applies to the protected characteristic of age, because some age-based rules and practices are seen as justifiable."[198]

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192. MINISTRY OF JUSTICE, EMPLOYMENT TRIBUNALS AND EAT STATISTICS, 2010–11, at 7 tbl.1 (2011), *available at* http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/employment-trib-stats-april-march-2010-11.pdf. Interestingly, the number of age discrimination complaints dropped in the year 2011–12 to 3700 after the abolition of the mandatory default retirement age. MINISTRY OF JUSTICE, EMPLOYMENT TRIBUNALS AND EAT STATISTICS, 2011–12, at 8 tbl.1 (2012), *available at* http://www.justice.gov.uk/downloads/statistics/tribs-stats/employment-trib-stats-april-march-2011-12.pdf.

193. Equality Act, 2010, ch. 15, pt. 2, ch. 2, § 13(2). This section of the Act requires the exceptional treatment to be a proportionate means of achieving a legitimate aim. This provides a basis for individual employers to justify mandatory retirement in their organizations.

194. Equality Act, 2010, ch. 15, sch. 9, pt. 2 ("Exceptions Relating to Age").

195. Equality Act, 2010, ch. 15, pt. 2, ch. 2, § 13, which defines direct discrimination, also provides, "If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim." *Id.* § 13(2).

196. In U.S. employment discrimination law, "disparate treatment" is a legal theory encompassing acts of intentional discrimination. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (discussing the plaintiff's burden of proving intentional discrimination through "disparate treatment").

197. In U.S. employment discrimination law, "disparate impact" is a legal theory addressing facially neutral employment policies that have an adverse impact on protected groups and cannot be justified on the basis of job relatedness and business necessity. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . . .").

198. EQUAL. & HUMAN RIGHTS COMM'N, EQUALITY ACT 2010 STATUTORY CODE OF PRACTICE: EMPLOYMENT ¶ 3.36 (2011), *available at* http://www.equalityhumanrights.com/

While such exceptions would include the extra protection given to young people, especially in relation to health and safety, no one would quibble with such beneficial protections. Rather, of concern to older workers is that the broadly stated general exception can be used to justify less favorable treatment, such as compulsory retirement.

At the time of transposing the Equal Treatment Directive, the U.K. adopted a default retirement age of 65 years.[199] It is almost inexplicable that a measure permitting mandatory retirement should be introduced at the same time as measures that tackle age discrimination in employment. The likely reason for such action is that the government gave way to employer pressure to pick an age at which workers could be removed without recourse to claims for unfair dismissal or age discrimination.[200] The process was accompanied by a procedure that allowed employees to ask to work beyond the retirement age. The employer was obliged to give each applicant a hearing but was not obliged to give any reasons for acceptance or rejection. In effect, it was a mandatory retirement age imposed at the discretion of the employer.

Age Concern England, a nongovernmental organization,[201] challenged the introduction of the default retirement age in the High Court.[202] Aspects of the case were referred to the CJEU,[203] but the challenge proved unsuccessful. In any event, the U.K. government abolished the default retirement age in 2011.[204] Thus, any compulsory retirement that now takes place must be justified by the employer as having a legitimate aim pursued through means that are appropriate and necessary.

The question of whether and when compulsory retirement may be

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uploaded_files/EqualityAct/employercode.pdf.

199. *See generally* Sargeant, *Disproportionate Means*, *supra* note 171, at 245 (discussing the default retirement age of 65, established by the Employment Equality (Age) Regulations 2006).

200. *See generally* Malcolm Sargeant, *The Employment Equality (Age) Regulations 2006: A Legitimisation of Age Discrimination in Employment*, 35 INDUS. L.J. 209, 209–27 (2006) (arguing that, in adopting the Employment Equality (Age) Regulations, the government mostly adopted the approach suggested by employers).

201. Following a merger with the nongovernmental organization "Help the Aged," Age Concern England is now known as "Age U.K." Details about the merged organization may be found at http://www.ageuk.org.uk/about-us/.

202. R (on the application of Age U.K.) v. Sec'y of State for Bus. Innovation & Skills, [2009] IRLR 1017, [1].

203. Case C-388/07 R (on the application of the Inc. Trs. of the Nat'l Council on Ageing) v. Sec'y of State for Bus., Enter. and Regulatory Reform, [2009] IRLR 373, [1]–[3].

204. The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, S.I. 2011/1069.

justified has been raised in a number of cases before the CJEU.[205] An important issue raised in these cases is under what circumstances could a compulsory retirement age be justified by having a legitimate aim with the means being appropriate and necessary. The CJEU has seemed willing to accept that matters such as intergenerational change—in other words, removing older workers to make room for younger ones—is one of the possible legitimate aims for having such an exception. *Petersen*, for example, concerned the application of a maximum age of 68 years old for so-called "panel dentists" in Germany.[206] In a challenge to the maximum age, the CJEU stated that it did not appear unreasonable for member state authorities to embrace the application of an age limit, leading to the withdrawal from the labor market of older practitioners, in order to promote the employment of younger practitioners.[207] The Court further stated:

> It follows that, if the aim of a measure such as that at issue in the main proceedings is the sharing out of employment opportunities among the generations within the profession of panel dentist, the resulting difference of treatment on grounds of age may be regarded as objectively and reasonably justified by that aim, and the means of achieving that aim as appropriate and necessary, provided that there is a situation in which there is an excessive number of panel dentists or a latent risk that such a situation will occur.[208]

The CJEU found that Article 6(1) of the Equal Treatment Directive appeared to justify making way for younger dentists, that the encouragement of employment was a legitimate employment policy measure, and that the compulsory retirement of older dentists could be an appropriate and necessary measure to achieve this objective.

In *Georgiev*,[209] which concerned a professor in a Bulgarian University, the CJEU reached a similar general conclusion. The legislation in question allowed for the compulsory retirement of professors at the age of 68.[210] According to the Bulgarian government, the aim of the legislation was to allocate the professorial posts among the generations to promote an exchange of experience and

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205. *See, e.g.*, Case C-341/08, Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, 2010 E.C.R. I-00047; Case C-250/09, Vasil Ivanov Georgiev v. Tehnicheski Universitet, 2010 E.C.R. I-11869.

206. Case C-341/08, Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, ¶ 2, 2010 E.C.R. I-00047.

207. *Id.* [¶ 70].

208. *Id.* [¶ 77].

