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One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases

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I. INTRODUCTION

The basic concept of anti-discrimination is one on which all can agree. After all, we prefer to be judged by our individual abilities rather than some characteristic that we cannot—or should not have to—mask or change, such as our race, gender, or age. The reality of the workplace is more complex and resists the straightforward application of this simple anti-discrimination principle. The prohibition against discrimination on the basis of race is one of our most widely accepted implementations of the anti-discrimination principle. The anti-discrimination principle is complex as it applies to race. Additional levels of complexity are added as the principle is extended beyond race. The list of groups that fall under the anti-discrimination rubric has proven fluid to some extent. Federal employment laws prohibit discrimination on the basis of race, gender, religion, national origin, age, and disability. State employment laws further expand this group to include discrimination on the basis of sexual orientation, marital status, and medical condition, among others.[1] This article looks at the expansion of anti-discrimination law to include older workers and the tensions this expansion has created in anti-discrimination law. While anti-discrimination theory applies in a multitude of contexts, such as voting and fair housing, this article is limited to anti-discrimination law as it has developed in the employment context.[2] At what point does the employer's right to employ at will, or in some cases, at whim, cross the line into prohibited discrimination?

Anti-discrimination law,[3] primarily an outgrowth of the Civil Rights Movement, was designed first and foremost to address the persistent race discrimination and subordination of African

1. California law prohibits employers from discriminating on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." CAL. GOVT CODE § 12940 (West Supp. 2004).

2. The Civil Rights Act of 1964 prohibited discrimination or segregation in places of public accommodation, public facilities, federally assisted programs, education, and employment. 42 U.S.C. § 2000a (2000).

3. I use the term anti-discrimination law to refer to legal protections that arise out of constitutional equal protection jurisprudence and statutory analysis. The relevant statutes include section 1981 of the Civil Rights Act of 1991, 42 U.S.C. § 1981 (2000); title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (2000) [hereinafter Title VII]; the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000) [hereinafter ADEA] and the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter ADA].

Americans.[4] The development of anti-discrimination law in the employment context was designed and applied with the elimination of race discrimination in mind. The expansion of anti-discrimination law to older workers has taken place within a legal system that encourages groups to present themselves as "similar to" African Americans.[5] The more dissimilar the groups, however, the more difficult it is to hold the fundamental anti-discrimination principles together in a coherent whole. Dissimilarities among groups protected under the umbrella of anti-discrimination laws raise concerns about whether the law should be applied equally to the new group as well as the old and whether the law adequately addresses the unique problems of the new group. For example, language and accent discrimination do not fit neatly into an anti-discrimination model primarily designed to eradicate race discrimination.[6]

The law provides an imperfect mechanism for making nuanced distinctions between theory and application. In theory, at least, discrimination is discrimination whether directed at racial groups or older workers. In the application of these laws, however, courts often make distinctions and apply anti-discrimination doctrines

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4. With good reason, anti-discrimination law has expanded beyond its historical origins—primarily as a remedy to race discrimination—to protect groups that have faced a similar history of animus and subordination. Anti-discrimination laws typically protect women, religious minorities, ethnic minorities, and the physically challenged.

5. I use the terms "African American" and "black" interchangeably. I sometimes use the term "black" because I am sensitive to the concerns raised by my non-American born, but black-identified friends. I also use the term "African American" to acknowledge the important links to our African ancestry. Occasionally, I use the term "people of color" or "workers of color" to signal that my critique is not limited to a black/white context but often applies to other racial groups as well.

6. Professor Perea demonstrates the inadequacy of Title VII's prohibition against "national origin" discrimination to address many of the types of discrimination faced by ethnic minorities. Juan F. Perea, *Ethinicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 809–10 (1994). Perea argues that discrimination is more likely to occur against persons because of "ethnic traits" (the perceptible manifestations of ethnic difference such as language or accent) than because of "national origin" (meaning the country of origin of the person or the person's ancestors). *Id.*; *see also* Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261, 269–70 (1998) (arguing that Title VII's civil rights model is based on a black/white paradigm that does not adequately address the importance of language issues to Latinos); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329, 1384–87 (1991) (critiquing Title VII jurisprudence's insistence on uniformity in speech pattern and recognizing that the demand for uniformity masks a hidden assumption of an Anglo accent at the center and that such assumptions contribute to the subordination of non-whites).

differently depending on the group seeking protection. The more dissimilar the groups, the greater the dissonance between the theory as developed and the law as applied. The expansion of anti-discrimination law to older workers illustrates this phenomenon. Extending the anti-discrimination norm to older workers has led to an explosion of litigation. Indeed, older workers are the fastest growing group of discrimination plaintiffs.[7]

This article explores the difficulty of applying general anti-discrimination principles to the uniquely positioned group of older workers. Older workers face challenges in the workplace different from those faced by workers of color. Age itself is a temporal concept. It is a group to which each of us, at least potentially, will belong.[8] Older workers transition from insiders (valued employees) to outsiders (devalued and/or obsolete employees) sometimes based on nothing more than the inevitable passage of time. Workers of color, on the other hand, never achieved "insider" status.[9] Black workers continue to experience barriers to full integration into the workplace. Older workers have not faced a history of subordination similar to that of African Americans, for example.[10] These dissimilarities are reflected in the law as applied.

Courts tend to narrow anti-discrimination theories in age cases. While both intentional and unintentional discrimination potentially violate anti-discrimination law as it applies to race, courts are divided as to whether unintentional discrimination vio-

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7. Age discrimination cases are one of the fastest growing areas of employment litigation. In 2003, age discrimination claims accounted for 23.5% of individual charges filed with the EEOC, as compared to 25.4% for individual charges filed under Title VII for all types of discrimination. *See* U.S. Equal Employment Opportunity Commission, CHARGE STATISTICS FY 1992 THROUGH FY 2003, *available at* http://www.eeoc.gov/stats/charges.html (last modified Mar. 8, 2003) [hereinafter EEOC Charge Statistics].

8. Each of us, of course, has a race, or races, but racial categorizations are generally held to be immutable.

9. For a description of the insider/outsider distinction, see, for example, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

10. Title VII generally protects historically disadvantaged groups who have faced historical animus and persistent social and economic disadvantage. The elderly as a group have not faced the same type of animus and persistent social and economic disadvantage. The elderly as a group tend to be wealthier than traditionally defined disadvantaged groups. *See generally* Larry Polivka, *In Florida the Future is Now: Aging Issues and Policies in the 1990s*, 18 FLA. ST. U. L. REV. 401, 423–24 (1991) (quoting Employee Benefit Research Institute, *Trends and Issues in Early Retirement*, 103 EBRI ISSUE BRIEF 1 (June 1990)) (discussing retirement trends and citing "minority women" as older citizens who will need continued employment throughout their later years)).

lates federal age discrimination law.[11] While the cost of a racially diverse workforce is generally considered irrelevant, costs of older workers are relevant considerations for many courts.[12] Some of these differences in application (but not all) can be attributed to differences in statutory language among the various civil rights statutes. But, minor differences in statutory language do not provide a satisfactory explanation of how these laws are applied by courts. I argue that differences between general anti-discrimination principles as stated and as applied also reflect the inevitable tension caused by attempts to apply a uniform model of anti-discrimination theory to dissimilar groups. Accepted principles of legal reasoning dictate that the legal protections should only extend to similarly situated groups. These principles dictate that those seeking to extend anti-discrimination protections beyond race should present themselves as "like" race. But, some groups are more "like" race than others. The failure to recognize relevant differences between groups can have the unintended effect of undermining fundamental principles of anti-discrimination law.[13] This is a process I call "cross-contamination."

Cross-contamination consists of two related problems—an "import" problem and an "export" problem. An import problem is created when doctrines developed to deal primarily with race discrimination are adopted and applied to deal with discrimination facing other groups. Importing these concepts assumes that the two groups are very similar. To the extent that a particular group has faced a similar history of discriminatory treatment in employment as African Americans, use of a similar legal framework to eradicate such discrimination is justified. But, where the manifestations and reasons for discrimination are more pronounced, as between age and race, for example, forcing age discrimination into a race model ignores those situations where the race model does not address the particular problems of older workers.

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11. See *infra* notes 156-66 and accompanying text.

12. See *infra* notes 190-93 and accompanying text.

13. This phenomenon is not limited to discrimination arising under different statutes, such as the ADEA and Title VII, but occurs within Title VII as well. Professor Hebert demonstrates how restrictive concepts developed in sexual harassment cases have been imported into racial harassment cases. *See* Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 820 (1997) ("[l]egal standards refined and given substance in connection with sexual harassment claims . . . have made it increasingly difficult to establish" a racial harassment claim.).

At the same time, the danger of creating an export problem also exists. The export problem occurs when concepts developed to tailor anti-discrimination law for one group (such as older workers) intentionally or unintentionally become part of the more general anti-discrimination model and then are applied inappropriately to anti-discrimination protections for other groups (such as racial groups). I argue that the focus on treating older workers as "like" black workers fails to fully address the unique problems of older workers in the workforce. Further, the emphasis on treating older workers and black workers similarly tends to marginalize the experiences of black workers.

Part II of this article describes the role analogy-based legal reasoning plays in encouraging social groups to present themselves as "like" another group in order to get the benefit of established legal rights. Part III describes the evolution and codification of anti-discrimination principles, focusing on the passage of Title VII of the Civil Rights Act of 1964 and the early cases interpreting the Act and shows that the model that developed was particularly "race" focused. Part IV describes the process by which anti-discrimination principles, developed in the context of race discrimination cases, were adopted into age discrimination jurisprudence and explores the genesis of restrictive concepts designed to tailor race-based doctrine to fit age-related problems. Part V describes the dangers of cross-contamination—the failure of the race model to adequately address problems facing older workers and the danger of restrictive concepts developed in the age context being used to undercut anti-discrimination law as it applies to race.

II. THE ROLE OF ANALOGY IN ANTI-DISCRIMINATION LAW

Basic principles of legal reasoning and the operation of the American legal system encourage the strategy of focusing on the similarities between groups. Principles of analogous reasoning—the process of comparing items to adduce a relevant similarity—allow legal principles developed in one context to apply to similar questions as they arise. American law's reliance on "precedent"-based legal reasoning is one such application of reasoning by analogy. An equally important principle of reasoning by analogy is that one must take relevant differences into account. Anti-discrimination law, however, provides no mechanism for making

such distinctions. Anti-discrimination principles are often mechanically applied without sufficient exploration of difference.

A. *Use of Analogies Lends Moral Force in Support of Extending the Law to New Groups*

Analogies are important legal reasoning tools. They can lead to a greater understanding of another group's struggles.[14] On the other hand, failure to acknowledge dissimilarities can result in marginalization. Professors Grillo and Wildman demonstrate this point with respect to analogies between race and sex discrimination. They describe how comparisons of sexism to racism often marginalize the experiences of people of color. In particular, they state that "[i]n each setting, although the analogy was made for the purpose of illumination, to explain sexism and sex discrimination, another unintended result ensued—the perpetuation of racism/white supremacy. When a speaker compared sexism and racism, the significance of race was marginalized and obscured . . . ."[15] Similarly, analogies between age and race can tend to marginalize the experiences of people of color while at the same time masking the unique experiences of older workers.

The process of comparing items to adduce a relevant similarity ("argument by analogy"[16]) is a fundamental principle of reasoning.[17] By comparing two items that share some properties one can infer that they share some further property.[18] In order for an argument by analogy to have rational force (yield a reliable judgment about the truth of its conclusion based on the assumed truth of its premises), "there must be sufficient warrant to believe that the presence in an 'analogized' item of some particular char-

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14. *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE L.J. 397, 398 (1991) ("Analogies provide [] both the key to greater comprehension [of oppression] and the danger of false understanding."); *see also* Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1581 n.37 (1987) ("Analogizing, or drawing upon one's own experience to understand another's feelings or experiences, is a part of relating to another . . . . One could otherwise not empathize with another's grief at losing a parent at all if one could not draw on one's own experiences of loss . . . .").

15. *See* Grillo & Wildman, *supra* note 14, at 399.

16. Scott Brewer, *Exemplary Reasoning, Semantics: Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926 (1996).

17. *See id.* at 962–75, 1016–18 (discussing the basic model for analogical argument).

18. *See id.* at 1006.

acteristic or characteristics allows one to infer the presence in that item of some particular other characteristic."[19]

Once a group is successful in acquiring support for a legal right or benefit, such as the right not to be discriminated against, that right enjoys a privileged position in the law.[20] When seeking to establish new rights or benefits, new groups seek to take advantage of the privileged position of an existing right by framing their claims as analogous to the existing beneficiaries' claims.[21] In the context of anti-discrimination, application of this principle permits new groups to argue that from the shared characteristic of pay disparities and under-representation in the workforce for example, one can infer that the cause for such outcomes is discrimination. By presenting themselves as "like" race, older workers are able to take advantage of established rights and benefits.[22]

B. *Failure To Acknowledge Difference Can Undermine the Moral Force of Analogy*

Recognition of dissimilarities is an equally important principle of reasoning. This is argument by disanalogy.[23] In an argument by disanalogy, there is a relevant dissimilarity between the target and the source that is sufficient to justify giving the second group a different legal treatment than the first received.[24] In the anti-discrimination context, the law must also consider whether there is a relevant dissimilarity between the target (black workers) and the source (older workers) to justify different legal treatment for age-based employment decisions. As one court de-

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19. *Id.* at 965.

20. This precedent-based system has been justified for utilitarian reasons (to fail to treat similar cases similarly is arbitrary and therefore unjust or unfair) and efficiency reasons (it is too burdensome to establish new rules in every case). *See* EVA H. HANKS, ET AL., ELEMENTS OF LAW 149–94 (1994).

21. *See, e.g.*, Samuel Issacharoff, *When Substance Mandates Procedure:* Martin v. Wilkes *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 215–18 (1992) (discussing the treatment of tenure as a property right).

22. *See* Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 808 (1997) (noting the shift in the EEOC from primarily race and gender discrimination claims to an increasing number of age discrimination claims).

23. Professor Brewer describes this type of argument as "argument by disanalogy." Brewer, *supra* note 16, at 1006.

24. *See id.* at 1006–16.

creed, the fact "[t]hat the law [ADEA] is embodied in a separate act and has its own unique history at least counsel[s] the examiner to consider the particular problems sought to be reached by the statute."[25] Yet, in legal discourse, analogous reasoning is often a one-way street. Precedential legal reasoning does encourage recognition of factual and legal distinction. These distinctions are addressed on a case-by-case method and do not necessarily lend themselves to a more generalized and well-reasoned alternative structure.

C. *The Experiences of Older Workers and Workers of Color Are Disanalogous in Certain Respects*

Both older workers and workers of color have suffered from diminished employment opportunities because of employer discrimination. But, the history and treatment of older workers and workers of color in the labor force are dissimilar in several respects.

1. Race, Segregation, and Subordination

Race and age discrimination arise out of very different social and historical contexts. Title VII was originally designed to address the legacy of American racism, which is rooted in an American history symbolized by slavery and subordination.[26] Laws protecting workers of color came about as a result of a national movement to end segregation. Older workers have not faced a similar history of slavery and subordination.[27] Unlike the social/political climate driving protections for African Americans, there was no nationwide social mobilization or national consensus that heralded the passage of the ADEA.[28] That is not to say that older workers have not faced widespread discrimination. Be-

25. Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975).

26. *See supra* notes 4–5 and accompanying text.

27. *See supra* note 10 and accompanying text.

