Rehabilitate the Age Discrimination in Employment Act: Resuscitate the “Reasonable Factors Other than Age” Defense and the Disparate Impact Theory

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JUDITH J. JOHNSON*

I. INTRODUCTION

The Age Discrimination in Employment Act (ADEA) promised to protect older workers from discriminatory exclusion from the workforce, but recent studies show that older workers are being cut from the workforce and are unable to find employment.1 In a 1995 article, I warned of the potential dangers of construing the ADEA to allow employment decisions based on age-correlated criteria.2 Most courts have failed to heed these warnings and now approve employer practices, such as terminating employees based on higher salaries and refusing to hire workers with too much experience.3 These practices may explain the difficulty older workers are having retaining current employment and obtaining new employment, which is exactly what the ADEA was

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1. See Gary Minda, Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment, 48 HASTINGS L.J. 511, 512, 516–18 (1997) (positing that employers are using downsizing to exploit "the vulnerable position of a late-career employee who cannot easily leave the relationship due to factors such as job-specific training... employment and pension benefits linked to seniority, and familial and community ties").


3. Howard C. Eglit, The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It is Today, Where It's Going, 31 U. RICH. L. REV. 579, 693–96 (1997). Professor Howard Eglit's excellent article analyzed the ADEA after thirty years. He cited studies in which greater age was viewed negatively. In one study, pairs of resumes were sent out, identical in all respects except for the age of the applicant; one applicant listing his age as thirty-two; the other as fifty-seven. The older job applicant was 26.5% less likely to receive a favorable response. Similarly, nearly five out of ten executive search firms interviewed cited age as a "significant and negative" factor. Id. at 670.
designed to prevent.\(^4\)

When Congress passed the ADEA in 1967, it was concerned about the number of displaced older people in the workforce who were unable to find employment because of age-based discrimination.\(^5\) In these days of corporate downsizing and emphasis on the "bottomline," older people are often considered the most expendable, especially when they can be replaced by younger people, making less money.\(^6\)

The principal problem, according to current scholarship, is the supposition by employers that older workers are less productive because they often make more money than their younger counterparts. This is explained by some economists in terms of a life cycle of productivity, that workers are overpaid when first hired, and that when they gain experience, they are underpaid. When they have been in the workforce a long time, they are overpaid again because they are paid more than similarly performing workers who have been in the workforce less time.\(^7\) Some authors label employers "opportunistic" when they terminate late-career workers, thereby reaping the benefit of having underpaid the worker at an earlier point in his career.\(^8\) These opportunistic terminations cause problems the ADEA was designed to prevent.

In terms of expectations, workers expect to make more money as they get older. Employers find it economically expedient to increase salaries of younger workers to retain them. The problem is that if the employer succeeds in retaining the employee past middle age, the employee becomes less mobile and less employable.\(^9\) It is probably not possible to change the expectation that one's salary will continue to rise, nor is it likely that the ADEA will be amended to prohibit opportunistic firings.

In any event, the life cycle of productivity is a generalization about older employees that may not be borne out in a particular situation.

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\(^4\) Id. at 604. Professor Eglit concluded that the age of the ADEA claimant is declining because the layoff rate of younger ADEA protected workers has increased dramatically.

\(^5\) 29 U.S.C. § 621(b) (2000). Congress noted:

1. in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

2. the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

3. the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.

\(^6\) Id. § 621(a).

\(^7\) See Minda, supra note 1, at 547–48.

\(^8\) See, e.g., Samuel Issacharoff & Erica Worth Harris, Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution, 72 N.Y.U. L. Rev. 780, 789 (1997).

\(^9\) Id. at 790.

\(^1\) See Minda, supra note 1, at 512.
There is another view of whether a worker with more experience is receiving an "efficient wage"... The older employee may be more productive by reason of his greater experience, or he may be paid a higher wage either to discourage shirking in his last period of employment or as a reward... for not having shirked previously."10

One author suggests that other factors may be at work in some downsizing operations that affect older workers, such as impressing investors and raising stock prices.11

In today's corporate board rooms, it is the unrestrained "bottom line" corporate decision-making tied to share price that drives the effort to downsize older workers. Because executive compensation is frequently tied to stock values and quarterly profit (or loss) margins today, executives in positions of power make labor relations decisions on the basis of the "bottom line;" that is, whether or not the decision will enhance the shareholders' investment by increasing stock prices through positive profitability figures... .