209. Case C-250/09, Vasil Ivanov Georgiev v. Tehnicheski Universitet, 2010 E.C.R. I-11869.

210. *Id.* [¶ 2].

innovation.[211] Despite Mr. Georgiev arguing that the legislation did not encourage the recruitment of young teachers, the Court reiterated its statement from *Petersen* that "it does not appear unreasonable for the authorities of a member state to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones."[212]

There is no evidence supporting the general argument that removing older workers provides opportunities for younger workers. Nevertheless, the CJEU has appeared willing to accept this stance as part of its jurisprudence. Indeed, the Court impliedly subscribes to the "lump of labor fallacy"—the assumption that the number of jobs available in an economy is fixed and that opportunities for the young may be created by removing older workers from the labor force.[213] Interestingly, this assumption has been challenged in U.K. government reports. For example, in *Winning the Generation Game*, a report published in 2000, the U.K. government dismissed the lump of labor fallacy, noting:

> A misplaced belief that there are a fixed number of jobs in the economy—a "lump of labour"—has led in the past to government policies which wrote off large numbers of people and unintentionally reduced employment.
>
> One reason this fallacy is pervasive, especially among people over 50, is that it feels, at an individual level, as if there is indeed a lump of labour. . . .
>
> This is, however, not what happens in the labour market as a whole. . . . Increasing the number of people effectively competing for jobs actually increases the number of jobs in the economy.
>
> The lump of labour fallacy ignores the fact that, in a flexible labour market, wages can and do adjust. More people competing for jobs means that people are less keen to demand wage increases. This reduces inflationary pressures and allows lower interest rates (and higher non-inflationary growth) than would otherwise be the case.[214]

Despite the contested nature of the "lump of labor," the assumption implicitly endorsed by the CJEU has recently been embraced by the

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211. *Id.* [¶ 46].

212. *Id.* [¶ 51].

213. The phrase is said to have originated in the nineteenth century in an article by U.K. economist David F. Schloss. *See* Tom Walker, *Why Economists Dislike a Lump of Labor*, 65 REV. SOC. ECON. 279, 281 (2007) (discussing the Schloss article and the origin of "lump of labor").

214. CABINET OFFICE PERFORMANCE & INNOVATION UNIT, WINNING THE GENERATION GAME 39 (2000) (emphasis omitted), *available at* http://www.donaldhirsch.com/generation.pdf.

U.K. Supreme Court in *Seldon v. Clarkson Wright & Jakes*.[215] *Seldon* involved the compulsory retirement of an equity partner in a firm of solicitors at the end of the year in which he reached age 65. As the U.K.'s default retirement age has been abolished, compulsory retirement constitutes direct discrimination unless the employer can objectively justify the dismissal. Moreover, the Court in *Seldon* held "that the approach to justifying direct age discrimination cannot be identical to the approach to justifying indirect discrimination."[216] Where direct discrimination is at issue, justification requires that an employer's aims be "of a public interest nature"[217] and "consistent with the social policy aims of the state."[218] Additionally, proportionate means must be used to achieve the aims—means that are "appropriate to the aim and (reasonably) necessary to achieve it."[219]

Three of the firm's articulated aims for the compulsory retirement age were before the U.K. Supreme Court: (1) ensuring associates were provided partnership opportunities in order to retain them; (2) facilitating workforce planning by being able to ascertain when partnership vacancies will arise; and (3) contributing to the firm's collegial culture by limiting partner expulsion based on performance deficiencies.[220] As to the lawfulness of these aims, the U.K. Supreme Court highlighted two legitimate social policy objectives that are deemed permissible by the CJEU. The first is an "intergenerational fairness" aim, which the Court characterized as uncontroversial.[221] This objective includes "facilitating access to employment by young people" and "sharing limited opportunities to work in a particular profession fairly between the generations," presumably by removing older workers from their jobs.[222] The second aim, seen by the Supreme Court as more controversial, seeks to promote employee "dignity" by eschewing "costly and divisive disputes about [older worker] capacity or underperformance."[223] As to whether the firm's aims passed muster, the first two—staff retention and workforce planning—were deemed connected to intergenerational fairness.[224] The third—limiting partner

215. Seldon v. Clarkson Wright & Jakes (A P'ship), [2012] UKSC 16, [50(4)(i)]–[50(4)(ix)].
216. *Id.* at [51].
217. *Id.* at [50(2)].
218. *Id.* at [55].
219. *Id.*
220. *Id.* at [10].
221. *Id.* at [56].
222. *Id.*
223. *Id.* at [57].
224. *Id.* at [67].

expulsion due to performance deficiency—was held related to the CJEU's dignity objective.[225] Thus, the Court found that all three of the firm's aims were legitimate.

Next, the U.K. Supreme Court noted that the Employment Tribunal should determine whether age 65 was an appropriate means for achieving the firm's stated objectives.[226] As noted by Lady Hale, "There is a difference between justifying *a* retirement age and justifying *this* retirement age."[227] While certainly a mandatory retirement age is possible where an employer can justify it, it may be difficult for employers to demonstrate that a particular age—whether age 65 or some other age—is appropriate under the circumstances in question. Even so, an employer-justified retirement age remains possible in the U.K.[228]

In the U.K., age discrimination is clearly on different and lesser footing than are other grounds of discrimination. Moreover, the inferior civil rights protections afforded to workers on the basis of age turn at least in part on the supposed economic imperative of intergenerational fairness. As for the assumptions undergirding the "employee dignity" aim, one might wonder whether being jettisoned from the workplace based on age is any more dignified than losing one's job due to allegations of performance deficiencies. In any case, there is no empirical research supporting the employee dignity assumption. Compulsory retirement policies are a poor tool for combating the stereotype of older worker performance incapacity. Such policies are based on the idea that at least some of those who are involuntarily retired perform at a subpar level.

E. Age Discrimination Protection in the U.S.: Narrow Statutory Interpretation and Doctrinal Weaknesses

In contrast to the U.K.'s Equality Act 2010, the ADEA's effectiveness in preventing disparate treatment is not undercut by a general employer justification.[229] Rather, the protective shortfall of the

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225. *Id.*

226. *Id.* at [68].

227. *Id.*

228. Indeed, both Cambridge and Oxford Universities have adopted an Employer Justified Retirement Age of 67 for academic staff. *See Cambridge Academics Approve Compulsory Retirement Age for 'Intergenerational Fairness,'* EQUAL. LAW (May 3, 2012), http://www.equalitylaw.co.uk/news/2305/66/Cambridge-academics-approve-compulsory-retirement-age-for-intergenerational-fairness/.

229. In the U.S., there are several statutory exceptions in the ADEA. The first permits disparate treatment (direct discrimination) where age is a *bona fide occupational qualification*. This defense operates as a very hard to satisfy, narrow exception to the rule of equal treatment.

ADEA is caused by the more onerous burden of establishing a prima facie case of disparate treatment as compared with that of other protected characteristics and, consequently, an increase in the ease with which employers may defend against age discrimination suits. In short, a case of disparate treatment age discrimination is doctrinally more difficult to establish than a case of disparate treatment based on race, color, religion, national origin, or sex. There is simply less protection against age discrimination than discrimination on other bases. Subsection 1, below, evaluates several important Supreme Court ADEA disparate treatment cases to highlight the lesser protection afforded victims of age discrimination and flesh out the economic imperative that may be responsible for that disadvantage.