28. Popular support is, of course, not the only stick by which we should measure the necessity for laws to redress legal wrongs. On the contrary, the American system of government—with three separate branches of power, including lifetime appointment of Supreme Court justices and election of Senators to six-year terms—helps in the enactment and upholding of laws for the good of the electorate, even where unpopular, rather than bow to the winds of popular change. But laws passed with popular support face less resistance over implementation.

fore the ADEA, ageism operated in full view of American society. Many employers adopted formal policies forcing workers to retire at a certain age and refusing to hire workers over a certain age.[29] The ADEA was passed to remove such barriers. But barriers to older workers are attributed to reliance on unwarranted stereotypes rather than a widespread distaste of older workers in general.

2. Age and Stereotypes

Motivations for age-based decisions overlap but are not necessarily coextensive with the motivations for race-based decisions. Race discrimination[30] arises from multiple impulses. Race-based actions may be based on conscious or unconscious animus toward blacks, a conscious or unconscious need to subordinate on the basis of race, or reliance on inaccurate stereotypes. Federal employment laws sought to confront American racism by outlawing certain employer motivations based on stereotypes and prejudice.

Studies on workplace behavior suggest that ageism in the workplace is often based on stereotypes, rather than prejudice. One study found that older workers were rated better than average in such categories as performance, attitude, and turnover, but these same workers were rated worse in flexibility, health care costs, and suitability for training.[31] Federal employment laws prohibiting age discrimination were directed at outlawing

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29. A 1965 Department of Labor study found that, in those states that did not prohibit setting age-specific limits for employment, over one-half of all employers applied age limitations (forty-five to fifty-five, typically); one-half of all private sector job openings were closed to applicants over fifty-five years of age, and one-fourth would not hire applicants over forty-five. Older workers represented less than five percent of new hires in most businesses. U.S. Dept. of Labor, The Older American Worker, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, at 6–7 (1965) [hereinafter The Older American Worker].

30. Although difficult to define, racism incorporates three interrelated terms—stereotypes, prejudice, and discrimination. *See* JAMES WALLER, FACE TO FACE: THE CHANGING STATE OF RACISM ACROSS AMERICA 25 (1998). Discrimination is the behavioral manifestation of stereotypes and prejudice. *Id.* Stereotypes are cognitive shortcuts that help the brain to process complex information by attributing characteristics to an individual based on the individual's group membership. *Id.* at 28. Prejudice has to do with attitudes, positive or negative, toward an individual because of the individual's membership in a specific group. *Id.* at 33.

31. Robert McCann & Howard Giles, *Ageism in the Workplace: A Communication Perspective*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 171 (Todd D. Nelson ed., 2002).

arbitrary discrimination against older workers, including actions based on inaccurate stereotypes.

The legislative history of the ADEA itself notes some fundamental differences between age and race discrimination.[32] In his report to Congress, the Secretary of Labor made a special point of distinguishing the possible causes and consequences of age discrimination from race discrimination:

> The Nation has faced the fact—rejecting inherited prejudice or contrary conviction—that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. This would be easy—and wrong.[33]

A study conducted by the Labor Secretary before the passage of the ADEA identified four different factors that tend to result in age discrimination in employment: (1) dislike or intolerance of older workers;[34] (2) arbitrary discrimination;[35] (3) where there is

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32. The House Report specifically recognized the employer's interest in achieving some age balance in the workforce. H.R. Rep. No. 90-805, at 7 (1967), *reprinted* in 1967 U.S.C.C.A.N. 2213, 2219.

33. The Older American Worker, *supra* note 29, at 1.

> The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example—race. . . .
>
> Employment discrimination because of race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned.
>
> The most closely related kind of discrimination in the non-employment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*

Id. at 2.

34. *Id.* at 5–6.

35. *Id.* at 2; see *also* Bruce J. Avolio & Gerald V. Barrett, *Effects of Age Stereotyping in a Simulated Interview*, 2 PSYCHOL. & AGING 56 (1987) (finding that simulated interviews suggest older job applicants will receive lower interview ratings than younger applicants or applicants whose age is not designated); Douglas T. Hall & Philip H. Mirvis, *The New Workplace and Older Workers*, *in* AGING AND COMPETITION: REBUILDING THE U.S. WORKFORCE 78–81 (James A. Auerbach & Joyce C. Welsh eds., 1994) (discussing barriers to retention of older workers); McCann & Giles, *supra* note 32, at 163–99. Other studies have shown the effect of ageist behavior on the employment opportunities for older workers, especially a reluctance to train older workers. *See* JEROME M. ROSOW & ROBERT ZAGER, THE FUTURE OF OLDER WORKERS IN AMERICA: NEW OPTIONS FOR AN EXTENDED WORKING LIFE 97–103 (1980) (stating that negative stereotypes result in reluctance to

in fact a relationship between age and ability to perform a job;[36] and (4) as a result of protectionist policies and programs such as seniority systems, pensions, and insurance programs.[37] The Labor Secretary concluded that only arbitrary age discrimination resembled some forms of race discrimination.[38] The Labor Secretary specifically discounted the existence of significant age discrimination arising out of dislike or intolerance of older workers, noting that discrimination against older workers generally takes the form of employment decisions based on stereotypes about older workers rather than animus toward the elderly.[39]

D. *Both Moral and Economic Imperatives Underlie Anti-Discrimination Principles*

The dissimilarities between race and age are further reflected in differences in the moral force given the underlying rationales that justify application of the anti-discrimination principles. In the race context, the application of the anti-discrimination principle is justified because race discrimination is considered immoral[40] and inefficient.[41] The prohibition against race discrimina-

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train older workers).

36. The Older American Worker, *supra* note 29, at 2.

> A third type of discrimination—which should perhaps be called something else entirely—involves decisions not to employ a person for a particular job because of his age *when there is in fact a relationship between his age and his ability to perform the job*. The only reason for marking out this third area is that it clearly does exist so far as the age question is concerned, but does not exist so far as, for example, racial or religious discrimination are concerned.

Id.

37. *See id.*

38. *Id.* at 5. The Secretary identified "arbitrary discrimination" as a significant adverse factor in the employment of older workers and that this waste of a valuable human resource has a negative impact on the economy. *Id.* at 6–9. "There is, nevertheless, clear evidence of the Nation's waste today of a wealth of human resources that could be contributed by hundreds of thousands of older workers, and of the needless denial to these workers of opportunity for that useful activity which constitutes much of life's meaning." *Id.* at 5.

39. *Id.* at 5–6. Congress seemed to accept the validity of the Secretary's conclusions. In its statement of findings and purposes, Congress focused on the statute's goal of eliminating arbitrary discrimination: "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (2000).

40. This moral principle attracts widespread acceptance even among conservative theorists.

41. Conservative theorists like Richard Epstein and Richard Posner argue that employment regulations impede inefficiency.

tion in employment is justified because treating a worker differently because of his/her race is immoral. This moral principle is one of the driving forces behind anti-racism and attracts widespread acceptance even among conservative theorists. This prohibition against age discrimination, on the other hand, does not elicit the same universal agreement that age distinctions are immoral.[42] General economic principles support the general proposition that treating workers based on individual ability promotes efficiency. Employers do not have perfect information about an individual worker and an employer's attempt to acquire such individual information can be costly. Therefore, many employers resort to the use of proxies such as race or age as a substitute for a work-related criteria, such as education level or dexterity. Economic theorists distinguish between this "rational" discrimination, which some argue can be "efficient" and "irrational" discrimination, which can impede efficiency.[43] But, even "rational" race discrimination is problematic for policy reasons. Economic arguments in favor of "rational" age discrimination are more widely accepted.

1. Anti-Racism—A Moral Imperative

The civil rights jurisprudence that underlies Title VII relies heavily on "rights" theory—that some rights are so fundamental from a moral standpoint that they deserve legal protection and, in some circumstances, are so important that they trump any countervailing concerns.[44] The rights-based justification for anti-

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42. *See, e.g.*, Edward P. Lazear, *Why Is There Mandatory Retirement?*, 39 J. POL. ECON. 127–36 (1979) (arguing that the ADEA may impair market efficiency). *But cf.* David Neumark & Wendy A. Stock, *Age Discrimination Law and Labor Market Efficiency*, 5 J. POL. ECON. 1081–1125 (1999).

43. Professor Richard Epstein, for example, vehemently criticizes anti-discrimination laws as unnecessary impediments to market efficiency. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing that discriminators are at a competitive disadvantage and that most discrimination would not survive a competitive market).

44. There are a variety of "rights" theories, including natural rights and social contract theory. For a discussion of natural rights theory, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) and JUDITH JARVIS THOMSON, THE REALM OF RIGHTS (1990). For a discussion of social contract theory, see JOHN RAWLS, A THEORY OF JUSTICE (1971). Several scholars question the "rights" theories. *E.g.*, Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma,* 93 HARV. L. REV. 518 (1980) (arguing that rights are only granted to oppressed groups when it is in the majority's interest, not because they are morally required); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62

discrimination law is not as widely accepted under the ADEA.[45] This fundamental difference is reflected in constitutional equal protection jurisprudence.

Equal Protection jurisprudence has long ascribed different levels of scrutiny for classifications that affect a fundamental right[46] or suspect class. A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[47] The suspect class designation is sparingly applied and generally reserved for "discrete and insular" minorities. The nation's unfortunate history of race discrimination qualifies racial minorities as suspect classes. For that reason, racial classifications are subjected to the highest level of scrutiny—strict scrutiny.[48]

Only classifications that are "like race" are accorded heightened scrutiny under the Constitution.[49] Classifications based on sex are subject to intermediate scrutiny to acknowledge the nation's history of gender discrimination. Age classifications, however, are subject to the lowest standard of constitutional scru-

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MINN. L. REV. 1049 (1978); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1384–94 (1982) (critiquing rights discourse as lacking utility).

45. *See* Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1813–14 (1996).

46. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (applying strict scrutiny to the right of privacy); Bullock v. Carter, 405 U.S. 134 (1972) (recognizing a rational basis for the right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (recognizing rational basis for the right of interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (mandating strict scrutiny for rights guaranteed by First Amendment); Skinner v. Oklahoma, 316 U.S. 535 (1942) (applying strict scrutiny for the right to procreate).

47. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

48. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Supreme Court stated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and . . . call for a more searching judicial inquiry." *Id.* at 153 n.4. The Court discusses the standard of judicial scrutiny of legislative enactments in *Carolene Products*. *Id.* While the regulation at issue in *Carolene Products* was subject to mere rational basis scrutiny, in footnote 4 the Court raised the prospect that racial classifications might be subject to a higher level of scrutiny. *Id.* The Supreme Court discussed extensively the concept of suspect classifications in *Korematsu v. United States*, 323 U.S. 214 (1944). Although the Court upheld the "relocation" of Japanese Americans, the Court recognized "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and "that courts must subject them to the most rigid scrutiny." *Id.* at 216.

49. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 149 (1980) ("[O]nly those classifications that are 'like race' in some relevant sense can responsibly be accorded similar treatment.").

tiny—rational basis. Age classification need only serve a rational government interest in order to be immune from constitutional challenge.[50] Older workers are neither "discrete and insular," nor, according to the Supreme Court, a group in need of "extraordinary protection from the majoritarian political process."[51] Instead, old age marks "a stage that each of us will reach if we live out a normal span."[52] Where an age classification is at issue, courts defer to the judgment of the decision maker as long as the classification serves some rational purpose.

In many respects the theoretical underpinnings of anti-discrimination law rely on the constitutional model of equal protection jurisprudence. While the rationales that underlie the prohibitions against race discrimination complement equal protection jurisprudence, the prohibition against age discrimination in employment does not have the same symbiotic relations with constitutional jurisprudence. Yet, the statutory prohibition against age discrimination as reflected in federal employment laws relies on its close association with race discrimination for its moral force.

While equal protection jurisprudence subjects age classifications to the lowest level of constitutional scrutiny, rational basis, the ADEA lifts older workers to a protected class, potentially on par with workers of color. The debates leading up to the passage of the ADEA focused on the history of unequal treatment of older workers.[53] Moreover, the ADEA liberally invokes Title VII's anti-discrimination mantel in support of its passage and adopts Title VII's anti-discrimination language virtually word for word.

It is in the application of the ADEA that the reliance on the race model raises problems. The differences between the pro-

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50. For a further discussion of suspect classifications, see *id.* at 145–70.

51. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (quoting *Rodriguez*, 411 U.S. at 28). In *Murgia*, the Supreme Court rejected plaintiffs' argument that age classifications deserved heightened constitutional scrutiny:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Id. at 313.

52. *Id.* "Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict scrutiny." *Id.*

53. *See* Pub. L. No. 88-352, 78 Stat. 241.

tected group of black workers versus the protected group of older workers, many of which are recognized in equal protection jurisprudence but ignored by anti-discrimination statutes, create inevitable tensions in the law as applied in age discrimination cases.

2. Anti-Racism—An Economic Imperative

Anti-discrimination principles are also justified based on efficiency concerns.[54] Two arguments underlie the prohibition against race discrimination—either laws prohibiting race discrimination are efficient or, if not efficient, nevertheless necessary for overriding policy reasons. First, making employment decisions based on "distaste" for workers of color results in an underutilization of human capital. Second, even if anti-discrimination laws can lead to inefficiencies, these inefficiencies are outweighed by general social benefit of anti-discrimination. In age cases, on the other hand, such laws are frequently attacked as promoting economic inefficiency by interfering with the employer's ability to discharge older workers.

Some economists argue that discrimination is only problematic to the extent that it causes market inefficiencies.[55] These theorists distinguish "irrational" from "rational" discrimination. "Irrational" discrimination is discrimination without any attendant social benefit. Discrimination based on animus toward a protected group, for example, has little social benefit, even if it brings pleasure to the individual who discriminated. "Rational" discrimination creates a more complex problem. If the employer is acting rationally, then legal impediments to employer decision-making may, indeed, encourage inefficiencies.

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54. For a more thorough discussion of economic theories of discrimination, see generally GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

55. Richard Epstein argues that the anti-discrimination regulations themselves create inefficiencies, such that, if left to market forces, discrimination would either disappear altogether or at least be rendered harmless. EPSTEIN, *supra* note 58. Epstein's provocative theory has generated a great deal of criticism. Professor Donohue, for example, argues that Title VII is efficient. *See* Donohue, *supra* note 58, at 1425–31; *see also* Paulette M. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555 (1985).

As this theory goes, a "rational" employer will discriminate where the protected characteristic is a useful proxy[56] for job qualifications. Employers often resort to proxies where precise information is costly to obtain. In theory, reliance on a proxy may be appropriate where it is not a cover for bias toward workers but is based on purely economic considerations, such as costs.[57] For example, because "[s]eniority and longevity often influence salary and fringe benefit levels" and "[b]ecause these factors correlate with age" some employers argue that discriminating against costlier older workers is "rational."[58] As this theory goes, employers are reluctant to hire older workers, not because of assumptions or misapprehensions about the workers' ability, but because, in general, they cost more.

The second part of the "rational" discrimination argument posits that, even if the employer makes ageist decisions based on stereotypes, because the stereotypes are not necessarily inaccurate such actions should not trigger legal protection for the older worker. Sometimes the stereotypes are accurate. There may in fact be a relationship between age and ability to perform a specific job. Because the rate of this decline varies from individual to individual, the role of the law is to prevent employers from generalizing about an older worker's abilities by insisting that, wherever possible, an employer must make an individualized determination of a particular employee's fitness to perform the specific job at issue.[59] But where such a correlation can be shown, the employer may discriminate.

Reliance on proxies to justify discrimination is much more controversial in the race context. With respect to race, while there may be demonstrable statistical discrepancies in work characteristics based on race, such as education level achieved, the idea of any correlation between race and inherent physical or mental

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56. For employment purposes, a proxy is where the employer uses a protected characteristic as a substitute for another trait. For example, an employer uses age as a proxy for manual dexterity.