What is missing in the stock portfolio analysis is a realistic assessment of the relative productivity of workers who have firm-specific skills because of their long service with the firm... . In failing to ascertain if older workers are in fact paid an "efficient" wage, corporate decision-makers have utilized a cost containment rationale to cover an age discriminatory motive.12

Even assuming that older workers are "overpaid," we must ask ourselves what kind of society we want. Do we want a society in which everything is justified by economic efficiency and other human values are ignored? In fact, the anti-discrimination acts did take into account the morality of discrimination in forbidding it. Making older workers expendable, even if justified in terms of economic efficiency, cannot be justified in terms of morality or in terms of the cost to society of promoting a culture in which workers fear being terminated because they no longer justify their higher salaries. Furthermore, "[t]here is a price—a cost—for securing more important remedial and social objectives."13

10. Id. at 529 (quoting RICHARD A. POSNER, AGING AND OLD AGE 336–37 (1996)).
11. Id. at 525.
12. Id. at 549–50.
13. Steven J. Kaminshine, The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 FLA. L. REV. 229, 231–32 (1990). For example, customer preference is not a defense in discrimination cases, despite profitability. Id. at 232. "[D]iscrimination, at least in the short term, is not always economically irrational. According to economists, an employer might find forbidden criteria attractive, even if only crudely predictive of productivity needs, because they are relatively convenient and cheap to administer." Id. at 232. For example, the bona fide occupational qualification (or "BFOQ") defense under both the ADEA and Title VII requires the employer to suffer some economic detriment rather than use a facially discriminatory policy. Id. at 243–45. Similarly, the ADEA forbids mandatory retirement at any age for most jobs. See discussion
The solution I am proposing contains two components that, working together, could help deter opportunistic terminations and the use of other age-correlated factors that exclude older workers from the workforce. One component to the solution is to apply the disparate impact theory to the ADEA, which would require an employer to justify the use of an age-correlated factor that would have a disparate impact on older workers. The employer's justification would implicate the second component of the solution, the ADEA's defense of "reasonable factors other than age" (hereinafter RFOA). Whether the case is based on disparate impact or disparate treatment, the employer should be required to bear the burden of persuasion that the use of an age-correlated factor that selects out older workers, such as high salary, is justified as a "reasonable factor other than age." While this is not a perfect solution, it is the only likely one. Unfortunately, because of recent developments in the law, courts are generally not applying either component of the proposed solution. The Supreme Court has recently granted certiorari to decide whether the disparate impact theory applies to the ADEA, so whether that part of the solution will be a viable vehicle for protecting older workers will soon be authoritatively determined.

The Supreme Court developed the disparate impact and disparate treatment theories of discrimination to define the scope of discrimination prohibited under Title VII of the Civil Rights Act of 1964 (Title VII). Disparate treatment is the theory of discrimination implicated when the employer has intentionally treated an employee differently because of his membership in a protected class. The disparate impact theory does not require proof of intentional discrimination, but rather proof that an employer has used a criterion that adversely impacts the protected class and cannot be justified by business necessity.

It was inescapable that both theories of discrimination would apply to the ADEA because Congress used the same language prohibiting discrimination in the ADEA that it had used in Title VII. The only notable difference is that Title VII prohibits discrimination based on race, sex, religion, color and national origin. The courts applied both theories of discrimination to the ADEA until 1993, when the Supreme Court decided Hazen Paper Co. v. Biggins. Before Hazen Paper, if an
employer used criteria such as high salary, seniority, tenure or too much experience to make unfavorable employment decisions, courts generally either found that the employer was discriminating per se under the disparate treatment theory or required the employer to justify the use of such factors that adversely affected older workers under the disparate impact theory. As noted earlier, the Supreme Court will determine shortly whether this situation will continue.

In Hazen Paper, the Court held that if the employer discharged the plaintiff because his pension was about to vest, that action, standing alone, did not constitute age discrimination. The Court specifically noted that the case did not involve disparate impact and only addressed the question of whether age-correlated factors are discriminatory per se under the disparate treatment theory. Nevertheless, lower courts have interpreted Hazen Paper to approve an employer's explicit use of age-correlated factors. These courts hold that either the disparate impact theory does not apply to the ADEA or that age-correlated factors are no longer probative at all of disparate treatment. Courts are thus employing Hazen Paper to disembowel the ADEA by allowing employers to use age-correlated factors with impunity.

The second component of the proposed solution involves the proper application of RFOA by requiring the employer to prove that the use of an age-correlated factor that selects out older workers is justified as a "reasonable factor other than age." Currently, the lower courts are misinterpreting the Hazen Paper case and the RFOA defense by holding that the use of "any" factor other than age, even a strongly age-correlated factor, does not have to be justified and does not violate the ADEA. However, RFOA can only be interpreted to allow the employer to use "any" factor other than age as a defense by disregarding the word "reasonable" in the statutory language. Furthermore, the judicial decisions, scholarship, and interpretation of the administering agency, all of which were more contemporaneous with the passage of the ADEA, support the conclusion that the use of an age-correlated factor must be justified by the employer. Thus, under the second component of the proposed solution, RFOA is the defense the employer should have to interpose, under either the disparate treatment theory or the disparate impact theory, if he uses an age-correlated criterion that screens out older workers.