Additionally, ADEA plaintiffs are disadvantaged in disparate impact (indirect discrimination) litigation in comparison with plaintiffs suing on other grounds. This handicap is tied to the "reasonable factor other than age" ("RFOA") defense, which appears in the ADEA's text and has been interpreted by the Supreme Court.[230] Subsection 2, below, considers two recent Supreme Court ADEA disparate impact decisions to underscore the Court's clear deference to, and concern for, employers' economic interests.

By hobbling the use of disparate treatment theory—and simultaneously, by articulating a defense to disparate impact that is highly deferential to employer business interests—the Supreme Court has not only made the government's enforcement efforts more difficult and harmed older workers,[231] but has also shaped age discrimination

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The employer must show that age, as a qualification, is reasonably necessary to its business's operation, and that substantially all members of the excluded group are unable to meet job requirements or that individual screening is impossible or impractical. Under this defense, for example, an employer might be permitted to use age restrictions to hire an actor to play a particular role. Matthew W. Finkin, *United States*, *in* INTERNATIONAL LABOR AND EMPLOYMENT LAWS 33a-1 to 33j-74 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009). The ADEA also has a bona fide seniority system exception. 29 U.S.C. § 623(f)(2)(A) (2006). So long as a seniority system was "not intended to evade the purposes of the Act," an employer may take actions that more generally benefit one age group over another. Involuntary retirement based on age is specifically prohibited under this section of the ADEA. Since rights typically increase with years of service and by chronological age, seniority systems that offer lesser rights to older workers are suspect. Finkin, *supra*, at 33g-45.

230. In March 2012, the U.S. EEOC issued a final rule amending the agency's age discrimination regulations to provide guidance on the RFOA defense. Kevin P. McGowan, *EEOC Issues Final Rule under ADEA on Defense to Disparate Impact Claims*, DAILY LAB. REP., Mar. 29, 2012, at AA-1. The U.S. Chamber of Commerce is critical of the final rule, arguing it imposes undue burdens on employers who might avail themselves of the defense. *Id.*

231. *See* Dianna B. Johnston, Assistant Legal Counsel, U.S. EEOC, Statement before the U.S. Comm'n on Civil Rights 12 (June 11, 2010) (on file with the author) [hereinafter *Johnston Statement*] (discussing the harm done to older workers by age discrimination).

jurisprudence to privilege economics over civil and human rights.

1. The Excessive Burden of Establishing a Case of Disparate Treatment on the Basis of Age

As noted above, it is more difficult to establish a case of disparate treatment on the basis of age than it is to sue on other protected grounds. This was not always so. For many years, the U.S. Supreme Court interpreted the ADEA in relative harmony with other anti-discrimination legislation, such as Title VII. In 2009, however, the Court clearly rejected that approach.

In *Gross v. FBL Financial Services, Inc.*, the 54-year-old plaintiff with thirty-two years of service with the firm sued over his demotion from claims administration director to claims project coordinator.[232] His employer reassigned many of his duties to a woman in her early 40s, who had previously been his subordinate.[233] Gross asserted that he was discriminated against, at least in part, based on age.[234] The company asserted that Gross's reassignment was merely part of a corporate restructuring.[235] Instead of answering the question upon which it had granted review,[236] the Supreme Court held that mixed motive claims—claims involving both discriminatory and non-discriminatory reasons—are not cognizable under the ADEA.[237]

Under this new precedent, a plaintiff claiming disparate treatment based on age must prove that age was the "but for" cause of the challenged decision.[238] Unlike plaintiffs suing for other types of discrimination, ADEA plaintiffs must demonstrate that age had a decisive impact on the employer's actions—even in cases where the employer admits that age motivated its decision in part.[239] This leaves

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232. 557 U.S. 167, 168–70 (2009).

233. *Id.*

234. *Id.* at 170–71.

235. *Id.*

236. *See id.* at 169 ("The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]. . . .").

237. *See id.* at 175–76 ("Our inquiry . . . must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not.").

238. *Id.* at 179.

239. At least one court has applied the reasoning in *Gross* to a disability discrimination claim. *See* Serwatka v. Rockwell Automation, 591 F.3d 957, 963 (7th Cir. 2010) (stating that as a result of *Gross*, a plaintiff is not entitled to any award because the jury found that the employer had a mixed motive for discharging her and thus there was no but for causation as required by *Gross*); *Johnston Statement, supra* note 231, at 13 ("Unfortunately, older workers who are subjected to age discrimination have to pursue their ADEA rights in a legal landscape that increasingly minimizes the significance of age discrimination. . . . The [recent Supreme Court] decisions

no possibility of burden shifting to the employer in such cases, and creates a legal hurdle for age discrimination victims that, for many, may be insurmountable.[240] As one commentator has noted, *Gross* allows some age-biased employers to escape liability without consequence, under-deters illegal employment decision-making, and provides a windfall to discriminating employers who relied on factors in addition to age.[241]

Writing for the majority, Justice Thomas employed a stingy reading of the legislation, devoid of policy considerations held either by Congress or latent in the statute, to eliminate mixed motive analysis from ADEA litigation. The Court interpreted the statute's directive that it is "unlawful for an employer . . . to . . . discriminate against any individual . . . *because of* such individual's age"[242] as requiring the plaintiff to establish that age was the "but for" cause of the decision.[243] The majority, without explanation, interpreted "because of" language in the ADEA differently than it had identical Title VII language in *Price Waterhouse v. Hopkins*, a 1989 case involving sex discrimination.[244] Indeed, in *Price Waterhouse*, a plurality of the Supreme Court held that the "because of" language in Title VII prohibits employment decisions based in whole *or* in part on a protected characteristic.[245] Thus, plaintiffs under Title VII need only prove that a protected characteristic was a *motivating* factor in an employment decision, recognizing the possibility that a complex set of reasons might be in play.[246]

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make age discrimination more acceptable . . . and harder to establish in court that an adverse action was motivated by age.").

240. *Serwatka*, 591 F.3d at 961.

241. Martin J. Katz, *Gross Disunity*, 114 PENN. ST. L. REV. 857, 880 (2010). Much of the scholarly criticism of the *Gross* decision has been scathing. *See* Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 273–74 (2010) ("The substantive outcome in *Gross* is not good for employment discrimination plaintiffs. The way the Court got there is not good for the law."); Charles A. Sullivan, *The Curious Incident of* Gross *and the Significance of Congress's Failure to Bark*, 90 TEX. L. REV. 157, 161 (2012) ("The reasoning underlying this result is, to be charitable, less than persuasive.").

242. *Gross*, 557 U.S. at 176 (quoting 29 U.S.C. § 623(a)(1) (2006)).

243. *Id.* at 177.

244. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion). *See also* Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 107 (2010) ("[The Court] gives no convincing reason for rejecting the holding of *Price Waterhouse* as precedent for interpreting the ADEA and instead favoring Justice Kennedy's dissenting interpretation of identical controlling language in Title VII.").