57. Hall & Mirvis, *supra* note 36, at 78–79 (discussing the cost barrier to employment of older workers); *see* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1639–43 (1991) (arguing that statistical discrimination can persist if there are actual differences in productivity between groups but should not persist if there are no actual differences in productivity).

58. Stevan J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 232 (1990).

59. *See* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 421–22 (1985).

ability is summarily rejected.[60] Rather, racial disparities seen in job-related "abilities" are generally traced to a legacy of segregation and subordination.[61] Thus, reliance on race as a proxy for job characteristics, even if fairly accurate, is nevertheless morally troubling because it tends to perpetuate the social realities that make the predictions accurate.[62]

Case law reflects this tension. Age proxy theory has developed somewhat differently than race proxy theory. The case law presents a confusing development of proxy theory in age cases. Initially, most courts treated age proxy as they did race proxy—that some proxies are so closely related to age that an employer's reliance on them constitutes per se age discrimination.[63] Other courts such as the Supreme Court in *Hazen Paper Co. v. Biggins*,[64] held that reliance on a trait correlated with age might be evidence of intentional discrimination, but not of age discrimination per se.[65] The Court in *Biggins* concluded that the ADEA is not violated where the employer acts "because of" some feature other than age, even if that feature (such as pension vesting)

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60. *E.g.*, CLAUDE S. FISCHER ET AL., INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH (1996); INTELLIGENCE, GENES, AND SUCCESS: SCIENTISTS RESPOND TO THE BELL CURVE (Bernie Devlin et al. eds., 1997); MEASURED LIES: THE BELL CURVE EXAMINED (Joe L. Kincheloe et al. eds., 1996); THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS (Russell Jacoby & Naomi Glauberman eds., 1995); THE BELL CURVE WARS: RACE, INTELLIGENCE AND THE FUTURE OF AMERICA (Steven Fraser ed., 1995).

61. Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L. J. 1659, 1667–70 (1991).

62. *See* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 203–08 (1992). Professor Alexander argues in favor of a per se ban on the use of race proxies. *Id.* at 205. First, the use of race as a rational proxy "may be extrinsically immoral because of the social effects of such use." *Id.* Second, claimed uses of "rational" race proxy will often be a cover for an immoral bias. *Id.* Third, even if the use of race as a proxy is not immoral, forbidding its use in employment is "unlikely to infringe the employers' moral rights." *Id.* Fourth, a per se ban on the use of race proxy may be easier to administer rather than having to adjudicate its use on a case-by-case basis. *Id.* Because the line between the moral rights of discriminators and victims is often difficult to draw, Professor Alexander argues that the law should not concern itself with all possible violations of moral rights, but only prohibit those types of discrimination that are most likely to be immoral, meaning most likely to violate the victim's rights or to cause the most social harm. *Id.* He argues that race discrimination is most likely to be immoral. This is less true for age discrimination. *Id.* at 204.

63. *See* Robert J. Gregory, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After* Hazen Paper Co. v. Biggins, 11 HOFSTRA LAB. L.J. 391, 393–94 (1994) (arguing that a limited proxy theory survives *Biggins*).

64. 507 U.S. 604 (1993).

65. *Id.* at 613.

closely correlates with age.[66] The Court used the unique history of the ADEA to support its interpretation.[67] The Court did not address how *Biggins* should be used in race cases, but made clear that in age cases an employer is not forbidden to rely on factors closely correlated with age.[68]

Principles of analogous legal reasoning encourage treating age discrimination as more "like" race than different from race. The rationales that lend force to anti-racist principles do not necessarily lend the same force to ageist decisions.

III. THE RACE-BASED ANTI-DISCRIMINATION MODEL

The anti-discrimination model that arose out of the civil rights movement was designed primarily to address race discrimination in private and public life. Activists sought to reverse centuries of formal and informal subordination of African Americans through application of anti-discrimination principles, both under the Constitution and as codified in civil rights statutes.

The employment discrimination that was prevalent and legal for much of this nation's history represented a formidable threat to the livelihood of all who suffered under it.[69] Title VII of the Civil Rights Act of 1964 deals specifically with discrimination in employment and prohibits discrimination on the basis of race, color, religion, sex, or national origin.[70] Section 703 provides:

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66. *Id.* at 616. Professor Gregory argues that while the Court in *Biggins* rejected the broadest version of proxy theory, it did not preclude the possibility of using proxy theory as evidence of intentional discrimination. *See* Gregory, *supra* note 49, at 393–94.

67. *Biggins,* 507 U.S. at 614.

68. *Id.* at 616.

69. In 1965, a non-white man must have had between one to three years of college before he could expect to earn as much as a white man with less than eight years of schooling. Andrew F. Brimmer, *The Negro in the National Economy, in* THE AMERICAN NEGRO REFERENCE BOOK 260 (John P. Davis ed., 1966). In 1959 black workers earned $612 for every $1,000 for whites. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 101 (1992). Between 1947 and 1964 the median income of non-white families was less than three-fifths of white families. U.S. DEP'T OF LABOR, THE NEGROES IN THE U.S.: THEIR ECONOMIC AND SOCIAL SITUATION, BULL. NO. 1511, at 13 (1966). Between 1954 and 1968 the unemployment rate for non-whites was more than double the rate for whites. U.S. DEP'T OF LABOR, Manpower Report of the President, 237 (1968); ECONOMIC REPORT OF THE PRESIDENT 255 (1969).

70. 42 U.S.C. §§ 2000e-2(a) to 2000e-2(n) (2000).

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[71]

Although Title VII protects against discrimination on the basis of religion, sex, or national origin,[72] the primary concern was America's race problem[73]—specifically the conditions of African Americans.[74]

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71. *Id.* § 2000e-2(a).

72. While the history leading up to the bill's passage was focused on race relations, as a result of a series of compromises and other maneuvers, the text of the civil rights bill was not limited to ending race discrimination, but included discrimination on the basis of color, creed, national origin, and sex. 42 U.S.C. § 2000e-2(a). An opponent hoping to derail the entire bill apparently added "sex" to the employment provision of the bill. *See* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–16 (1985). But there was very little public debate about the type, degree, or frequency of discrimination faced by these additional groups. *Id.* at 117. As each of these groups rightfully demanded protection under the statute, they framed their claims in terms of their similarity to race plaintiffs.

73. In his speech to the nation before introducing the bill in Congress, President Kennedy made specific reference to the goal as eliminating inequalities based on race:

> One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.

WHALEN & WHALEN, *supra* note 72, at xx.

Attorney General Robert Kennedy emphasized the Act's racial purpose in his testimony at the first hearing of the bill before the House Judiciary Committee:

> With respect to the bill [H.R. 7152] in its entirety, it must be emphasized that racial discrimination has been with us since long before the United States became a nation, and we cannot expect it to vanish through the enactment of laws alone. But we must launch as broad an attack as possible.

Id. at 5.

President Lyndon Johnson emphasized the goal of the law, to eliminate racial inequalities, in his televised speech to the nation before signing the Civil Rights Act of 1964 into law.

> I am about to sign into law the Civil Rights Act of 1964. I want to take this occasion to talk to you about what the law means to every American. We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain inalienable rights. Yet many Americans do not enjoy these rights. We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skin. . . .

The Civil Rights Act of 1964 came about as the result of protests against racial segregation.[75] The racialization of American society into black/white resulted in the legal, cultural, and geographic separation of the races. The legal separation of the races continued well past the formal abolition of slavery.[76] The Jim Crow laws in the South, for example, separated the races in places of public accommodation. Many employers also adopted formal segregationist policies. But by the 1960s a well-organized campaign to end formal racial segregation swept the country.[77] Civil rights leaders carried on a multi-pronged battle against segregation. The National Association for the Advancement of Colored People challenged segregation in the courts.[78] Civil rights organizations, such as the Student Non-Violent Coordinating Committee, Congress on Racial Equality, the Southern Christian Leadership Conference, and others took their protests to the streets, bringing their fight directly into American homes via television.[79] The violent response to peaceful protests focused the national spotlight on the condition and treatment of African Americans. The response of Birmingham Chief of Police, Bull Connor, to the peaceful protests by school children—turning water hoses and police dogs on them—was broadcast both nationally

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Id. at 227.

74. Anti-discrimination law is often viewed as representing a black/white racial paradigm that does not fully address the realities of non-black people of color. For a critique of the limits of the black/white racial paradigm, see, for example, ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 58–60 (1999); Grillo & Wildman, *supra* note 14, at 401–10.

75. The anti-discrimination laws that made up the Civil Rights Act of 1964 sought to appease those protesting the systemic racial inequities that existed in American society. No longer just content with nonviolent protests and no longer confined to the South, urban violence protesting racism and segregation spread throughout the country. The National Advisory Commission on Civil Disorders reported 8 major uprisings, 33 serious uprisings, and 123 minor incidents. Report of the National Advisory Commission on Civil Disorders 65–66 (1968).

76. American racism is rooted in an American history symbolized by slavery, an institution aptly described as evil. The "peculiar" American institution of slavery was justified on the twin beliefs of the racial inferiority of African Americans and biological determinism. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 122, 189 (7th ed. 1994); George W. Ellis, *The Psychology of American Race Prejudice*, *in* RACISM: ESSENTIAL READINGS 10 (Ellis Cashmore & James Jennings eds., 2001) (describing racism as based on a belief that blacks are naturally inferior to whites and a system of social, economic, and political benefits for whites at the expense of blacks).

77. *See supra* note 5 and accompanying text.

78. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483, 484 (1954) (ending racial segregation in schools).

79. *See, e.g.*, HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS (1964).

(and internationally) and further mobilized support for an end to segregation.[80] An increasing number of Americans of all races took part in the protests.[81] The escalating violence and tension brought increasing public pressure for action to bear on the President and Congress to act.[82]

Years of protest, civil disobedience, sustained, organized, and unrelenting challenge to the evil of segregation culminated in the passage of the Civil Rights Act of 1964,[83] which passed with popular support. With the passage of the Civil Rights Act of 1964, Congress left many unanswered questions. Congress failed to define "discrimination" in the statute, for example. It was left to the courts to determine the parameters for liability, in other words, to define which employer actions violated the statutes.

A. *Liability Theories Expanded To Strike at the Full Spectrum of Race Discrimination*

Early cases applying anti-discrimination principles in employment were focused on race, eliminating race discrimination in employment.[84] It was in these early cases that the major compo-

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80. Hundreds of demonstrations and thousands of arrests took place in the weeks following the children's campaign. *See* WHALEN & WHALEN, *supra* note 72, at 19 ("In the 10 weeks following the children's march in Birmingham, there were 758 demonstrations, with 13,786 people arrested in 75 cities in the South alone.").

81. *See id.* ("A July *Newsweek* poll revealed that forty percent of black people had taken part in a sit-in, marched in a mass protest, or picketed a store.").

82. *See id.* at 33–34. Examples of the escalating violence include the murder of civil rights activist Medgar Evers and the bomb that exploded under the steps of the Sixteenth Street Baptist Church in Birmingham, Alabama, killing four little girls. *Id.*

83. For a description of the events leading up to the passage of the Civil Rights Act of 1964, see generally Robert D. Loevy, *Introduction: The Background of the Civil Rights Act of 1964, in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 10–42 (Robert D. Loevy ed., 1997). For a description of the legal history of the civil rights movement, see LAWRENCE FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 297–311 (2002); ZINN, *supra* note 79. For a first person account of the strategy and tactics employed to get the bill passed over resistance, see Joseph L. Rauh, Jr., *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963–64, in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (Robert D. Loevy ed., 1997).

84. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the first Supreme Court case interpreting the substantive provisions of Title VII, the Court held that high school diploma and intelligence test requirements that had a disparate impact on African American workers violated Title VII. *See id.* at 431–32. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court permitted the plaintiff to proceed with his cause of action for intentional discrimination without direct evidence of the employer's discriminatory motive. *See id.* at 798–804.

nents of anti-discrimination law were developed, including formulating the first definition of "discrimination,"[85] developing the theories of liability;[86] and laying out the structures of proof plaintiffs must follow in establishing liability.[87] These early decisions establishing liability theories and altering proof structures were built upon fundamental assumptions about the nature of race discrimination in America—that race discrimination in employment was rampant, it was hard to prove, and that past discrimination contributed to the poor social conditions of African Americans. These assumptions were reflected in the expansion of liability theory to include unintentional employer acts, the lowering of the standard of proof in intentional discrimination cases, and the development of a theory of affirmative action to mitigate the present effects of past discrimination.

1. A Lower Standard of Proof of Intent

Traditional anti-discrimination law forbade intentional race discrimination. In intentional discrimination cases (disparate treatment cases), the plaintiff must prove that the employer treated him or her less favorably than others because of his or her protected characteristic, such as race.[88] Proof of the employer's motive is crucial to proving discrimination in these cases.[89]

Early Title VII courts adopted a special proof structure for proving intent. The special proof structure permits plaintiffs to take advantage of relaxed pleading standards and favorable inferences. The special proof structure acknowledged that victims of race discrimination are unlikely to have direct evidence of discrimination (e.g., a supervisor who says, "you're fired because you're black") and recognizes the difficulty of proving intent using circumstantial evidence. The Supreme Court adopted a special proof structure that applies to circumstantial evidence cases. The employee can create a legally rebuttable presumption of inten-

85. There was some debate whether "discrimination" focused on employer intent or effect of employer actions. *See, e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656, 668–69 (1987); Thomas v. Eastman Kodak Co., 183 F.3d 38, 58–61 (1st Cir. 1999); Ferrill v. Parker Group, Inc., 168 F.3d 468, 472–73 (11th Cir. 1999).

86. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977).

87. *See infra* notes 90-99 and accompanying text.

88. *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

89. *Id.*

tional discrimination merely by proving a bare minimum of facts—the employee's race and that he or she was imminently qualified for a job but was passed over. The special proof structure permits plaintiffs to take advantage of relaxed pleading standards and favorable inferences.[90] Specifically, in *McDonnell Douglas Corp. v. Green*,[91] the Court adopted a special proof structure for intentional discrimination cases based on circumstantial evidence.[92] The plaintiff must establish a prima facie case of discrimination by demonstrating that the plaintiff belongs to a protected group, that the plaintiff applied for and was qualified for the job, and despite his/her qualifications, the plaintiff was rejected, and after his/her rejection the position remained open.[93]

Under this special proof structure, proving the prima facie elements results in "a legally mandatory, rebuttable presumption" in favor of the plaintiff.[94] The burden then shifts "to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[95] Finally, the plaintiff must be given an opportunity to show that the employer's stated reason is mere pretext.[96] The inference of intent from proof of the prima facie factors reflects a judgment that acts, not otherwise explained by common non-discriminatory reasons—such as the employee was unqualified or failed to apply for the job—more likely were the result of discrimination.[97] As the Supreme Court explained in *Furnco Construction Corp. v. Waters*:[98]

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90. *See infra* note 114–19 and accompanying text.

91. 411 U.S. 792 (1973).

92. *See Int'l Bhd. of Teamsters*, 431 U.S. at 358 n.44 (1977).

93. *See McDonnell Douglas*, 411 U.S. at 802 (1973).

94. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

95. *See McDonnell Douglas*, 411 U.S. at 802.

96. *See id.* at 804. The Supreme Court also adopted a special proof structure for proving systemic discrimination against a class of plaintiffs. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court held that Title VII plaintiffs can make out a systemic disparate treatment case using circumstantial evidence by establishing that the employer has engaged in a pattern or practice of discrimination. *See id.* at 334–43. Like in individual disparate treatment cases, proof of the prima facie elements results in a presumption in favor of the plaintiffs. *See id.* at 342–43. In these cases the employer's discriminatory motive can be inferred from statistical disparities as well as anecdotal evidence of disparate treatment of individual class members. *See id.* at 337–40. Like in individual cases, once a plaintiff satisfies the prima facie case, the employer has an opportunity to rebut. *See id.* at 342.

97. *See Burdine*, 450 U.S. at 254 n.7.

98. 438 U.S. 567 (1978). In *Furnco*, three African American bricklayers made out a prima facie case of discrimination against their employer for the employer's refusal to hire them. *Id.* at 569. The employer, accused by these bricklayers of discrimination, "hired only

> A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, . . . it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.[99]

Similarly, the Supreme Court's willingness to infer discriminatory intent from the absence of workers of color in an employer's workforce reflects an acceptance of fundamental assumptions about the persistence of racial inequality. In *International Brotherhood of Teamsters v. United States*,[100] the government alleged that the employer intentionally discriminated on the basis of race in assigning drivers.[101] In support of its argument the government offered evidence that African American and Latinos, who represented a significant percentage of the community from which the drivers were hired, were concentrated in the lower paying city driver positions and that none filled the line driver positions.[102] Although the employer did not have a formal policy of assigning jobs based on race, the Court relied on the stark absence of Latinos and African Americans in the line driver position to infer intent.[103] The Court concluded that "[s]tatistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination."[104] Rather than forcing each individual plaintiff to prove the employer intended to discriminate against him or her individually, the Court accepted the idea that the absence of diversity is the equivalent of circumstantial evidence of intent and that non-discriminatory employment practices should result in a

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persons whom he knew to be experienced and competent . . . [bricklayers] or persons who had been recommended to him as similarly skilled." *Id.* at 570. The court of appeals reversed the district court ruling that the plaintiffs failed to make out a prima facie case of intentional discrimination. *Id.* at 569. The Supreme Court reversed and remanded the case. *Id.* The Court agreed that the company had effectively rebutted plaintiffs' prima facie case of intentional discrimination. *Id.* at 578. But, the Court concluded, a prima facie showing establishes merely a rebuttable presumption; it is not equivalent to an ultimate finding of discrimination. *Id.* at 576–77.

99. *Id.* at 577 (citation omitted).

100. 431 U.S. 324 (1977).

101. *Id.* at 329.

102. *Id.*

103. *Id.* at 342 n.23.

104. *Id.* at 340 n.20.

racially diverse workforce; therefore, it is unlikely that a racially segregated workforce would arise by chance.[105] In both *McDonnell Douglas* and *Teamsters*, the Supreme Court made clear that a wide range of circumstantial evidence can support a finding of intent to discriminate.

2. Mitigating the Effects of Past Discrimination

The Supreme Court was also concerned with the present effects of past racial discrimination. It was in this context that the Court designed theories to mitigate the effects of past discrimination. The Court developed the theory of disparate impact to attack neutral employer policies that perpetuated the effects of past racial discrimination.[106] The Court also approved the employers' voluntary use of affirmative action to address persistent racial inequities. In *United Steelworkers of America v. Weber*,[107] a white employee challenged the validity of an affirmative action plan adopted as part of a collective bargaining agreement.[108] The plan was "designed to eliminate conspicuous racial imbalances in . . . [the employer's] then almost exclusively white craftwork force."[109] The plan reserved 50% of the openings in in-plant craft-training programs for black employees.[110] The plan was to continue until the percentage of black craft workers in a plant was commensurate with the percentage of blacks in the local labor force.[111] The Court held that Title VII did not forbid all forms of private, voluntary affirmative action.[112]

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[113]

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105. *See id.* at 339–40 & n.20.
106. *See infra* notes 115-121 and accompanying text.
107. 443 U.S. 193 (1979).
108. *Id.* at 198–99.
109. *Id.* at 198.
110. *Id.*
111. *Id.* at 199.
112. *Id.* at 208.
113. *Id.* at 204 (citation omitted) (quoting Sen. Humphrey, 110 Cong. Rec. 6552 (1964)). The recent decision by the Supreme Court in Grutter v. Bollinger reaffirmed the use of affirmative action in school admissions. 539 U.S. 306 (2003).

The Court looked to the legislative history of Title VII as well as to the goals of the statute to support its ruling.[114]

3. Disparate Impact: Liability for Unintentional Discrimination

Supporters of the new civil rights laws sought to expand the scope of liability to include liability for unintentionally discriminatory acts as well. Eventually, this is where constitutional doctrine and statutory doctrine diverged. Civil rights activists were unsuccessful in their attempts to incorporate liability for unintentional acts into equal protection jurisprudence.[115] Under federal employment laws, however, both liability theories were recognized. Employers could be liable for both intentional and unintentional acts.[116]

In these disparate impact cases, intent is not the basis of liability. The challenge is to an employment practice that is facially neutral in its treatment of a protected group but falls more harshly on a protected group and cannot be justified by business necessity. Of course, recognizing liability for unintentional acts does not result in automatic employer liability for every policy that impacts racial groups differently. It is only for those disparate impacts for which the employer is unable to demonstrate a business justification.

Disparate impact theory was not explicitly provided for in the original version of Title VII, but implied from the statutory language and history. The justification for extending employment laws to include this theory rested primarily on concerns about the invidious nature of race discrimination in employment. The Supreme Court in *Griggs v. Duke Power Co.*[117] inferred disparate impact from the statutory language of Title VII. In *Griggs*, a group of African American workers challenged an employer policy requiring employees to have a high school diploma and to pass a general intelligence test in order to transfer to other jobs within

114. *Weber*, 443 U.S. at 201–07.

115. In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court rejected application of disparate impact theory under the Constitution. *See id.* at 244–48.

116. These two theories of liability became known as disparate treatment theory referring to intentionally discriminatory acts and disparate impact theory referring to unintentionally discriminatory acts.

117. 401 U.S. 424 (1971).

the company.[118] The Court concluded that Title VII prohibited unintentional discrimination as well as intentional discrimination.[119] The goal of the statute, according to the Court, was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[120] Under this standard, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[121] The *Griggs* Court looked to the goals of Title VII and determined that the goal of equal opportunity meant more than eliminating overt discrimination, but included the removal of institutional barriers that continued to operate to the disadvantage of black workers. These early cases demonstrate the Court's belief in the pervasiveness of race discrimination and its commitment to interpret Title VII to address both overt and subtle forms of discrimination.

B. *Combating Racism By Limiting Employer Defenses to Discrimination*

The limited defenses available to employers in discrimination cases also demonstrate concern with the pervasiveness of race discrimination. Defenses to race discrimination include a combination of statutory and common law defenses.[122] Only two of Title VII's statutory defenses make direct reference to race—defenses based on application of a bona fide seniority or merit system[123] or use of professionally developed tests.[124] Further, the few defenses

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118. *Id.* at 426–28.
119. *Id.* at 429–30.
120. *Id.*
121. *Id.* at 430.
122. *See* 42 U.S.C. § 2000e-2(h)(2000).
123. 42 U.S.C. § 2000e-2(h) provides:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . . .

124. 42 U.S.C. § 2000e-2(h) further provides:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test pro-

that are recognized are interpreted narrowly, and courts limit the types of rationales employers can present in defense to race discrimination.[125] Although it incorporates a "bona fide occupational defense," which allows the employer to defend an otherwise discriminatory decision if it can show the discriminatory act is supported by a bona fide business reason.

Section 703e(1) of Title VII provides a statutory defense to discrimination on the basis of religion,[126] sex,[127] and national origin where the employer can show that absence of the protected characteristic is a bona fide occupational qualification ("BFOQ") for the job. It states:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .[128]

The BFOQ defense does not apply to race discrimination, however. In effect, Congress made a legislative determination that race is never a "bona fide occupational qualification" for employment.[129] By excluding the BFOQ defense in race cases, Congress

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vided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

125. *See, e.g.*, Ferrill v. Parker Group, Inc., 168 F.3d 468, 473 (11th Cir. 1999) (holding the bona fide occupational defense inapplicable to race discrimination).

126. 42 U.S.C. § 2000e(j) states, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

127. 42 U.S.C. § 2000e-2(h) provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of title 29.

128. 42 U.S.C. § 2000e-2(e)(1). According to the Interpretive Memo that accompanied Title VII, "examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion." 110 CONG. REC. 7213 (1964) (Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senator Joseph S. Clark and Senator Clifford P. Case, Floor Managers).

129. One explanation of the lack of a race BFOQ is that Congress recognized that race discrimination is more harmful than discrimination on the basis of sex, religion, or national origin. Another explanation is that Congress believed (perhaps mistakenly) that a

cemented the statute's focus on race as its primary concern. In addition to the statutory defenses, the courts have inferred additional common law defenses to discrimination cases. An employer can rebut an inference of discriminatory motive by showing that the employer had a "legitimate, nondiscriminatory reason" for its decision.[130]

Defenses to race are interpreted narrowly. Early cases placed the burden on the employer to prove it acted pursuant to a legitimate non-discriminatory reason to avoid liability.[131] Later cases somewhat loosened the strictures on an employer's ability to defend against discrimination cases. In *Texas Department of Community Affairs v. Burdine*,[132] the Court held that the employer need only offer evidence of a legitimate reason for its actions, rather than prove it acted pursuant to that legitimate reason.[133] Later cases greatly expanded the types of reasons an employer can offer in defense of its actions. The scope of "legitimate" reasons seems to include any reason that does not expressly violate the anti-discrimination principle even if it violates some other of the employer's legal obligations.[134]

The business necessity defense is available to the employer in unintentional discrimination cases. In unintentional discrimination cases the employer can prevail if it shows that the employ-

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race BFOQ was unnecessary because certain types of benign race discrimination did not rise to the level of a Title VII violation. For example, Senators Clark and Case in their interpretive memorandum to Title VII acknowledged that Title VII did not prohibit directors from discriminating on the basis of physical appearance. They used the example of casting a film in Africa for the proposition that the director could validly exclude those actors who did not appear African. 110 CONG. REC. 7212, 7213 (1964).

130. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973). In offering its legitimate non-discriminatory reason, the employer is held to a lower proof standard—a burden of production rather than a burden of persuasion. *See id.* The burden that shifts to the employer is to rebut the presumption of discrimination established by proof of the prima facie case. *See id.* The employer need not persuade the factfinder that it was actually motivated by the proffered reason; the employer need only raise a genuine issue of fact by introducing admissible evidence of the reason for the adverse action. Texas Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 254–55 (1981).

131. *See, e.g.*, Burdine v. Texas Dept. of Cmty. Affairs, 608 F.2d 563 (5th Cir. 1979), *overruled by* 450 U.S. 248 (1981); Williams v. Bell, 87 F.2d 1240, 1246 (D.C. Cir. 1978); Higgins v. Gates Rubber Co., 578 F.2d 281, 284 (10th Cir. 1978).

132. 450 U.S. 248 (1981).

133. *Id.* at 255–58 (holding that the employer has a mere burden of production rather than a burden of persuasion with respect to the "legitimate non-discriminatory reason" defense).

134. Indeed, in *Hazen Paper Co. v. Biggins*, the Court upheld as legitimate an employer's admission that it intended to violate ERISA as a "legitimate non-discriminatory reason" for age discrimination. 507 U.S. at 612.

ment criteria that caused the under representation was "job-related" and consistent with a "business necessity." In general, the business necessity defense has been interpreted narrowly, in part, no doubt, as a result of the judicial acceptance of the prevalence of race discrimination.[135]

The courts further limit the types of rationales employers can present in defense to race discrimination. Early on courts rejected the idea of costs as a justification for race discrimination. In early Title VII cases, for example, employers argued that integrated workforces would harm the employer's bottom line, either because customers would boycott such establishments or integration would increase firm governance costs because of coworker animosity. In *Robinson v. Lorillard Corp.*,[136] the Fourth Circuit rejected the employer's business necessity defense that was based on a cost rationale: "[A]voidance of the expense of changing employment practices is not a business purpose that will validate the racially differential effects of an otherwise unlawful employment practice."[137] The societal goal of eliminating race discrimination outweighed concerns about the additional costs an employer must absorb in order to further that goal.

While the Supreme Court has never specifically addressed the cost justification defense in a race case, the Court nevertheless made its view of cost justifications under Title VII clear in *Los Angeles Department of Water & Power v. Manhart*,[138] a sex discrimination case. In *Manhart*, the employer required female employees to make larger contributions to the pension fund than male employees.[139] The employer argued, based on evidence including mortality tables, that since women on average live longer than men, the cost of a pension for the average retired female would be greater than for the average male, and therefore female

135. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also supra* text accompanying note 84.

136. 444 F.2d 791 (4th Cir. 1971).

137. *Id.* at 800; *see also* United States v. N.L. Indus., Inc., 479 F.2d 354, 366 (8th Cir. 1973) ("[W]e do not believe that the alleged excessive costs in changing the seniority system can be substantiated. However, assuming arguendo that the proposed remedy will entail some additional costs, we adhere to the Fourth Circuit's view that, '[A]voidance of the expense of changing employment practices is not a business purpose that will validate the racially differential effects of an otherwise unlawful employment practice.'"). *Id.*

138. 435 U.S. 702 (1978).

139. *Id.* at 705.

employees were justifiably required to make higher contributions.[140] The Court rejected the employer's cost defense.

> In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes.... But neither Congress nor the courts have recognized such a defense under Title VII.[141]

Although *Manhart* is a sex discrimination case, the Court's broad language rejecting the cost justification defense "under Title VII" seems to preclude the cost justification rationale under any Title VII category, including race, a view consistent with the treatment of cost rationales in lower courts.

IV. THE AGE MODEL: IMPORTING FROM RACE

> Take the sum of human achievement in action, in science, in art, in literature; subtract the work of men above 40, and while we should miss great treasures, even priceless treasures, we would practically be where we are today. It is difficult to name a great and far-reaching conquest of the mind which has not been given to the world by a man on whose back the sun was still shining. The effective, moving, vitalizing work of the world is done between the ages of 25 and 40.
>
> –William Osler 1908[142]

Anti-discrimination principles rightly apply more broadly than the limited context of race. The goal of eliminating inequities based on gender, for example, has resulted in the wide application of these anti-discrimination principles in that context. Federal employment laws extend the anti-discrimination principle to actions based on religion, national origin, age, and disability. But the methodology of applying a race model to address discrimination against disparate social groups raises concerns. What adjustments if any should be added to the race model to accommodate these differences? What effect, if any, will this expansion have on existing groups?

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140. *Id.*

141. *Id.* at 716–17.

142. William Osler, *The Osler Deadline,* N.Y. TIMES, Oct. 4, 1908, at pt. 5, p. 11, *in* KERRY SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS 8 (2001).

From the outset, ADEA proponents sought to import general anti-discrimination standards into the ADEA—that is, to treat older workers like black workers before the law. Consequently, many of the formal legal standards adopted in the race context under Title VII were transposed to the ADEA. The push to make age plaintiffs "like race" plaintiffs went beyond emphasizing similarities in statutory language. Proponents focused on similarities between the goals of the two statutes and similarities in the type of discrimination the two groups have faced to advance the argument that age discrimination is analogous to race discrimination and therefore age plaintiffs should have access to the full panoply of discrimination theories. But, as discussed above, older workers and black workers are dissimilar in several respects. Anti-discrimination law provides little or no guidance on how to incorporate the differences. Instead the case law is a study of confusion and incoherence. Courts sometimes ignore the dissimilarities between the two groups and allow determinations about race uncritically to guide their interpretation of age discrimination. In other situations courts take account of the dissimilarities and these dissimilarities are reflected in the law as applied. These courts tend to narrow anti-discrimination theories in age cases and broaden defenses to age discrimination.