245. *Gross*, 557 U.S. 182–83 (Stevens, J., dissenting) (citing *Price Waterhouse*, 490 U.S. at 240).

246. In 1991, Congress codified *Price Waterhouse*, in slightly modified form, by amending

Moreover, the causation requirement embraced in *Gross* is especially ill-suited for evaluating employment discrimination claims.[247] As Justice Breyer noted in dissent:

> It is one thing to require a typical tort plaintiff to show "but for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. . . . In a case where we characterize an employer's actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious . . . .[248]

The *Gross* majority instructs plaintiffs that, if they are to prevail, they must separate all possible motives and prove that age is the overriding cause of a negative employment decision.[249] Yet, as noted in Part I, age stereotyping often interacts with other factors involved in employer decision-making in complex ways.[250] For example, negative stereotypes about older worker competence may interact with the coding of certain jobs as less appropriate for older workers because they are years removed from their professional training.[251] Separating the clearly illegal negative performance stereotype from what some may view as a legitimate rationale—i.e., that more recent training makes one candidate better suited for the job than the other—may be virtually

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Title VII to add: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)).

247. Professor Charles Sullivan has recently argued that the Supreme Court is "tortifying" employment discrimination law doctrine— adopting common law tort-based notions of intent and proximate causation—that may make it increasingly difficult to use the cognitive bias literature of stereotyping in discrimination litigation. *See generally* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1454–57 (2012) (discussing the focus on cause-in-fact in the discrimination context)

248. *Gross*, 557 U.S. at 189–92 (Breyer, J., dissenting).

249. *Id.* at 177.

250. *See supra* Part I.

251. *See supra* notes 71–74 and accompanying text (discussing how a stereotype about older workers can interact with other decision-making factors in such a way that it can be difficult to determine whether a hiring decision was based on the animus or another factor).

impossible for a plaintiff.[252] The two motives may be inextricably intertwined; one's view that more recent training is superior to experience in the field may even be driven by age bias.

The *Gross* decision on its face appears to be a straightforward, if terribly misguided, case of statutory interpretation. But it is not readily apparent that an economic imperative is the impetus for the Court's diminishment of a civil right—the right to be free from age discrimination.[253] Teasing out such an imperative in American law requires looking at several ADEA decisions by the Supreme Court over the last two decades. From this perspective, it becomes clear that the ADEA has suffered something akin to death by a thousand cuts—cuts driven by a belief that employers must be permitted to make economically rational employment decisions that in some cases will be catastrophic for older workers.

Gross, although the most recent ADEA decision, is not the only case in which the Supreme Court has made clear that age discrimination is different than other forms of discrimination.[254] The first inkling of differentiation came in *Hazen Paper Co. v. Biggins*, a 1993 case in which the plaintiff was terminated shortly before his pension was to vest based on his years of service with the company.[255] Noting that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age,"[256] the Court held that pension status, while correlated with age, is both analytically distinct from age and unrelated to prohibited stereotyping.[257] Thus, while it is illegal to fire someone

252. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (writing for the plurality, Justice Brennan made this point about the difficulty of untangling motives in the context of sex discrimination cases). *See also* Susan Bisom-Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases,* 1995 UTAH L. REV. 1029, 1040–53.

253. Relatedly, in case law and among commentators, there is a similar dearth of discussion about the values driving the U.S. retirement income security system. *See* Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values it Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 6 (2011) ("Discussions of the 'principles' or 'values' underlying employment-based pensions are rare. In the European context, in contrast, discussions of values are more common.").

254. *See* Corbett, *supra* note 134, at 708–09 ("Divergence between Title VII law and ADEA law is not limited to the holding in *Gross* . . . . For many years, the Court has said that there are differences between [age and other forms of discrimination] . . . and . . . that the law under Title VII and the law under the ADEA should differ in ways reflective of those differences. . . . The divergence invariably has produced less protection against age discrimination than is available for the characteristics covered by Title VII.").

255. 507 U.S. 604, 611 (1993).

256. *Id.* at 610.

257. *Id.* at 611.

whose pension is about to vest under the Employee Retirement Income Security Act of 1974 (ERISA),[258] unless the plaintiff can muster evidence that the employer used pension status as a proxy for age, the termination does not violate the ADEA.[259]

Of course, bias against older workers is closely bound with the perception that older workers are, and often may be, more costly workers. As far back as 1965, the seminal Wirtz Report noted that employers were loath to hire older workers due to a number of cost-based reasons, such as: (1) younger workers command lower salaries; (2) pension plans represent unwanted costs; and (3) employers are concerned that health care and life insurance costs are greater for older workers.[260] By both narrowly defining age discrimination as an erroneous belief in declining performance, and characterizing cost-based justifications such as pension eligibility as analytically distinct from age, the Court significantly restricted the type of circumstantial evidence available to prove age discrimination.[261] As a result, employers are generally free to use salary and length of service—factors very commonly associated with age and higher costs—as the rationale for economically devastating employment actions, such as reductions in force.[262] Under *Biggins*, such cost-based factors are unlikely to be deemed evidence of disparate treatment based on age. Case law that shields cost-based justifications from challenge clearly privileges the "needs of the free market," allowing an economic imperative to trump the civil rights of older workers.[263]

A similarly cramped interpretation—one clearly placing age discrimination protection on poorer footing as compared to other grounds—is apparent in the more recent decision, *Kentucky Retirement Systems v. EEOC*.[264] In *Kentucky Retirement Systems*, a state disability retirement plan tied benefit eligibility and calculation to normal

258. 29 U.S.C. § 1140 (2006).

259. *Biggins*, 507 U.S. at 612.

260. *See* WIRTZ REPORT, *supra* note 42, at 8 (listing selected reasons why employers impose restrictions on hiring older workers).

261. *See* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 572 (1996) (discussing how, by concluding that pension status is not a proxy for age, the Court "restricted the range of circumstantial evidence upon which a factfinder can draw the inference of discrimination").

262. Minda, *supra* note 131, at 536–37.

263. *See* Rothenberg & Gardner, *supra* note 26, at 20 ("[ADEA] [c]ourt rulings over the last fifteen years have continued to reflect a commitment to neo-liberal economics and the needs of the free market at the expense of social justice.").