A. *The Age Discrimination in Employment Act*

The ADEA, which was passed three years after Title VII, adopted many of the substantive provisions of Title VII.[143] The definition of an "unlawful employment practice" under the ADEA is taken word for word from the Title VII definition of an unlawful employment practice, merely substituting the word "age" for the phrase "race, color, sex, religion, sex, or national origin."[144]

143. The ADEA borrowed many of the substantive provisions from Title VII, but it followed the model of the Federal Labor Standards Act in establishing its enforcement mechanism. *See* Lorillard v. Pons, 434 U.S. 575, 584–85 (1978) (determining that Congress intended for the ADEA's remedial and procedural provisions to follow the Federal Labor Standards Act, rather than Title VII).

144. *Compare* Title VII, § 703, 42 U.S.C. § 2000e-3 (2000), *with* ADEA, § 623, 29 U.S.C. § 623 (2000).

Section 703 of Title VII provides:	**Section 623 of the ADEA provides:**
It shall be an unlawful employment practice for an employer . . .—	It shall be [an] unlawful [employment practice] for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of such individual's race, color, religion, sex, or national origin**; or	(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of such individual's age**;
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, **because of such individual's race, color, religion, sex, or national origin.**[145]	(2) to limit, segregate, or classify his employees [or applicants of employment] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, **because of such individual's age.**[146]

The similarity in language lent weight to the argument that the ADEA should be interpreted similarly to Title VII.[147] Yet, as discussed in Part II.C.1. above differing constitutional standards of review suggest a more complicated interpretation. This underlying disconnect between theory and application is seen in the refusal of many courts to recognize disparate impact theory in age

145. Sections 703(c)–(d), (k)–(m) of Title VII describes additional prohibitions on discrimination. Sections 703(e)–(j) describes exceptions to the anti-discrimination principle. *See* 42 U.S.C. § 2000e-3.

146. 29 U.S.C. § 623(a) (emphasis added). Section 623(c)(1) of the ADEA describes additional prohibitions on age discrimination as well as exceptions to the prohibitions. *See* 29 U.S.C. § 623(c)(1).

147. See, for example, *Trans World Airlines v. Thurston,* 469 U.S. 111 (1984), where the Supreme Court prohibited discrimination on the basis of age in the allocation of employment benefits as such action is prohibited under Title VII. "This interpretation of Title VII of the Civil Rights Act of 1964 [requiring non-discrimination in dispensing of benefits] applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" *Id.* at 121 (citation omitted) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

discrimination cases in courts, refusal to permit "reverse" age discrimination cases,[148] and in the inconsistent application of relaxed pleading standards in age cases. The manner in which these liability theories and proof structures are applied in age cases suggests that at some level courts recognize that the same assumptions do not operate in the age context as they do in the race context. As a result, age plaintiffs cannot necessarily take advantage of the identical liability theories available to workers of color. Nor do age plaintiffs necessarily reap the benefit of all the inferences and presumptions race plaintiffs enjoy. Courts do not merely permit age plaintiffs to "step into the shoes" of race plaintiffs in all circumstances. The rationale for failing to extend disparate impact theory to age cases and the acceptance of cost rationales rely, in part, on unconvincing statutory distinctions.

B. *Similarities in Statutory Language Do Not Necessarily Result in Similar Legal Treatment*

The statutory language that gives rise to liability for race and age discrimination is strikingly similar. Both Title VII and the ADEA prohibit discrimination "because of" race and age, respectively. The "because of" language of section 703 of Title VII gave rise to two main liability theories—disparate treatment and disparate impact.[149] The ADEA's use of the same language to set the liability standard suggests that the liability theories that operate under Title VII should operate under the ADEA as well. Yet several circuits deny older workers access to the disparate impact theory of liability.[150] In this instance, similarity in statutory language does not result in a similar interpretation. The result is a confusing body of law that lacks clear guidance on when age discrimination cases are to be interpreted like race cases and when they should be treated differently.

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148. Just recently the Supreme Court held that the ADEA does not extend to "reverse" age discrimination cases where a younger worker challenges favored treatment of older workers. The Court's age decision stands in contrast to its acceptance of reverse discrimination in race cases. The Court supports its ruling, in part, by relying on "contextual meaning" arguments that "age" as the term is used in the ADEA should be read more narrowly than the term "race" as used in Title VII. *Compare* General Dynamics Land Systems, Inc. v. Cline, 124 S. Ct. 1236 (2004), *with* McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976) (recognizing reverse race discrimination cases).

149. Other theories of liability include harassment and failure to accommodate. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 238–39 (5th Cir. 1971) (recognizing a cause of action based upon maintenance of a discriminatory environment).

150. *See infra* notes 159–64 and accompanying text.

Some parts of the race-based framework are adopted wholesale into the age context. For example, the ADEA's "because of" language does give rise to disparate treatment theory, and the special proof structures plaintiffs must follow for disparate treatment cases adopted under the race model have been transposed into the age model.[151] The same structure of proof applies in class wide age discrimination cases as in class wide race discrimination cases even though the ADEA does not explicitly provide for these types of cases.[152]

But, age cases also diverge from the race model. While an employer's refusal to hire a qualified black worker for an available position generally is presumed to be evidence of unlawful motive,[153] the same inference of discriminatory motive may not necessarily follow from satisfying the prima facie elements of age discrimination. In *Laugesen v. Anaconda*,[154] the Sixth Circuit questioned whether proof of the prima facie elements in an age case should result in the same inference of discriminatory intent.

> While it may not be unreasonable to assume that in a proper case the guidelines established in McDonnell Douglas v. Green can be applied in age discrimination jury cases, we believe it would be inappropriate simply to borrow and apply them automatically.
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> . . . .
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> . . . Thus, while the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, we do not believe that Congress intended automatic

151. The *McDonnell Douglas* structure of proof has been adopted in intentional age discrimination cases. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (finding the disparate treatment theory to be available under ADEA). For a more detailed explanation of discrimination theories, see *supra* notes 20–44 and accompanying text. *See also* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994) ("[An age discrimination plaintiff] may utilize the indirect, burden-shifting method of proof for Title VII cases originally set forth in *McDonnell Douglas Corp. v. Green,* and later adapted to age discrimination claims under the ADEA.").

152. Section 707 of Title VII authorizes the Attorney General to prosecute on a class-wide basis where an employer engages in a pattern or practice of discrimination. Private parties can also bring such class-wide actions under section 707. *See, e.g.*, Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 325 (1977). There is no ADEA equivalent to Title VII's section 707. Courts nevertheless apply the law as developed under Title VII to age discrimination claims. *See* Sperling v. Hoffmann-La Roche, Inc., 924 F. Supp. 1346 (D.N.J. 1996); *see also* King v. General Electric Co., 960 F.2d 617 (7th Cir. 1992); EEOC v. Western Electric Co., 713 F.2d 1011 (4th Cir. 1983); EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980).

153. *See supra* notes 90-105 and accompanying text.

154. 510 F.2d 307 (6th Cir. 1975).

presumptions to apply whenever a worker is replaced by another of a different age.[155]

C. *Most Courts Reject Disparate Impact Theory in Age Cases*

Under Title VII, an employer is liable for unintentional practices that have a disparate impact on a protected group unless the practice is justified by a business necessity.[156] Initially, most courts assumed disparate impact theory applied under the ADEA.[157] The trend now is against recognizing disparate impact theory under the ADEA.[158] The First,[159] Third,[160] Sixth,[161] Seventh,[162] Tenth,[163] and Eleventh[164] Circuits reject the disparate impact theory of liability under ADEA. The Supreme Court is set to resolve this issue in *Smith v. Jackson.*[165] Certain justices have

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155. *Id.* at 312, 313 n.4. See also *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) [hereinafter Consolidated Serv. Sys.], in which the Court stated:

> We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point we shall assume it.
>
> . . . .
>
> The prima facie case . . . requires "*evidence adequate to create an inference that employment decision was based on an illegal discriminatory criterion . . . .*" In the age discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger.

Id. at 311–13 (citation omitted) (quoting *Int'l Bhd. Of Teamsters,* 431 U.S. at 358).

156. *See* 42 U.S.C. § 2000e-2(K)(I)(A)(i).

157. *See, e.g.*, Abbott v. Federal Forge, Inc., 912 F.2d 867, 870 (6th Cir. 1990) (presuming the application of the disparate impact theory); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 691 (8th Cir. 1983) (analyzing the case under a disparate impact theory).

158. The Second, Eighth, and Ninth Circuits, following Title VII precedent, continue to infer disparate impact theory under the ADEA. *See, e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000); EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950 (8th Cir. 1999); Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997); Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997); Smith v. City of Des Moines, 99 F.3d 1466, 1469–70 (8th Cir. 1996); EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1993); EEOC v. Borden's, Inc., 724 F.2d 1390, 1394–95 (9th Cir. 1984); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980).

159. *See* Mullin v. Raytheon Co., 164 F.3d 696, 704 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999).

160. *See* DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995).

161. *See* Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995).

162. *See* EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–77 (7th Cir. 1994).

163. *See* Ellis v. United Airlines, Inc. 73 F.3d 999, 1007 (10th Cir. 1996).

164. *See* Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001).

165. 351 F.3d 183 (5th Cir.), *cert. granted*, 2004 U.S. LEXIS 2386 (Mar. 29, 2004). The Supreme Court was set to decide this issue in 2001 in the case of *Adams v. Fla. Power*

signaled, however, that in their view disparate impact theory should not necessarily apply in age cases.[166]

The rationales against the inclusion of disparate impact theory in age discrimination cases rest, in part, on statutory arguments. The Seventh Circuit in *EEOC v. Francis W. Parker School*,[167] for example, focused on differences in statutory language to support the court's conclusion that disparate impact is not available under the ADEA:

> In the relevant statutory provisions, however, Title VII and the ADEA differ in a significant way. Subsection (2) of Title VII's prohibitions, which was the basis for the Supreme Court's holding in *Griggs v. Duke Power Co.*, proscribes any actions by employers which "limit, segregate, or classify [their] employees or *applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (citation omitted). The "mirror" provision in the ADEA omits from its coverage, "applicants for employment." In light of the ADEA's nearly verbatim adoption of Title VII language, the exclusion of job applicants from subsection (2) of the ADEA is noteworthy.[168]

There are two basic arguments against recognizing disparate impact theory in age cases. First, differences in statutory language reflect congressional intent to reject disparate impact theory in age cases.[169] They argue, for example, that the inclusion in the ADEA of the additional statutory defenses of "reasonable factors other than age" and "good cause" impliedly rejects disparate impact theory.[170] Second, Congress's failure to amend the ADEA to codify disparate impact into the statute after it amended Title VII is tacit acknowledgement of Congress's intent to exclude disparate impact theory in age discrimination cases.[171] These formal

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Corp., 255 F.3d 1322 (11th Cir.), *cert. granted*, 534 U.S. 1054 (2001), but the Court dismissed certiorari. *See* Adams v. Fla. Power Corp., 5345 U.S. 228 (2002).

166. 507 U.S. 604, 618 (1993) (Kennedy, J., concurring). In the concurring opinion in *Hazen Paper Co. v. Biggins*, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, signaled hostility toward disparate impact liability theory in age discrimination cases. Justice Kennedy wrote: "[N]othing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII." *Id.* (Kennedy, J., concurring).

167. 41 F.3d 1073 (7th Cir. 1994).

168. *Id.* at 1077–78 (citations and footnote omitted).

169. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996).

170. *See infra* notes 207–09 and accompanying text.

171. *See id.*

rationales do not completely explain this divergence from the race model.

The First and Eleventh Circuits, for example, argue that by including the "reasonable factors other than age defense" and "good cause" defense, Congress must have intended that no disparate impact liability apply in age cases.[172] According to this argument, "reasonable factors other than age" include factors that may have a disparate impact on older workers. Therefore, by recognizing the "reasonable factors other than age" defense, Congress must have intended to reject disparate impact theory in age cases. In his dissenting opinion in *Metz v. Transit Mix, Inc.*,[173] Judge Easterbrook described the interplay between the ADEA's "reasonable factors other than age" defense and disparate impact theory.[174] According to Judge Easterbrook, the "reasonable factors other than age" defense in the ADEA "impl[ies] strongly that the employer may use a ground of decision that is not age, even if it varies with age," and even if it disparately affects older workers.[175] Similarly, in *Adams*, the Eleventh Circuit justified rejecting the disparate impact theory in part based on the "reasonable factors other than age" language that exists under the ADEA but not Title VII.[176] The Eleventh Circuit followed the reasoning of the First Circuit that if the "reasonable factors other than age" defense is not understood to preclude disparate impact liability, "it becomes nothing more than a bromide"—a bit of circular reasoning "to the effect that 'only age discrimination is age discrimination.'"[177] Cost, for example, is a factor that is often correlated

172. *See id.*

173. 828 F.2d 1202 (7th Cir. 1987) (Easterbrook, J., dissenting).

174. *Id.* at 1211–22 (Easterbrook, J., dissenting); *accord* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125–26 (7th Cir. 1993).

175. *Metz*, 828 F.2d at 1220 (Easterbrook, J., dissenting).

176. Adams v. Florida Power Corp., 255 F.3d 1322, 1325–26 (11th Cir. 2001). The court based its decision on four grounds: (1) the ADEA's exception for "reasonable factors other than age" does not exist in Title VII; (2) the "reasonable factors other than age" exception is similar to an exception to the remedial provisions of the Equal Pay Act that the Court had interpreted as precluding disparate impact claims; (3) the legislative history of the ADEA was unlike the legislative history of Title VII; and (4) the Supreme Court's decision in *Hazen Paper Co. v. Biggins* suggested that no disparate impact claims could be brought under the ADEA. *Id.*

177. *Id.* at 1325 (quoting Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999). In *Mullin*, the First Circuit argued that the Supreme Court's decision in *Biggins* precluded disparate impact claims in age cases.

> Since disparate impact claims encompass the precise scenario that Justice O'Connor describes [in *Biggins*]—disparate impact assigns liability when employment practices are grounded in factors other than the statutorily protected characteristic (say, age), yet fall more harshly on individuals within

with age and generally has a greater impact on older workers—older workers tend to have higher salaries, and vested benefits. Some courts have held that when an employer makes decisions based on a neutral factor such as cost, cost is a "reasonable factor other than age" even though the factor disparately affects older workers.[178]

The second rationale posits that since Title VII was amended in 1991 to codify disparate impact and the ADEA was not similarly amended, this means that Congress never intended disparate impact to apply in age cases.[179] The Civil Rights Act of 1991 made substantial changes to Title VII, including codifying disparate impact theory into the statutory language of Title VII. Congress did not (and has not) similarly amended the ADEA. The failure to amend the ADEA does not necessarily undercut the argument that disparate impact theory should be available in age cases. The passage of the Civil Rights Act of 1991 was a reaction to Supreme Court cases cutting back the scope of Title VII in race cases.

Of course these formal rationales cannot be dismissed out of hand and may partially explain the differing outcomes, but they are an incomplete answer to the question of why so many courts reject disparate impact theory in age cases. The reluctance of most courts to adopt disparate impact theory in age cases has more to do with perceived differences between age and race than just statutory interpretation arguments. The subtext of many of these cases in which disparate impact theory is rejected is the

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> the protected group (say, older persons)—the inescapable implication of her statements is that the imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA.

Mullin, 164 F.3d at 700–01.

178. *See, e.g.*, *Adams*, 255 F.3d at 1325–26 (quoting *Mullin*, 164 F.3d at 702).

179. The *Mullin* Court cited Congress' failure to codify disparate impact theory into the ADEA as proof that it did not intend disparate impact theory to apply.

> The third factor that persuades us not to emulate the *Griggs* approach to Title VII in the ADEA context concerns more recent legislative developments. In 1991, Congress amended Title VII to provide explicitly for causes of action based upon disparate impact. It simultaneously amended the ADEA in myriad respects, but it did not create a corresponding disparate impact cause of action.
>
> . . . .
>
> . . . [T]his divergence helps to persuade us that Congress never intended to make a disparate impact cause of action available under the ADEA.

Mullin, 164 F.3d at 703 (citations omitted).

courts' fundamental discomfort with treating older workers and African American workers interchangeably.[180] In these cases courts tend to emphasize differences between older workers and workers of color to further support the outcome just as those who argue in favor of allowing disparate impact claims in age cases emphasize the similarities between discrimination faced by older workers and faced by African American workers.[181]

D. *Defenses*

Courts accept a broader range of defenses to age discrimination than to race discrimination. The different treatment is explained in part by differences in statutory language. But, a close reading of the cases suggests a more complex calculus goes into this determination. The statutory language that gives rise to defenses under the ADEA is similar to Title VII's language in some respects and different in others. Like Title VII, the ADEA explicitly recognizes a statutory BFOQ defense.[182] Both the ADEA and Title VII except from liability otherwise discriminatory actions where the actions are justified by a bona fide occupational qualification.

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180. *See, e.g.*, Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact, in* AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 68 (Monte B. Lake ed. 1982) (arguing that ADEA based on "an intent to discriminate because of age" and the disparate impact theory for age cases does not fall under ADEA); Douglas C. Hebert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 627 (1996) (discussing no disparate impact theory for age cases); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 EMPL. REL. L.J. 437, 451–52 (1984–85); Nathan E. Holmes, Comment, *The Age Discrimination in Employment Act of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299, 301 (2000); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 838 (1982); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 270 (1995); *see also* Mack Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. TOL. L. REV. 1261, 1271–72 (1983) (discussing no liability for adverse impact if practice is age neutral and reasonable).

181. These courts characterize Title VII and ADEA as having similar purpose—the elimination of "stigmatizing stereotypes" on the basis of age and race. *See Adams*, 255 F.3d at 1326–27 (Barkett, J., concurring).

182. *See* 29 U.S.C. § 623(f)(1) (2000).

Section 703(e)(1) of Title VII provides:	**Section 623(f) of the ADEA provides:**
Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[183]	It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.[184]

The common law defenses of "legitimate non-discriminatory reason" and "business necessity" are also recognized and applied in age cases, but the scope of the defenses is expanded.[185]

As discussed above, under Title VII the BFOQ defense applies to employment decisions based on gender, religion, and national origin, but not race. The presence of the BFOQ defense in age cases is an important statutory distinction, but does not explain why an age BFOQ might nevertheless be interpreted differently from a BFOQ on the basis of the other protected groups—sex, religion, or national origin.

183. 42 U.S.C. § 2000e-2(e).

184. 29 U.S.C. § 623(f)(1).

185. *See* Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983) (explaining that once a plaintiff has established a prima facie case of age discrimination, the burden of persuasion shifts to the defendants to prove that their selection plan was justified by a business necessity).

The ADEA incorporates two statutory defenses that have no direct Title VII counterpart, the "reasonable factors other than age" defense[186] and the "good cause"[187] defense.[188] Rather than looking at these statutory defenses as signaling differences between the race model and the age model, the "reasonable factors other than age" defense and the "good cause" defense themselves may be nothing more than codifications of the common law defenses that have arisen under Title VII.[189]

E. *The Cost Rationale*

Cost rationales implicate another fundamental debate underlying anti-discrimination law in general and the differences between the race model and age model specifically. Neither Title VII nor the ADEA makes direct reference to cost justifications as an appropriate rationale supporting a defense to intentional discrimination. Yet, cost rationales have been formally rejected in race cases. In age cases, on the other hand, the response is more equivocal. Some courts reject cost rationales while others accept them.

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186. 29 U.S.C § 623(f)(1) provides: "It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . ."

187. 29 U.S.C. § 623(f)(3) provides: "It shall not be unlawful for an employer, employment agency, or labor organization— . . . (3) to discharge or otherwise discipline an individual for good cause."

188. The ADEA also contains an exception to its prohibition on mandatory retirement for bona fide executives, police, and firefighters. *See* 29 U.S.C. §§ 631(c)(1), 623(j). The ADEA also excepts bona fide employee benefit plans. *See* 29 U.S.C. § 623(f)(2)(B).

189. See, for example, Adams v. Fla. Power Corp., 255 F.3d 1322, 1328 (11th Cir. 2001) in which the court stated:

> In light of the parallels between the substantive provisions of the ADEA and Title VII, and in light of the fact that Congress has amended the ADEA several times but has never explicitly excluded disparate impact claims, a reasonable interpretation of Section 623(f)(1) is that it codifies the business necessity exception to disparate impact claims.

Id.; *see also* EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting) (asserting that reasonable factors other than age defense codifies the business necessity defense); Hiatt v. Union Pac. R.R. Co., 859 F. Supp. 1416, 1434 (D. Wyo. 1994) ("It is at least arguable, however, that the modifier 'reasonable' could be interpreted within the scheme of a disparate impact claim as encapsulating the defenses of business necessity and job relatedness.").

One of the major critiques of anti-discrimination law is that such regulations are economically inefficient.[190] However, in the context of race, these arguments are generally rejected either because it is believed that such laws are efficient, that the benefits of such laws outweigh the attendant costs, or that the moral imperative of ending race discrimination outweighs such economic concerns. In age cases, however, cost rationales enjoy more general acceptance. While most courts appear to reject cost rationales based on inaccurate stereotypes or animus toward older workers, a growing number of courts[191] and commentators[192] consider cost a relevant and necessary consideration in age cases.[193]

Initially courts following *Manhart* and other Title VII precedent formally rejected costs as a rationale in age cases, as well. In *Metz v. Transit Mix, Inc.*, the Seventh Circuit determined that the employer's desire to lower salary costs was not a legitimate justification for replacing an older worker with a younger worker.[194] The court reasoned that the ADEA shares the same focus as Title VII.[195] Because of the high correlation between age

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190. *See, e.g.*, Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1312 (1989) (arguing that sex discrimination law is costly).

191. Some courts claim to reject cost rationales, but a close reading of the cases suggests that costs nevertheless creep into the decisions. *See infra* notes 223-27and accompanying text.

192. Professor Kaminshine argues that the use of salary costs as a criterion for layoffs is economically rational. Since salaries tend to increase with age, attempts to cut salary costs often burden older workers, but the burden is justified. Kaminshine, *supra* note 58, at 231–33; see *also* Mark S. Brodin, *Costs, Profits and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 327 (1987) ("[C]ost justification has generally not upheld practices which are overtly discriminatory, but has with increasing frequency succeeded where the challenged practice is neutral on its face but discriminatory in its operation.").

193. *See* Kaminshine, *supra* note 58, at 231–33. Professor Kaminshine describes the inevitable tension between an employer's impulse to cut costs and the ADEA's goal of prohibiting discriminatory discharges of older workers.

> Because these factors [seniority and longevity] correlate with age, older workers can become more costly to compensate than their younger counterparts. This disparity creates significant tension during times of economic stress when employers look to maximize savings by laying off or replacing their costliest workers .... To the extent that the ADEA prohibits discriminatory discharges out of concern that displaced older workers face unique obstacles in finding employment late in their careers, seniority-related cost comparisons can frustrate that objective. On the other hand, to require employers to ignore such costs as part of an economic cutback may equally frustrate the need for sensible cost-cutting policies.

Id. at 232–33. *See also* Issacharoff & Harris, *supra* note 22, at 798–99.

194. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1206 (7th Cir. 1987). *But see* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125 (7th Cir. 1994) (questioning the majority decision of *Metz* in light of the Supreme Court's reasoning in *Biggins*).

195. *Metz*, 828 F.2d at 1220.

and salary, it would undermine the goals of the ADEA to recognize cost cutting as a non-discriminatory justification for an employment decision.[196] In *Leftwich v. Harris-Stowe State College*[197] a terminated college professor alleged age discrimination in the college's choice of which faculty members were retained when control of the city college was transferred to the state college system.[198] The court found that the college's use of salary as a factor in the selection process had an adverse impact on older faculty members.[199] The college offered a "cost savings" defense—its action was justified by a need "to reduce costs by eliminating some positions at the college for tenured faculty who were generally higher paid than the non-tenured faculty."[200] Although the selection plan was based on tenure status rather than explicitly on age, the court nevertheless rejected the employer's "cost savings" defense because of the close correlation between the two factors—age and salary.[201] The Eighth Circuit, then, adhered to the Title VII approach to rationales.

Cost justifications, however, increasingly have found their way into age cases. In *Evers v. Alliant Techsystems, Inc.*,[202] the court concluded that the ranking process did not have a disparate impact on older workers, and that even if it did have such an impact, the economic necessity of layoffs constituted adequate justification.[203] The plaintiff argued that the employer should be forced to adopt an alternative budget with a less discriminatory impact on older workers.[204] The court rejected the plaintiffs' argument for a less discriminatory alternative process.[205] Employees "presented no evidence that any of these alternatives would result in cost savings comparable to those realized by the overall reduction in force or that the alternatives would be less discrimi-

196. *Id.* at 1205.

197. 702 F.2d 686 (8th Cir. 1983).

198. *Id.* at 689–90. A consultant hired by the college recommended a plan that would reduce the faculty from fifty-one members to thirty-four. *Id.* at 689. Under the plan, the new college had two positions available in the plaintiff's field—a tenured position and a non-tenured position. *Id.* A sixty-two-year-old African American man was chosen over the plaintiff for the tenured position; the plaintiff was not considered for the "non-tenure" position even though he received a higher score on the evaluation measures. *Id.* at 689–90.

199. *Id.* at 690.

200. *Id.* at 691.

201. *Id.*

202. 241 F.3d 948 (8th Cir. 2001).

203. *Id.* at 956.

204. *Id.* at 954.

205. *Id.* at 954–55.

natory."[206] This later Eighth Circuit decision signals a move away from adherence to the Title VII approach and an openness to considering a properly supported cost rationale.

Because the ADEA contains statutory defenses that have no Title VII equivalent—the "good cause"[207] defense, and the "reasonable factors other than age"[208] defense, for example, it is in these areas that cost justifications have made their boldest inroads in anti-discrimination jurisprudence. Courts have found that costs are a "reasonable factor other than age,"[209] and to the extent the employer relied on costs, the employer had "good cause"[210] for its action. In *Marks v. Loral Corp.*,[211] the California Court of Appeals for the Fourth District held that a decision based on a salary differential did not violate the ADEA or the California prohibition of age discrimination.[212] According to the court, "[i]f the goal of age discrimination statutes is to preclude decisions based on *generalities* about older workers which may have no basis as to *individuals*, then they certainly do not extend to decisions based on relative compensation rates between individual workers."[213] The court also found statutory support in the "reasonable factors other than age" defense under the ADEA.[214] The court concluded that "[a] differentiation based on salary is as 'reasonable' a factor as is imaginable in a market economy."[215] The court recognized that while the "anti-cost" principle had been

206. *Id.* at 955.

207. 29 U.S.C. § 623(f)(3) ("It shall not be unlawful for an employer, . . . (3) to discharge or otherwise discipline an individual for good cause.").

208. 29 U.S.C. § 623(f)(1) ("It shall not be unlawful for an employer, . . . (1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . .").

209. *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993); Hanebrink v. Brown Shoe Co., 110 F.3d 644 (8th Cir. 1997); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994); EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984).

210. *See, e.g.*, Kehoe v. Anheuser-Busch, Inc., 995 F.2d 117, 118 (8th Cir. 1993).

211. 68 Cal. Rptr. 2d 1 (Cal. Ct. App. 1997).

212. Id. at 3–4. The plaintiff, Marks, was a member of the corporate finance staff at Ford Aerospace (later purchased by Loral Corporation), which was relocated to California. *Id.* at 4. Marks argued that, unlike his younger colleagues, he was not offered an opportunity to stay in Michigan after the unit relocated to California. *Id.* Later most of the corporate finance staff positions, including his, were eliminated in 1992. *Id.* Marks filed a subsequent claim, under federal, as well as state, age discrimination laws, that his age was a factor in his not being able to secure another position within the company and that the company had retaliated against him for his prior complaint. *Id.*

213. *Id.* at 8.

214. *Id.* at 9.

215. *Id.* at 9–10.

rejected in the Title VII context, it was nevertheless appropriate in an age case:

> An objection to the use of price as a 'reasonable factor' is that profitability has not been allowed to justify discrimination in other civil rights contexts.
>
> . . . .
>
> Salary differentials, however, present a matter qualitatively different from the usual disparate impact situation in a Title VII context. An action based on price differentials represents the very quintessence of a legitimate business decision.[216]

Although the case was overturned by statute,[217] it nevertheless remains instructive regarding the influence of cost concerns in age discrimination allegations.

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216. *Id.* at 10. In *Mullin v. Raytheon Co.*, 2 F. Supp. 2d 165 (D. Mass. 1998), an older executive whose position was downgraded and whose salary was reduced alleged that the company engaged in age discrimination under both disparate treatment and disparate impact. The court concluded that even if the policy had a disparate impact on some segment of older workers that the employer nevertheless demonstrated the necessity of the policy.

> Raytheon has produced uncontested evidence that the company suffered a business contraction stemming from a downturn in the defense industry. Following plant consolidation and administrative restructuring, Raytheon's decision to reclassify many of its salaried employees was necessary to ensure that salaries and labor grades were commensurate with the actual job responsibilities of those employees. Mullin has offered nothing to suggest that such parity is not a necessary adjunct to a sound plan of business management, nor can [h]e suggest any way that the company could have achieved its ends while imposing no disparate impact on its older workers.

Id. at 174–75.

217. California's age discrimination statute predates the federal statute. The California statute was first passed in 1961 as part of the Unemployment Insurance Code. California Government Code section 12,491 now states:

> The Legislature hereby declares its rejection of the court of appeal opinion in Marks v. Loral Corp. and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations.

CA. GOV. CODE § 12,941 (2003) (citation omitted).

Courts have also recognized cost as a basis for "good cause" defense. In *Kehoe v. Anheuser-Busch, Inc.*,[218] the court found that an employer could use cost justifications as a "good cause" defense to age discrimination.

> Under the ADEA, employers are prohibited from discharging employees because of their age. The Act, however, specifically excludes a discharge, which is based on good cause. In the present case, the District Court held that Mr. Kehoe was dismissed as part of a plan to reduce costs in order to meet tightening marketplace conditions. This reasoning, if factually supported, would be sufficient to justify Anheuser-Busch's actions under the ADEA.[219]

While cost justifications are more likely to occur in the context of applying the "reasonable factors other than age" or for "good cause" defenses,[220] cost rationales also crop up in connection with traditional anti-discrimination defenses. Some courts maintain that costs can be a "business necessity."[221] In *Evers v. Alliant Techsystems,* the Eighth Circuit upheld the "economic necessity of layoffs" as a legitimate non-discriminatory reason without ever addressing the Supreme Court's apparent rejection of costs as a rationale for intentional discrimination in *Manhart*.[222] The Supreme Court has not squarely decided whether reliance on salary differentials violates the ADEA, but dicta in the *Hazen Paper Co. v. Biggins* case seems to support the use of cost rationales in such cases.[223] In *Biggins*, the Court held that an employer does not "discriminate" by relying on a factor correlated with age (such as pension status).[224] Under *Biggins*'s reasoning, an employer's reliance on a salary differential, which is distinct from, but correlated with, age does not violate the statute.[225] *Biggins* calls into question the validity of cases like *Metz* where the court treated salary and age as inextricably related.[226] But the Court has yet to fully embrace the cost justification defense in age cases.

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218. 995 F.2d 117 (8th Cir. 1993).