264. 554 U.S. 135 (2008).

retirement eligibility.[265] The latter required either twenty years of service or five years of service so long as the worker had attained age 55.[266] Hazardous position workers, including law enforcement personnel, fire fighters, paramedics, and corrections officers, who were disabled in the line of duty before retirement eligibility were permitted to retire immediately and have their pensions calculated by imputing to their years of service the number of years they had left to attain pension eligibility.[267] Those disabled after reaching retirement eligibility, however, did not have any additional years imputed for the purpose of calculating their pensions.[268] The plaintiff, who was disabled at age 61 with eighteen years of service, argued that, had he become disabled before age 55, he would have had additional years of service imputed for the purpose of his pension calculation.[269]

Even though the disability retirement plan clearly took account of age to the detriment of older workers—it was facially discriminatory and, as applied, was financially disadvantageous to older workers—the Supreme Court held that Kentucky was actually motivated by pension status, a factor that is analytically distinct from age.[270] Moreover, Kentucky's disability retirement plan did not rely on any of the core stereotypes about older worker competency that the ADEA aims to eradicate.[271] Finally, the Court emphasized a non-age-related rationale behind the plan: to increase payments to disabled workers whose careers were cut short in the line of duty.[272] Thus, the Court held that to prove age discrimination, the plaintiff would need to demonstrate animus beyond the express use of age as a factor in the determination of disability retirement benefits. To meet this burden, the plaintiff would need to establish that age "'actually motivated' the employer's decision."[273] This additional burden—which plaintiffs who allege other forms of disparate treatment do not bear in cases of facial discrimination[274]—may doom many ADEA claims because it is rare to

265. *Id.* at 137.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 142.
271. *Id.* at 144–46.
272. *Id.* at 144–45.
273. *Id.* at 149–50.
274. *See, e.g.*, City of L.A., Dep't. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (holding that a facially discriminatory retirement plan requiring female employees to make greater monthly contributions than male employees violated Title VII), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; UAW v. Johnson Controls, Inc.,

find direct evidence of discriminatory animus.[275] Indeed, it is especially difficult to find animus in the context of age discrimination because, as noted above, age bias typically operates *without the hostility* present in other forms of employment discrimination.

Professor William Corbett opines that *Kentucky Retirement Systems* "narrows coverage under the ADEA, permitting a facially discriminatory rule, apparently because of its laudable objective."[276] While this observation brings to mind a U.K. employer's ability to justify direct age discrimination when its aims are public interest in nature,[277] one should recall that in the U.K. the burden of proving justification rests with the *employer*.[278] Under U.S. Supreme Court jurisprudence, it is the *employee* who carries the burden.[279] *Kentucky Retirement Systems* weakens protection against age discrimination by making the prima facie case more difficult to prove.

A review of *Gross*, *Biggins*, and *Kentucky Retirement Systems* demonstrates that employees receive less protection from disparate treatment based on age than on other grounds. Moreover, *Biggins*

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499 U.S. 187, 200 (1991) (holding that a facially discriminatory policy prohibiting female employees who are fertile from performing jobs involving lead exposure violated Title VII).

275. *See generally* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999) (discussing how employers take precautionary measures by creating employment documentation that gives them a decisive advantage over employees who allege discrimination).

276. Corbett, *supra* note 134, at 718.

277. *See* Equality Act 2010 (c. 15), Sched. 9, pt. 2, § 10(2) (U.K.) (allowing an employer to award benefits using length of service as the criterion in some circumstances). There is no need to justify any differences related to service less than five years. *Id.* Where service exceeds five years, the employer's use of length of service needs to fulfill a business need of the undertaking. *Id.* This provision has been relevant in cases where redundancy (severance) pay plans treat longer service more favorably, the argument being that such plans may discriminate against younger workers. *See, e.g.*, Rolls Royce v. Unite the Union [2009] EWCA Civ 387, [6] (appeal taken from Eng.) (addressing the question of whether length of service may be considered in redundancy decisions); MacCulloch v. Imperial Chem. Indus., PLC, [2008] IRLR 846, [1]–[2] (appeal taken from Eng.) (examining if both age and length of service may figure in a redundancy determination scheme); Loxley v. BAE Sys. (Munitions and Ordnance) Ltd [2008] IRLR 853 [1]–[2] (tackling when age based discrimination may be justified). In the U.S., the ADEA's bona fide employee benefit plan exception allows employers to consider age in awarding employee benefits. MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 483 (7th ed. 2008) [hereinafter EMPLOYMENT DISCRIMINATION]. A bona fide employee benefit plan that either provides employees equal benefits regardless of age or "provides age-differentiated benefits but incurs equal costs" across age groups is lawful. *Id.* Hence, an employer is permitted to provide lesser life insurance coverage for older as compared with younger workers so long as it spends the same amount on each group. *Id.*

278. *See infra* Part II.D.2

279. *See supra* note 229 (describing the bona fide occupational qualification defense and its burdens on employees).

demonstrates that age discrimination law privileges economic concerns over civil rights.[280] Put concretely, *Biggins* stands for the proposition that employers who act on factors correlated with age, such as higher salary, are generally not liable for disparate treatment based on age.[281] This is because higher salary is, like pension status, analytically distinct from age. But might such employers be subject to disparate impact liability? After all, choosing to downsize employees based on higher salary is likely to have a greater impact on older workers, whose salaries increase over the course of their careers. Unfortunately for older workers, as discussed below, the answer is "no."

2. Neutering Disparate Impact Theory under the ADEA

Until 2005, it was unclear whether disparate impact (indirect discrimination) was a theory cognizable under the ADEA. However, in what might initially appear to be a victory for plaintiffs, the Supreme Court in *Smith v. City of Jackson* held that the ADEA allows for recovery for neutral employment policies or practices that fall more harshly on older workers.[282] *Smith* involved a salary increment plan by the City of Jackson, Mississippi, which granted raises to police officers and dispatchers based on years of service.[283] Those with fewer than five years of service were given proportionately larger salary increases than those with greater seniority.[284] Most officers who were age 40 or older, therefore, received proportionately lower increases than their younger counterparts.[285] The older employees challenged the plan as having a disparate impact based on age; the city explained its rationale as an attempt to bring the beginning salaries of the employees "up to the regional average."[286]

The Court noted the similarities between language in Title VII and the ADEA. More specifically, employer actions are prohibited when they "'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' race or age."[287] Disparate impact theory is encompassed by the ADEA

280. An employer in the U.S. may not pursue an age-specific policy based on cost savings or profit enhancement under the bona fide occupational qualification defense. Eglit, *Age Bias*, *supra* note 45, at 115.

281. *Id.* at 138.

282. Smith v. City of Jackson, 544 U.S. 228, 232 (2005).

283. *Id.* at 231.

284. *Id.*

285. *Id.* at 242.

286. *Id.* at 231.

287. *Id.* at 235.

because the text—text identical in Title VII—directs attention to the effects of employer actions rather than to employers' motives. Yet, textual differences between the two statutes as a whole indicate that "the scope of disparate[] impact liability under [the] ADEA is narrower than under Title VII."[288] Most importantly, according to the Court, the inclusion of RFOA language within the ADEA—holding it permissible for an employer to take action where differentiation is based on a reasonable factor other than age—indicates that age, unlike other protected categories, often is relevant to an employee's ability to perform certain jobs.[289]

Turning to the facts at hand, the *Smith* Court held that not only did the plaintiffs fail to demonstrate a specific employment practice and the negative impact that it caused, but that it was absolutely clear that the City's actions were "reasonable given the City's goal of raising employees' salaries to match those in surrounding communities."[290] The Court found that other methods the City could have used to lessen the impact on older workers were irrelevant. Unlike the business necessity defense used in Title VII disparate impact cases—which considers whether less onerous alternatives were available—the reasonableness inquiry under the ADEA includes no such requirement.[291] Thus, just like disparate treatment, U.S. law gives less protection to employees on the basis of age under disparate impact theory as compared with other discrimination grounds.