219. *Id.* at 118.

220. *See supra* notes 186-189 and accompanying text.

221. *Compare* Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 691–92 (8th Cir. 1983) (holding that cost justification was no defense to a claim of disparate impact of a faculty reduction plant), *with* Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (8th Cir. 2001).

222. *Evers*, 241 F.3d at 959.

223. Hazen Paper Co. v. Biggins, 507 U.S. 604, 612–13 (1993).

224. *Id.* at 612.

225. *Id.*

226. *Id.* at 612–13.

As these cases demonstrate, courts increasingly deviate from the Title VII model and acknowledge cost defenses in age cases. Courts use the ADEA's statutory defenses or focus on other differences in ADEA's statutory language to justify relying on cost justifications. But, as discussed in Part IV, above, when examined closely, the formal rationales are unsatisfying in many respects. The courts' actions, explicitly or implicitly, seem also driven by a reliance on differences between the protected groups.

V. CROSS-CONTAMINATION

> Today the protected classes extend to a majority of all Americans, including white men over forty, short people, the chemically addicted, the left-handed, the obese, members of all religions. Surely there is a scholar somewhere who can tell us how we came to this state of affairs and how the road to civil rights became so crowded . . . In our society, there were only so many fruits to go around. When short, fat, old, white men step to the front of the line . . . then our civil rights are as endangered as they were by Bull Conner and Sheriff Jim Clark twenty-five years ago.[227]

Anti-discrimination law does not provide a systematic method for discerning when groups should be treated the same and when they should be treated differently. This difference has lead to a schism in the application of the anti-discrimination model in age cases. Courts struggle to transpose the race model wholesale into age cases when they do not appear convinced that the same assumptions and rationales that underlie the race model apply in the age context. At the same time, courts often fail to acknowledge that they are treating age differently because of these differences. Without formal acknowledgement that they are in fact developing a different anti-discrimination model in age cases means that these cases are added to general anti-discrimination jurisprudence and therefore raise at least the danger that creative litigants will offer, and that uninformed courts will accept, arguments that undercut race. I call this process cross-contamination. Cross-contamination refers to the process by which doctrines developed under one discrimination theory are often transposed into the developing law under other statutes.[228] This sharing of concepts can provide positive benefits, such as economy and effi-

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227. PHILLIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 132–33 (1994) (quoting Julian Bond).

228. *See supra* notes 14–21 and accompanying text.

ciency, uniformity, and so on, and can lead to a greater understanding of the harm of discrimination.[229] Yet, the reverse is also true: restrictive concepts developed in one area can creep into other areas, undercutting the goals of anti-discrimination law generally. Courts must remain cognizant of the significant differences between protected groups when restricting the scope of the law.

A. *The Harassment Example*

The expansion of harassment as a theory of liability is an example of both the positive and negative benefits of cross-borrowing. Such borrowing occurs both within and between statutes. Harassment as a form of discrimination was first held to violate Title VII in the race context. *Rogers v. EEOC*,[230] a race case, was the first case to recognize a cause of action based upon a discriminatory work environment. [231] The court reasoned that employees should not be singled out by race to experience a different and less comfortable working environment than that experienced by workers of other races.[232] This harassment theory subsequently was adopted in sexual harassment cases. In *Meritor Savings Bank, FSB v. Vinson*,[233] the Supreme Court cited *Rogers* in support of its finding that an employee can state a cause of action for sexual harassment.[234] In concluding that sexual harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.[235]

Harassment law also exemplifies the danger of cross-borrowing. Courts have begun to borrow limiting concepts from sexual harassment cases and to apply them to racial harassment

229. *See, e.g.*, Grillo & Wildman, *supra* note 14, at 399–400.

230. 454 F.2d 234 (5th Cir. 1971).

231. Id. at 236–37.

232. *Id.* at 238.

233. 477 U.S. 57 (1986).

234. *Id.* at 65–66.

235. *See generally* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971); 45 Fed. Reg. 74,676 (1980). "Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Vinson*, 477 U.S. at 66.

claims.[236] In particular, the concept of "unwelcomeness" has been imported into racial harassment cases. In *Vinson,* the Court defined harassment as unwelcome sexual advances that create an offensive or hostile working environment.[237] "Welcomeness," traditionally, was not an issue in racial harassment cases, but now some courts treat "unwelcomeness" as a required element in racial harassment cases.[238]

B. *The Import Problem*

Wholesale application of anti-discrimination principles, from race to age, potentially minimizes the distinctions and dilutes the effectiveness of the theories. Minimizing the difference between age plaintiffs and race plaintiffs has the unintended effect of obscuring the special needs of the intended beneficiaries of the ADEA and contributes to general narrowing of anti-discrimination law in general.

The focus on comparisons between Title VII and ADEA has steered courts to focus on limiting anti-discrimination theories in age cases because age is not interchangeable with race. Little

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236. *See* Hebert, *supra* note 13. Professor Hebert demonstrates how restrictive concepts in sexual harassment cases have been imported into racial harassment cases:

> The explicit and implicit comparisons drawn by the courts between sexual harassment and racial harassment have produced both of these positive and negative effects. For some courts, drawing analogies between race and sex in the context of workplace harassment has allowed the courts to understand and to demonstrate the unlawful and discriminatory nature of sexually harassing behavior. On the other hand, by importing into the racial context legal standards refined and given substance in connection with sexual harassment claims—for which the courts have adopted a number of measures to protect against what are perceived to be non-meritorious, trivial, or even frivolous claims—the courts have made it increasingly difficult for employees to successfully establish the existence of a racially hostile or abusive work environment. Therefore, for some courts, the use of analogies between racial and sexual harassment, rather than causing them to recognize the seriousness of sexual harassment, may in fact have caused them to take claims of racial harassment less seriously.

Id. at 820 (footnote omitted).

237. *Vinson,* 477 U.S. at 65. While the Court rejected the employer's argument that harassment should be determined under a "voluntariness" standard, the Court, nevertheless, acknowledged the relevance of the plaintiff's "dress and personal fantasies" to determine whether the sexual advances were unwelcome. *Id.* at 63.

238. *See, e.g.,* Motley v. Parker-Hannifan Corp., No. 1:94-CV-639, 1995 U.S. Dist. LEXIS 7420, at *5 (W.D. Mich. May 10, 1995); Johnson v. Teamsters Local Union No. 559, No. 87-00215 FHF, 1995 U.S. Dist. LEXIS 8181, at *9–10 (D. Mass. Mar. 31, 1995); 264, 265 Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1512–14 (D. Me. 1991).

thought is given to whether there exists a separate basis to support anti-discrimination theories in age cases based on age concerns alone. The focus should be on whether the doctrines separately advance the status of older workers. Disparate impact should be recognized under the ADEA, not because of similarities between race and age, but because disparate impact theory is necessary to address the unique problems of older workers.[239] Similarly, courts should view cost rationales warily, not because such rationales are rejected under Title VII, but because they often mask just the type of economic opportunism that the ADEA sought to prevent.

Often in age cases an employer has an incentive to terminate the older worker because the older worker generally earns higher wages. But the decision to terminate older workers to save costs often does not take into account the older employee's overall wage history. Often the higher wage earned at the end of the work career represents catch up payments from prior underpayments.[240]

Therefore on employer's "cost-based" rationale in an age case may be nothing more than the employer taking opportunistic advantage of an older worker by terminating the older worker before the "catch up" payments fall due. Professor Jolls, for example, argues for applying disparate impact theory in age cases, not because of the similarities between older workers and workers of color, but because disparate impact theory is useful to address problems specific to older workers. Because wages rise over time, an employer has an incentive to rid itself of older, costlier workers. Jolls argues that this cost-based decision making nevertheless may be problematic because for most workers, higher wages at the end of their employment life cycle are actually deferred

239. *But cf.* Jolls, *supra* note 45, at 1841–44.

240. In an ideal work of economic harmony, one would expect that an employee's wage would correspond to that employee's marginal product. Economists have long noted, however, that seldom does the wage paid to an employee correlate with that employee's marginal productivity. Economists use the term "life cycle theory of earnings" to explain this seeming paradox. *See, e.g.*, Duncan Brown & Michael Armstrong, Paying for Contribution 132–33 (1999). Employers often pay an employee more than the employee's marginal product at the beginning and end of an employee's career; wages fall below an employee's marginal product during the middle years of an employee's career. The overpayment at the beginning reflects training costs. The overpayment at the end is supposed to compensate the employee for underpayments that occurred during the middle years. The employer, than, has an incentive to discharge the employee in the later stages. Job mobility, for example, generally prevents an employee from negotiating a long-term employment contract to prevent the employer from discharging the worker in his later years.

wages from earlier years.[241] Jolls argues that applying disparate impact theory to such cost-based decisions could help curb such employer opportunism.

1. Backlash

The last two decades have been witness to a general narrowing of anti-discrimination principles. The perception is that discrimination in the workplace has been eliminated or, at the very least, is not longer a major cause of adverse job actions. This is not a new strategy.[242] In some sense this backlash against anti-discrimination laws is to be expected. Title VII represented an unprecedented attempt to reform social views on the limits of such fundamental concepts as employment at will and freedom of association. "[B]acklash tends to emerge when the application of a transformative legal regime [such as Title VII] generates outcomes that diverge too sharply from entrenched norms and insti-

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241. Jolls, *supra* note 45, at 1824–25.

242. Opponents of the 1964 civil rights bill suggested adding age as a protected characteristic under the employment provisions of the bill, hoping to defeat the entire bill. The strategy failed. *See* 110 Cong. Rec. 9911 (1964) (statements of Sen. Smathers):

> [T]here is about as much discrimination with respect to the employment of people who get above 40 years of age as there is discrimination in any other category which anyone can possibly imagine.
>
> This proposed amendment to title VII of the pending civil rights bill would seek to prohibit age discrimination in employment. Heretofore, during the course of this debate, I have made it abundantly clear that I disapprove of this title's coercive approach to discriminatory employment practices. I have strongly criticized this title as an infringement upon the freedom of employers to choose their associates, contrary to the spirit if not the letter of the Constitution. That I am now offering an amendment to that title in no way implies any change in my opinion of it.

Id. Opponents of the bill tried a similar tactic in the House of Representatives. *See* 110 Cong. Rec. 2599 (1964) (Statements of Rep. Goodell):

> [W]hat we are seeing here, in some instances with great sincerity and in other instances less so, is an attempt, frankly, to load the bill with items and factors that the bill is not designed to cope with.
>
> The problem of this amendment [to add age] is that the whole framework, and our whole section here was drawn especially to meet the very peculiar problems of discrimination on the basis of race, creed, or color.
>
> Discrimination based on age has an economic source. There are many other factors that are very complicated in the problems of age. . . . We should try to develop some machinery to deal with it. But this is not the vehicle by which to do it.

Id. Instead, Congress directed the Secretary of Labor to study and prepare a report on the problem of age discrimination. The Secretary's findings were presented to Congress in 1967. *See* The Older American Worker, *supra* note 29.

tutions," to which the majority group belongs.[243] Anti-discrimination law is, of course, just such a transformative legal regime. But, the overemphasis on analogizing race to age facilitates the backlash.

The attack on anti-discrimination laws has taken many forms, some overt, some covert. The overt attack has taken the form of vocal challenges to fundamental assumptions underlying the legislation, such as increasing judicial and social skepticism about the extent to which race discrimination continues to operate in society, increasing hostility to the continued use of remedial techniques such as affirmative action and a growing sentiment that the majority race is increasingly the victim of reverse discrimination.[244] Instead, many groups attribute the still undeniable racial disparities in wages etc., to legitimate differences in skills, education, abilities, and interests.[245]

The current affirmative action debate exemplifies the "retrenchment" that has taken place.[246] As originally conceived, affirmative action sought to remedy racial subordination by disestablishing the structures, institutions, and ideologies that perpetuated racial inequity.[247] Opponents to affirmative action have made progress advancing their cause by using the language

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243. Linda Hamilton Krieger, *Afterword: Socio-legal Backlash*, 21 BERKELEY. J. EMP. & LAB. L. 476, 477 (2000).

244. *See infra* notes 40–41 and accompanying text.

245. One such website, "adversity.net," claims to be for "victims of reverse discrimination." *Stop the Divine Emphasis on Race*, at http://www.adversity.net/default_1_start.htm (last updated Mar. 21, 2004). The group opposes the use of disparate impact theory in employment discrimination cases:

> We strongly disagree with the politically-correct notion that test scores or employment criteria which appear to have a "disparate impact" upon selected racial, ethnic, or gender groups are inherently racist or sexist. In fact, most instances of so-called "disparate impact" constitute a legitimate reflection of differences in skills, education, and abilities.

Philosophy and Theory, at http://www.adversity.net/philosophy.htm (last updated Feb. 2, 2003).

246. Professors Charles Lawrence III and Mari Matsuda describe affirmative action as one of the policies that arose out of the social changes occurring in America in the 1960s. CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 18 (1997) ("Affirmative action was forged in the fire of urban rebellion.").

247. The affirmative action policies as instituted never reached that ideal. Instead, they reflected a compromise between those seeking to transform American society and those fighting to maintain the status quo. "Affirmative action as we know it today is the product of this era of rebellion and compromise. Powerful institutions made token concessions, partial payments on the demands for full equality, in an effort to purchase peace." *Id.* at 25, 27.

of anti-discrimination laws and turning the language "on its head" by decrying affirmative action as an unfair race preference policy that promotes "reverse" discrimination; that it is inconsistent with the goal of a "color blind society."[248]

The covert attack has manifested in a more subtle undermining of the laws by exploiting vulnerabilities in the doctrine. Opponents of anti-discrimination laws have succeeded to a certain extent in chipping away at the scope of the law's protections by creating and preying upon public fears that anti-discrimination laws extend too far and to too many.[249] Phillip K. Howard levels this charge in *The Death of Common Sense: How Law is Suffocating America*:

> Rights, almost no one needs to be told, are all around us. The language of rights is used everywhere in modern America—not only in public life, but in the workplace, in school, in welfare offices, in health care. There are rights for children and the elderly; the disabled; the mentally disabled; workers under twenty-five and over forty; alcoholics and the addicted; the homeless; spotted owls and snail darters.... Rights have taken on a new role in America. Whenever there is a perceived injustice, new rights are created to

248. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Alan Bakke, a white applicant, challenged the medical school's special admission procedure for the consideration of applications for "disadvantaged" students. Bakke claimed the procedure allowed for less qualified applicants to gain admission and unfairly discriminated against him because of his race. Justice Powell, who cast the deciding vote, struck down the particular policy challenged by Bakke but determined that race could be considered in admissions in certain circumstances. For a more detailed discussion of the impact of the *Bakke* case, see LAWRENCE & MATSUDA, *supra* note 246, at 41–58. In the recent case of *Grutter v. Bollinger*, 123 S. Ct. 2325 (2002), the Supreme Court struck down the University of Michigan's undergraduate admissions program, while upholding the admissions program for the University of Michigan law school. *Id.* at 2347. In November 1996, California voters were asked to vote on "Proposition 209," called "The California Civil Rights Initiative." Although described as a "civil rights initiative," proponents of Proposition 209 argued that civil rights laws had been hijacked by special interest groups through the use of "quotas, set asides and preferences." Their stated goal of the initiative was to end "reverse discrimination." The initiative passed the California electorate by a 54 to 46% vote on November 5, 1996. The initiative amended the California Constitution to add the text of the "Civil Rights Initiative" to the California Constitution. *See* OFFICE OF THE SEC'Y OF STATE OF CALIFORNIA, CALIFORNIA BALLOT PAMPHLET, GEN. ELECTION, NOVEMBER 5, 1996, *available at* http://vote96.ss.ca.gov/Vote96/html/BP/ home.htm (last visited Mar. 31, 2004). A group called "Californians Against Discrimination and Preferences" ran the "Yes on 209" campaign. For the text of the argument in favor of Proposition 209 that was included with the ballot, see Argument in Favor of Proposition 209, *available at* http://vote96.ss.ca.gov/Vote96/html/BP/209yesarg.htm (last visited Mar. 31, 2004).

249. *See, e.g.*, RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); PHILLIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994); WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE (1997).

> help the victims. . . . While the rights-bearers may see them as "protection," they don't protect so much as provide. These rights are intended as a new, and often invisible, form of subsidy.[250]

As anti-discrimination laws have expanded to include additional groups, such as the elderly, courts have begun to look askance at large and unwieldy protective clauses.[251] The sheer size of the protected group of older workers encourages courts to interpret the ADEA narrowly.[252] Courts' fear of expanding anti-discrimination law to such a large and unwieldy class of older workers operates to subtly influence them to restrict the scope of the law as applied in age cases. This trend is seen in the growing number of courts that reject disparate impact as a theory of liability in age discrimination case and in the growing acceptance of cost justifications as a defense to age discrimination cases.

The relative success of older workers in discrimination cases fuels a growing misperception about the outcomes of discrimination cases. Among civil rights plaintiffs, age discrimination plaintiffs tend to fare better in the courts than other discrimination plaintiffs.[253] Ironically, the success of ADEA plaintiffs seems to fuel a growing trend to limit the scope of anti-discrimination laws. It fuels the perception that the law is being abused and the courts overrun with meritless cases that result in huge damage awards.[254] These erroneous perceptions have led to a movement to repeal or cut back on the scope of anti-discrimination laws. Despite the growing perception that discrimination in the workplace has been eliminated or, at the very least, is no longer a major cause of adverse job actions, workers of color continue to experience discrimination.

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250. HOWARD, *supra* note 249, at 115–18.

251. Professor Michael Selmi argues that the breadth of the age discrimination state explains courts' penchant for interpreting the statute narrowly. *See* Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?,* 61 LA. L. REV. 555, 564–65 (2001). Similarly, concern over the size of the potential class of the disabled has led to limits on the scope of the Americans With Disabilities Act. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 477–89 (1999) (restricting the definition of "person with a disability" and expressing concern with the potential size of the protected class under plaintiff's proposed interpretation of the statute).

252. *See* Selmi, *supra* note 251, at 564–65.

253. Age discrimination cases are one of the fastest growing areas of employment litigation. For the year ending 2003, age discrimination claims accounted for 23.5% of individual charges filed with the EEOC, as compared to 25.4% for individual charges filed under Title VII for all types of discrimination. *See* EEOC Charge Statistics, *supra* note 7.

254. Ironically, the perception that there are huge numbers of meritless race discrimination claims being brought and huge damage awards received is not the case. See Selmi, *supra* note 251, at 557–61 for data compiled by the Administrative Office of the Courts.

While Title VII may have successfully broken down formal barriers based on race, it has done little to transform the underlying institutions that continue to subordinate on the basis of race.[255] Disparities in employment persist despite the passage of laws seeking to eradicate it.[256] Intentional job discrimination continues to affect negatively blacks, Hispanics, Asian-Pacific and white women.[257] Yet civil rights plaintiffs (including older workers who fare the best) fare worse in court than other civil plaintiffs, save prisoners. A civil rights plaintiff's trial victory is more likely to be reversed on appeal than a plaintiff's victory in other types of civil cases (42% versus 6%). Defense verdicts in civil rights cases are rarely reversed. Yet there is a rising intransigence in the courts and in public opinion to cases seeking to redress these disparities.

2. The ADEA's Unmet Goals

Age discrimination litigation is among the fastest growing type of employment discrimination cases. Despite the volume of litigation, many of the ADEA's goals remain unmet. The ADEA sought

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255. LAWRENCE & MATSUDA, *supra* note 246, at 77 ("The effect of this ideology of formal equality, is to make it possible to pretend that racism doesn't exist."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1371–76 (1988) (criticizing antidiscrimination law for failure to address the subordination of African Americans); *see* Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial* 285–309, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys, ed., 3d ed. 1998) (describing the myth of meritocracy and failure of civil rights law to obtain equal opportunity); *see also* KWAME TURE & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 3–5 (1967) (describing racism as "the predication of decisions and policies on considerations of race for the purpose of *subordinating* a racial group and maintaining control over that group" and describing institutional racism as "originat[ing] in the operation of established and respected forces in the society" and relying "on the active and pervasive operation of anti-black attitudes and practices").

256. *See* David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 966–67 (1996). In 1990, black, male workers earned $731 for every $1,000 earned by a white, male worker. *Id* at 966. Black, male college graduates earned $798 for every $1000 earned by their white counterparts. *Id.* According to 1995 statistics, black women earned 10% less than white women and 36% less than white men. *Id.* at 967. Black women with professional degrees in top management positions earned 60% of the salaries of their white male counterparts. *Id.* Further, black workers are disproportionately represented in the ranks of low wage earners. *Id.* "Although blacks constitute 12% of the population and 10% of the workforce, they fill over 30% of the nursing aide and orderly jobs and almost 25% of the domestic servant jobs, but only 3% of the jobs for lawyers and doctors." *Id.* at 967.

257. *See* Alfred W. Blumrosen & Ruth G. Blumrosen, *The Reality of Intentional Job Discrimination in Metropolitan America—1999*, *available at* http://law.newark.rutgers.edu//blumrosen-eeo.html (last visited Mar. 31, 2004).

to remove formal age barriers. It was successful in ending mandatory retirement. The ADEA also sought to increase the employment rates for older workers and limit employers' ability to opportunistically terminate older workers to avoid paying higher wages. With respect to employment rates, the ADEA has not been successful in this regard. The employment rates for older workers are no better than they were before passage of the ADEA. Rather, it appears that the primary beneficiaries of the ADEA are white men, a subgroup within the class of older workers, while older minority women are among the poorest in society.[258] "[W]hile older workers who remain employed are often very well paid, those who use their positions frequently find themselves unable to obtain comparable employment.[259] The ADEA, then, has become a bit of protectionist legislation for established workers, but generally ineffective in accomplishing its goal of creating new job opportunities for older workers.

C. *The Export Problem*

In general concepts that have entered one area of anti-discrimination law have extended to other areas of the law and encompassed new groups—a positive development in the law for the most part. But, as these concepts have been stretched near to breaking, they render the law vulnerable to attack. The growing resistance to allowing disparate impact claims in age cases and the increasing approval of employer cost justifications are two ways in which the court restricts the scope of anti-discrimination remedies in age cases. These restrictions parallel attempts to restrict anti-discrimination law under Title VII. While these comparisons are not always explicit, those attempting to limit dispa-

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258. Previous studies have shown that white male professionals bring the majority of age discrimination claims. A 1984 analysis of 153 federal court cases alleging ADEA violations showed that fifty-seven percent of the cases were brought on behalf of white men in professional and managerial occupations. *See* Michael Schuster & Christopher S. Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REL. REV. 64–68 (1984); *see also* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491 (1995). Professors Issacharoff and Worth argue that the ADEA allows a small group of older workers to use anti-discrimination law to unjustifiably capture wealth for themselves. Issacharoff and Harris identify three areas of unjustified wealth capture: early retirement incentive plans, pension severance offset programs and supplemental employment benefits. *See* Issacharoff & Harris, *supra* note 15, at 813–19.

259. *See* MICHAEL J. ZIMMER ET AL., Cases and Materials on Employment Discrimination 6 (6th ed. 2003).

rate impact theory, for example, take advantage of the general hostility toward anti-discrimination, a hostility furthered in part by the expansion of the law to older workers. Richard Epstein alludes to this export problem:

> The basic congressional theme of parity of treatment for different forms of discrimination carries over to this context: the major implication is that since Title VII is desirable, the ADEA must be desirable as well. But the argument also works in reverse: that is, on its face the ADEA is no more desirable than the other antidiscrimination provisions found under the civil rights law.[260]

Epstein uses the extension of anti-cost rationales to age discrimination to support his argument that all anti-discrimination laws are inefficient.

1. Disparate Impact

Before the Civil Rights Act of 1991, Title VII disparate impact theories were under attack. The Supreme Court in *Wards Cove Packing Co. v. Atonio*[261] substantially cut back the scope of disparate impact law.[262] The case was reversed in part by the Civil Rights Act of 1991.

Congress's codification of disparate impact theory into the statutory language of Title VII limits the ability to attack disparate impact theory directly. Nevertheless, litigants have attempted to use the Court's hostility to disparate impact in age cases to attempt to limit the availability of disparate impact in race cases in other contexts, under other anti-discrimination statutes. In *National Fair Housing Alliance, Inc. v. Prudential Ins. Co. of America*,[263] a fair housing case, the district court rejected the defendant insurance company's argument that the Fair Housing Act should not recognize disparate impact claims based on the Supreme Court's *Biggins* decision.[264] "While defendants

260. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 444 (1992).

261. 490 U.S. 642 (1989).

262. For a discussion of the impact of *Wards Cove* on disparate impact theory as well as the effect of the Civil Rights Act of 1991 in partially reversing *Wards Cove*, see Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs, *a Partial Return to* Wards Cove, *or All of the Above?*, 43 CASE W. RES. L. REV 287 (1993).

263. 208 F. Supp. 2d 46 (D.C. Cir. 2002).

264. *Id.* at 58–60.

argue that [the Supreme Court's decision in *Hazen Paper Co. v. Biggins*] also suggests the Supreme Court's hesitancy to extend the disparate impact doctrine, that case concerned the Age Discrimination in Employment Act, a statute that differs significantly in structure from the FHA and Title VII."[265]

2. Cost Justifications

Cost rationales, formally rejected under Title VII, are more accepted in age cases. Such cost defenses have not remained confined to age cases, but contrive to seep into other areas of antidiscrimination law. An ever vigilant civil rights community has been successful in beating back many, but not all of these attempts.

In *Wards Cove*, the Supreme Court found that cost was relevant in determining whether a proposed alternative practice was equally as effective as the prohibited practice in serving the employer's business goals.[266] In *Wards Cove*, the plaintiffs challenged a myriad of policies that they *contended* resulted in a racially segregated workforce.[267] The employers argued that costs factored into the assignment of housing. The Supreme Court found that "factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."[268] The Civil Rights Act of 1991 reversed much of the *Wards Cove* decision.[269]

Two years after *Wards Cove*, dicta in *International Union, UAW v. Johnson Controls, Inc.*,[270] for example, raised the possibility that costs could constitute a valid BFOQ under Title VII in the future.[271] *Johnson Controls* involved a challenge to the employer's fetal-protection policy.[272] The Court rejected the em-

265. *Id.* at 60 (citation omitted).
266. *Ward's Cove*, 490 U.S. at 661.
267. *Id.* at 647–48.
268. *Id.* at 661.
269. Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (codified in various sections of 42 U.S.C. (Supp. III 1992)).
270. 499 U.S. 187 (1991).
271. *Id.* at 208–11.
272. *Id.* at 190.

ployer's attempt to use safety concerns to justify excluding fertile women from certain jobs in its battery-manufacturing plant.[273]

The concurrence of Justice White, with Chief Justice Rehnquist and Justice Kennedy, disagreed with the majority opinion to the extent the majority held that the BFOQ defense could never justify a sex-specific fetal protection policy.[274] They argued that under appropriate circumstances, costs could support application of the BFOQ defense.

> [A] fetal protection policy would be justified under the terms of the statute if, for example, an employer could show that exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability. Common sense tells us that it is part of the normal operation of business concerns to avoid causing injury to third parties, as well as to employees, if for no other reason than to avoid tort liability and its substantial costs.[275]

This language stands in contrast to language in earlier cases where courts rejected cost as a justification for application of the BFOQ defense. In *Wilson v. Southwest Airlines Co.*,[276] the district court rejected the employer's argument that its female-only flight attendant policy was necessary to ensure the airlines competitive success with its mostly male passengers.[277] The court stated, "[w]ithout doubt the goal of every business is to make a profit . . . . [However] [i]f an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order."[278] Courts have also rejected employer's arguments that the cost of providing facilities or housing for female workers justifies a gender-based BFOQ.[279]

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273. *Id.* at 191–92. Johnson Controls instituted a policy prohibiting "women who are pregnant or who are capable of bearing children" from holding certain jobs involving lead exposure. *Id.* at 192. The employer argued that its policy did not discriminate on the basis of sex and that, even if it did, the company could raise a valid BFOQ defense based on protecting the safety of the unborn fetus. *Id.* at 195. The district court and the Seventh Circuit both ruled in favor of defendant-employer. *Id.* at 193. The Supreme Court reversed. *Id.* at 211.

274. *Id.* at 211 (White, J., concurring).

275. *Id.* at 212–13 (White, J., concurring).

276. 517 F. Supp. 292 (N.D. Tex. 1981).

277. *Id.* at 304–05.

278. *See id.* at 302 n.25.

279. *See* Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977).

In fact, there is evidence that cost justifications have been subtly raised and relied on in race cases despite the strong mandate by the Supreme Court that cost is irrelevant.[280] In *EEOC v. Consolidated Service Systems*,[281] for example, the EEOC alleged that the owner of a small company intentionally discriminated on the basis of race by relying on word-of-mouth hiring practices.[282] The court concluded that word-of-mouth hiring did not violate the statute because it was the cheapest method of recruitment.

> If the most efficient method of hiring, adopted *because* it is the most efficient . . . just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer, this is not intentional discrimination.
>
> . . . .
>
> It is not discrimination, and it is certainly not active discrimination, for an employer to sit back and wait for people willing to work for low wages to apply to him. The fact that they are ethnically or racially uniform does not impose upon him a duty to spend money advertising in the help wanted columns of the *Chicago Tribune*."[283]

The Supreme Court has yet to decide a case that directly raises this issue. The *Johnson Controls* concurrence and changes to the composition of the Court since *Johnson Controls* may suggest that, contrary to popular opinion, *Manhart* may not have settled the cost justification issue. If the Court would consider recognizing a cost justification under any aspect of Title VII, it is not much of a leap to imagine the same "prohibitive cost" rationale would at some point become available in race discrimination cases as well.

VI. CONCLUSION

Both courts and litigants must pay closer attention to the cross-contamination problem. Indeed, courts must make clear when their decisions limiting anti-discrimination law are in response to differences between the nature of the discrimination

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280. For a description of how cost justifications have "crept" into race cases, see Brodin, *supra* note 192, at 337–57.

281. 989 F.2d 233 (7th Cir. 1993).

282. *Id.* at 234.

283. *Id.* at 236–37 (citations omitted).

faced by age plaintiffs and race plaintiffs and resist attempts by those who seek to undermine anti-discrimination law and even those who seek to expand the law, not realizing the potential unintended harmful effects.

As discussed above, I am not suggesting that courts cut back on the scope of age laws. To the contrary, the protection for older workers may very well merit expansion. Courts need not analogize to race to justify the application of disparate impact theory in age cases or to reject cost rationales, for example. Separate rationales support these outcomes. But, to the extent courts accept restrictions in the age context, they should not export them to race cases.

Legal protections against some types of age discrimination in the workplace are necessary. But there are also important differences between the treatment accorded to the protected group of older workers and attempts at ending subordination on the basis of race. Failure to acknowledge those points at which age discrimination differs from race discrimination renders anti-discrimination jurisprudence vulnerable to being undermined by its opponents. If the courts do not acknowledge important distinctions between race and age, then limiting concepts developed in age discrimination cases, such as costs, should logically be applicable in race cases as well. Such applications could seriously undermine the rights race plaintiffs have gained or hope to gain.