Three years after *Smith*, in *Meacham v. Knolls Atomic Power Laboratory*,[292] it became clear how much less protection the ADEA affords plaintiffs in disparate impact suits. In *Meacham*, the Court focused on the RFOA defense, which functions like a general justification provision without any need for an employer to demonstrate proportionality. In *Meacham*, the employer used a formula to score employees on their performance, flexibility, and critical skills to decide who on the payroll would be subject to a reduction in force. Of the thirty-one employees laid off, all but one fell within the class protected by the ADEA (i.e., they were 40 years old and older). Twenty-eight of the employees sued claiming both disparate treatment and disparate impact.[293] The question for the Supreme Court was whether, when

288. *Id.* at 240.
289. *Id.*
290. *Id.* at 242.
291. *Id.* at 243.
292. 554 U.S. 84 (2008).
293. *Id.* at 87.

proffering the RFOA defense, an employer bears both the burden of production and of persuasion.[294]

While reading the ADEA's RFOA language as an affirmative defense, the Court strongly signaled that, in most cases, carrying this burden by a preponderance of the evidence would not be difficult for most employers. It would only be the rare case "where the reasonableness of the non-age factor is obscure"[295] that the employer would need to do more than simply produce its rationale for using the factor creating the disparate impact. Indeed, noted the Court, "Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA."[296] The problem for plaintiffs, of course, is that the use of many cost-based factors—e.g., higher salaries and higher healthcare costs—may appear imminently reasonable to reviewing courts.

Professor Judith Johnson, reviewing case law subsequent to *Smith* and *Meacham*, concluded that "courts seem to be interpreting 'reasonable' to be whatever the employer wants it to mean."[297] Lower courts have taken the Supreme Court at its word, holding that the RFOA defense is not difficult to prove.[298] A similar review of the case law by attorneys Carla Rozycki and Emma Sullivan found that very few ADEA disparate impact cases have survived when the RFOA defense is raised.[299] For example, the Tenth Circuit Court of Appeals has held that "[c]orporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations."[300] A jurisprudence that gives such great deference to business considerations and that allows great leeway for age-correlated employment decisions clearly allows an economic imperative to trump a civil right.

What are the real world effects of two decades of the Court slowly dismantling protections against age discrimination? Recall that a central distinction between the U.K. and U.S. approaches to age discrimination law is the possibility of employer-justified compulsory

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294. *Id.*

295. *Id.* at 101.

296. *Id.*

297. Judith J. Johnson, *Reasonable Factors Other than Age: The Emerging Specter of Ageist Stereotypes*, 33 SEATTLE U. L. REV. 49, 50 (2009).

298. *Id.* at 51.

299. Rozycki & Sullivan, *supra* note 135, at 13.

300. Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1201 (10th Cir. 2006). This case was decided after *City of Jackson*, but before *Meacham*.

retirement in the former and the illegality of such policies in the latter. But might employers in the U.S. accomplish something similar in different guise?

3. How Weak Employment Law Can Lead to Involuntary Withdrawal from the U.S. Labor Force

When Congress abolished the upper age limit for protection under the ADEA in 1986,[301] compulsory retirement policies became illegal in most U.S. workplaces.[302] However, employers skirting the formal prohibition still remained a possibility. Concerned that older workers were asked to waive their rights when presented with voluntary exit incentives or involuntary layoffs, Congress passed the Older Worker Benefit Protection Act of 1990 (OWBPA),[303] which mandates that employers follow strict requirements when severing older employees from employment and asking them to release potential ADEA claims.[304] The protections afforded older workers under the OWBPA are far greater than those available for workers in other protected categories. Any waiver must be in writing, and before signing it, employees must be advised to consult with legal counsel, provided an extended period to consider the offer, and offered valuable consideration for the waiver.[305] These protections aim to enhance

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301. *See supra* note 146 and accompanying text (explaining that, before the removal of the limit, ADEA protection did not extend to those over the age of 70).

302. While mandatory retirement is generally prohibited under the ADEA, there are two exceptions of note. Bona fide executives or those in high policymaking positions may be retired at 65 years of age provided that the employee has occupied the position for two years prior to retirement and is eligible to receive defined benefits totaling at least $44,000 annually. 29 U.S.C. § 631(c)(1) (2006). Additionally, state and municipal employers may subject law enforcement (police) and firefighters to mandatory retirement rules. The rationale for this latter exception is that physical fitness and agility, which are central to those jobs, typically decline with age. *See* EMPLOYMENT DISCRIMINATION, *supra* note 277, at 482 (noting that the exception may not be used to evade another substantive provision of the ADEA).

303. 29 U.S.C. §§ 623, 626, 630 (2006).

304. Judith Droz Keyes & Douglas J. Farmer, *Settlement of Age Discrimination Claims—The Meaning and Impact of the Older Workers Benefit Protection Act*, 12 LAB. LAW. 261, 267–72 (1996).

305. Waivers of Rights and Claims under the ADEA, 29 C.F.R. § 1625.22 (2012). More specifically, the OWBPA enumerates seven factors required at a minimum for ADEA waivers to be considered "knowing and voluntary." Minimally, such a waiver: (1) must be written in plain language; (2) must expressly refer to ADEA rights or claims; (3) must advise the employee to consult with legal counsel; (4) must provide the employee at least twenty-one days to consider the employer's offer; (5) must provide the employee with a seven-day revocation period; (6) must not be prospective; and (7) must be for valuable consideration. U.S. EEOC, *Understanding Waivers of Discrimination Claims in Employee Severance Agreements* (2009) [hereinafter EEOC, *Understanding Waivers*], *available at* http://eeoc.gov/policy/docs/qanda_severance-agreements.html. There are further requirements when group layoffs are contemplated. Where a

employees' free choice by ensuring that waivers are executed voluntarily by those who are fully informed of their rights.[306]

Although the OWBPA provisions may sound good in theory, one wonders how they work in practice, especially in periods of economic hardship[307] when layoffs are rampant.[308] As the U.S. Equal Employment Opportunity Commission notes, "Employee reductions and terminations have been an unfortunate result of the current economic downturn. . . . Often, employers terminate older employees who are eligible for retirement, or nearly so, because they generally have been with the company the longest and are paid the highest salaries."[309]

As noted above, age discrimination law generally fails to recognize an employer's use of such factors—high salary and long job tenure, for example—as actionable age bias under both disparate treatment and disparate impact theory. Employers who are litigation-averse, however, will nonetheless ask employees to release potential claims in exchange for severance (redundancy) pay, which is not otherwise statutorily required in the U.S.

Older workers who accept payment and release potential claims under the assumption that there is little else they can do become jobless just as if they had been subject to compulsory retirement. Those who do not sign are similarly rendered redundant, and, though they may sue, will find their suits stymied by the evisceration of the protections

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layoff is taking place, employees must be given forty-five days (rather than twenty-one days) to consider the offer, be informed of the unit at issue, and be provided with the job titles and ages of all those in the unit selected for the layoff as well as those not selected. *Id.*

306. Craig Robert Senn, *Fixing Inconsistent Paternalism under Federal Employment Discrimination Law*, 58 UCLA L. REV. 947, 983–85 (2011).

307. *See* Rothenberg & Gardner, *supra* note 26, at 21 (explaining how the ADEA has been ineffective at protecting older workers during economic downturns and company downsizing).

308. One study indicates that the significant labor market effects coinciding with the global economic crisis and its aftermath—what is known in the U.S. as the "Great Recession"—are out of proportion to the economic distress experienced by corporations. ANDREW SUM & JOSEPH MCLAUGHLIN, CTR. FOR LABOR MKT. STUDIES AT NORTHEASTERN UNIV., HOW THE U.S. ECONOMIC OUTPUT RECESSION OF 2007–2009 LED TO THE GREAT RECESSION IN LABOR MARKETS: THE ROLE OF CORPORATE DOWNSIZING, WORK HOUR REDUCTIONS, LABOR PRODUCTIVITY GAINS, AND RISING CORPORATE PROFITS 1 (2010). Real output dropped by 2.5%, while corporate payrolls were sliced by 6%. *Id.* at 2. Between the fourth quarter of 2008 and the first quarter of 2010, corporate profits increased by $572 billion while wage payments plummeted by $121 billion. *Id.* at 4. Many employers seized on the recession as an opportunity for corporate restructuring aimed at profit maximization at the expense of employees. *See, e.g.*, Nelson D. Schwartz, *Industries Find Surging Profits in Deeper Cuts*, N.Y. TIMES, July 26, 2010, at A1 (reporting that many companies have cut jobs in a successful effort to improve the bottom line profit margin).

309. EEOC, *Understanding Waivers*, *supra* note 305.

afforded by the ADEA. They too find themselves on the street, just as if they'd been subject to compulsory retirement. The difference, however, is that compulsory retirement envisions an orderly transition from work to retirement occurring at a particular age. Because mandatory retirement is generally unlawful in the U.S., such dislocation occurs more randomly and unexpectedly.

If layoffs occurred relatively infrequently in the U.S. or affected small numbers of older workers, one might chalk up such displacement to collateral damage associated with the efficient workings of a flexible labor market. However, layoffs, very laxly regulated under U.S. law, have become a regular part of working life, and great numbers of older workers are adversely affected. This has been especially true during the global economic crisis and its aftermath.[310] Although the group comprised of workers aged 50 and over continues to have a lower unemployment rate than the other age groups, these employees saw a doubling in those unemployed between 2007 and 2011.[311] In 2007, there were 1.3 million unemployed older workers compared with 3.2 million in 2011.[312] Moreover, during this time period, the number of older workers categorized as long term unemployed rose from 300,000 to 1.8 million employees.[313] Additionally, older workers were the most likely group to fall into the category of the very long-term unemployed—those out of work for fifty-two weeks or more. In fact, in 2011, 41.6% of unemployed older workers were on the job market for a year or more, an increase of twenty-seven percentage points from 2007.[314]

Commentators now warn that older American workers' historical protections from layoffs—seniority provisions in collective bargaining agreements or normative practices unconnected to contractual provisions—are diminishing.[315] An overall reduction in job tenure for

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310. U.S. GOV'T ACCOUNTABILITY OFFICE, UNEMPLOYED OLDER WORKERS, MANY EXPERIENCE CHALLENGES REGAINING EMPLOYMENT AND FACE REDUCED RETIREMENT SECURITY 9 (April 2012) [hereinafter UNEMPLOYED OLDER WORKERS] ("Like many other demographic groups, older workers have faced dramatic increases in unemployment and long-term unemployment since the recession began in 2007.").

311. Claire McKenna, *Economy in Focus: Long Road ahead for Older Unemployed Workers*, ISSUE BRIEF (Nat'l Emp. Law Project), Mar. 9, 2012, at 2, *available at* http://www.nelp.org/page/-/UI/2012/NELP.older.workers.3.9.2012.pdf?nocdn=1.

312. *Id.*

313. *Id.* at 3.

314. *Id.*

315. *See* ALICIA H. MUNNELL, STEVEN A. SASS & NATALIA A. ZHIVAN, CTR. FOR RET. RESEARCH AT BOS. COLL., WHY ARE OLDER WORKERS AT GREATER RISK OF DISPLACEMENT? 1 (May 2009), *available at* http://crr.bc.edu/wp-content/uploads/2009/05/IB_9-10.pdf (describing older workers' risk of job displacement as rising absolutely and relatively vis-à-vis prime age

older workers is concerning because, among other factors, suffering "job separation between ages 50 and 56, for whatever reason, is associated with substantial reductions in the probabilities of working full-time, or working at all, at age 60."[316] It is becoming clear that older workers who involuntarily lose their jobs might face great difficulty in delaying retirement.[317] Anecdotal accounts confirm this difficulty.[318] In fact, there was a spike in claims for Social Security retirement benefits in 2009 following significant increases in older worker unemployment.[319] Some 6% more older workers availed themselves of these "benefits than would have been expected in the absence of a recession."[320]

Given these facts, it may be legally accurate to say that compulsory retirement is prohibited in the U.S. But given this reality, are employers accomplishing the very same thing under a different label? True, under the OWBPA, employers must observe strict formalities and provide severance pay, which otherwise would not be legally mandated. And, an older worker can refuse the consideration and sue instead. Yet, in the face of imminent unemployment, many employees will choose severance pay and "moving on with their lives" over litigation. Moreover, those who sue face a set of legal rules that make it difficult to prevail in age discrimination litigation.

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workers); Daniel Rodriguez & Madeline Zavodny, *Changes in the Age and Education Profile of Displaced Workers*, 56 INDUS. & LAB. REL. REV. 498, 508 (2003) (concluding that older workers' relative risk of displacement has increased relative to younger workers).

316. Steven A. Sass & Anthony Webb, *Is the Reduction in Older Workers' Job Tenure a Cause for Concern?* 2 (Ctr. for Ret. Research at Bos. Coll., Working Paper 2010-20, 2010), *available at* http://crr.bc.edu/wp-content/uploads/2010/12/wp-2010-20-508.pdf. *See also* UNEMPLOYED OLDER WORKERS, *supra* note 310, at 15 ("[S]everal experts we interviewed said long-term unemployment diminishes the likelihood older workers will ever be reemployed."); RICHARD W. JOHNSON & BARBARA A. BUTRICA, URBAN INST. UNEMP'T & RECOVERY PROJECT, AGE DISPARITIES IN UNEMPLOYMENT AND REEMPLOYMENT DURING THE GREAT RECESSION AND RECOVERY 3 (May 2012) ("Adults ages 62 and older were the least likely age group to become reemployed once they lost their jobs.").

317. *See* Charles A. Jeszeck, Dir., Educ., Workforce, & Income Sec., U.S. Gov't Accountability Office, Statement before the Special Committee on Aging, U.S. Senate, May 15, 2012, at 10 [hereinafter Jeszeck Statement] ("[L]ong term unemployment can motivate older workers to file for early Social Security retirement benefits . . . because they need[] a source of income to help pay for living expenses."). *See also* LINDA LEVINE, CONG. RESEARCH SERV., OLDER DISPLACED WORKERS IN THE CONTEXT OF AN AGING AND SLOWLY GROWING POPULATION 5–6 (Jan. 15, 2010), *available at* http://aging.senate.gov/crs/aging22.pdf (noting that eligibility for social security benefits, as well as private pensions and access to Individual Retirement Accounts without penalties, contribute to older workers withdrawing from the workforce).

318. Evans & Needleman, *supra* note 27; Rich, *supra* note 27.

319. Jeszeck Statement, *supra* note 317, at 11.

320. *Id.*

CONCLUSION

A comparison of age discrimination protections in the U.K. and U.S. yields convergences and divergences. Regarding convergences, both countries have age discrimination legislation aimed at eliminating ageist stereotypes about older worker competency and diminished performance. Both countries have similar theories of legal action: direct discrimination (disparate treatment) and indirect discrimination (disparate impact). And both countries provide lesser protection for the victims of age discrimination than for the victims of other forms of bias and, hence, undercut the ability of law to vanquish negative stereotyping. This lesser protection—the unwillingness to prohibit age discrimination to the same extent as other grounds of discrimination—is driven by an economic imperative that undermines the civil and human rights of age discrimination victims.

As for divergences, U.K. legislation embraces a much larger protected class than the protected class in the U.S. The problem of discrimination against younger workers falls within the ambit of British legislation, while bias against younger workers is not cognizable in the U.S. (at least on the federal level).[321] U.S. policymakers must recognize that age-based stereotyping may produce adverse results for workers of any age. Thus, Congress should both legislatively overrule *General Dynamics Land Systems, Inc. v. Cline*,[322] the case holding that reverse discrimination claims are not cognizable within the ADEA's protected class, and remove the ADEA's lower age limit of 40 years.

In the U.K., justification presents an obstacle to successful age discrimination lawsuits, including claims involving compulsory retirement. To counter this barrier, British policymakers ought to move away from the European approach, which permits compulsory retirement of older workers. Neither the empirically unproven aim of intergenerational fairness nor the controversial argument that compulsory retirement promotes employee dignity withstands close analysis. Age should be treated in the same way as other protected characteristics; there should be no general justification for direct age

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321. There are a few states that recognize age bias against younger workers. For example, New Jersey's Law Against Discrimination provides protection from age discrimination beginning at 18 years of age. *See* N.J. Office of the Attorney Gen., *Age Discrimination—Your Rights*, http://www.nj.gov/lps/dcr/downloads/fact_age.pdf (last updated July 25, 2011) (explaining that workers between the ages of 18 and 70 are covered by New Jersey's law). Similarly, Michigan's Elliot Larsen Civil Rights Act also prohibits discrimination on the basis of youth. Lee Hornberger, *Employment Discrimination Law in Michigan*, MICH. BAR J., Sept. 2003, at 13, 14, *available at* http://www.michbar.org/journal/pdf/pdf4article612.pdf.

322. 540 U.S. 581 (2004).

discrimination. In fact, the economic imperative for justifying age discrimination must be removed before age can be treated in the same way as other protected characteristics.

Nonetheless, a lesson for British policymakers is that simply eliminating compulsory retirement may not be sufficient to ameliorate the vulnerability of older workers towards the end of their working lives. In the U.S., compulsory retirement is generally unlawful. But legal doctrine regarding the making of a prima facie case of disparate treatment age discrimination presents a significant obstacle to successful challenges to employment decision-making affecting mid- and late-career employees. Similarly, the RFOA defense hobbles claims of disparate impact. When protection against age discrimination has been so eviscerated, it matters little that compulsory retirement is illegal. Therefore, Congress should enact legislation to statutorily overrule *Gross v. FBL Financial Services*,[323] the case that eliminated mixed motive analysis under the ADEA, and endorse Professor William Corbett's suggestion for a uniform standard for disparate impact liability, including the repeal of the ADEA's RFOA defense.[324]

However, this Article's assessment of the ADEA in action shows that changes beyond those to age discrimination law are necessary if the U.S. wishes to safeguard the interests of older workers. In the U.S., declining protection against layoffs—due to both waning coverage by collective agreements and an unraveling of the social contract more generally—leaves many U.S. older workers with greatly diminished employment prospects and, in some cases, leaves them facing involuntary early retirement. In this regard, "[g]eneral labor standards, such as those restricting termination and layoff or requiring severance payments, are just as important in reducing or forestalling older worker vulnerability" as prohibiting age discrimination.[325] In other words, older workers in the U.S., unlike workers in many other countries, lack—but would benefit from—general protections such as good cause protection from discharge and greater restrictions on layoffs. Since the U.S. has tended to leave such matters to the market, one might certainly argue that American political reality makes the embrace of enhanced protection unlikely. To the extent that this is the case, vulnerability will

323. The Protecting Older Workers against Discrimination Act, S. 2189, 112th Cong. § 2 (2012), would have legislatively overruled *Gross*, restoring the availability of mixed motive analysis in ADEA claims and making clear that complaining parties may rely on direct or circumstantial evidence to establish their claims. The bill was not enacted. As this Article goes to press, the bill has yet to be reintroduced in the 113th Congress.

324. Corbett, *supra* note 134, at 726–27.

325. Bisom-Rapp, Frazer, & Sargeant, *Decent Work, Older Workers*, *supra* note 4, at 117.

continue to haunt America's older workers.

Is the U.S. system, which allows these conditions to flourish, better than the U.K. approach, which provides for an employer-justified retirement age? Considering that the outcome for many older workers in both countries is consignment to precarious working status, it is difficult to rate one system as more beneficial for older workers than the other. Ultimately, at a minimum, if the U.K. and U.S. are to vanquish age discrimination in the workplace, that form of bias must be placed on equal footing with other forms of bias. Beyond taking steps towards this goal, however, and especially in the wake of the global financial crisis, a rebalancing of the needs of both human beings and economic organizations is necessary.[326]

326. *See* Alain Supiot, *A Legal Perspective on the Economic Crisis of 2008*, 149 INT'L LAB. REV. 151, 160 (2010) (arguing for effective control of markets and to "restore the order of ends and means as between human needs and economic and financial organization").