22. See infra note 69 (citing cases in which courts found the employer's use of factors that correlate with age violative of the ADEA).
23. See supra note 15.
24. 507 U.S. at 612.
25. Id. at 610. The Court never reached the disparate impact theory because the employee "claim[ed] only that he received disparate treatment." Id.
26. See infra Section V.
27. See cases cited infra Section V.
28. See infra Section V.A.2.
Although the Supreme Court did not explicitly mention the defense of RFOA in *Hazen Paper*, the Court said that, in a *disparate treatment* case, the ADEA is not violated if the employer legitimately acts on the basis of any factor other than age, even if it strongly correlates with age. The lower courts are problematically over-reading *Hazen Paper* to hold that the employer's use of *any* factor other than age, even if age-correlated, has no more evidentiary significance than any non-age-related factor and can even serve as a defense.

This view of *Hazen Paper* reads the defense of RFOA out of the statute and replaces it in all cases with the defense of "legitimate nondiscriminatory reason." Legitimate nondiscriminatory reason is not a statutory defense to an ADEA suit, but rather it was borrowed from Title VII which contains no defense comparable to RFOA. Legitimate nondiscriminatory reason can be any reason that does not discriminate on its face; it does not have to be reasonable. In ADEA terms, it can be *any* factor other than age.

Although lower courts are interpreting *Hazen Paper* very broadly, much of the language from *Hazen Paper* that the lower courts are citing is taken out of context or is dicta, from which the Court should retreat. Because the statutory structure and contemporaneous understanding of the ADEA do not permit RFOA to be interpreted as "*any* factor other than age," it is unlikely that the Supreme Court in *Hazen Paper* would have made such an important determination without a statutory reference to, and analysis of, the RFOA defense. Furthermore, if RFOA means "*any*" factor other than age, then disparate impact may not apply to the ADEA, a decision that the *Hazen Paper* Court said it was not making, and would surely not make in such an offhand manner. Even though RFOA has not been adequately defined under the ADEA, it

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29. 507 U.S. at 611-12.
30. See cases cited infra Section V.
32. See infra text accompanying notes 156-67.
33. Id.
34. See infra Section V.
35. See infra Section V.C.
36. Although my first article assumed that there was little room after *Hazen Paper* to interpret RFOA as anything other than "*any* factor other than age," I now am making a different argument in this sequel, nine years later.
37. If RFOA means "*any*" factor other than age, this would probably preclude disparate impact because the basis for a disparate impact case is that a factor other than age is causing the disparate impact. See discussion infra accompanying notes 72-75.
must be afforded a place in the statutory scheme and cannot be considered surplusage. The argument I am making is that if the employer uses an age-correlated factor, the employer has to justify the factor using the RFOA defense, whether the plaintiff uses the disparate treatment theory or the disparate impact theory.39

In many cases involving age-correlated factors, the employer may be intentionally ridding the workforce of older workers, which the employer cannot accomplish directly but nevertheless may do so indirectly by covertly using age-correlated factors. In other cases, the employer may not be consciously intending to discriminate. Rather, the employer may choose the age-correlated criterion because employees who are earning a higher salary, for example, are not perceived as "worth it," based on stereotypical but unconscious views regarding older workers.

Stereotypical views depict older workers as potentially less employable than younger persons, particularly for managerial positions. Research findings suggest that older persons are seen as less capable of responding creatively, enthusiastically, or efficiently to job demands. Moreover, age stereotypes depict older employees as less interested in change and less capable of coping with future challenges. To the extent these stereotypes (which are not borne out by the research as being empirically correct) influence managerial decisions, there are potentially serious consequences for older employees, including lowered motivation, career stagnation, and eventual career obsolescence.40

Until shortly after Hazen Paper was decided, most lower courts allowed plaintiffs to ferret out unconscious and other hidden discrimination using the disparate impact model of proof. The majority of courts now hold that the disparate impact theory does not apply to the ADEA, based in large part on Hazen Paper.41

In 2001, the Supreme Court granted certiorari to decide whether the disparate impact theory applies to the ADEA42 but later dismissed the petition as improvidently granted.43 It appeared that the Court would never have to decide the issue because disparate impact, as applied to the ADEA, is dying of its own accord in the lower courts.44 Nevertheless, as discussed earlier, the Court has recently granted certiorari to decide the issue.45

39. See infra text accompanying notes 63–66 for a discussion of disparate impact and Section V.2.a. discussing the defense of RFOA.
40. Eglit, supra note 3, at 672 (quoting BENSON ROSEN & THOMAS H. JERDEE, OLDER EMPLOYEES: NEW ROLES FOR VALUED RESOURCES 35–36 (1985)).
41. See discussion infra accompanying note 95.
44. See discussion infra accompanying notes 101–02.
While the disparate impact theory and properly applying the RFOA defense do not provide the ideal protection for ADEA claimants, their availability may deter employers from using age-correlated factors. Without the disparate impact theory and RFOA, employers may use unjustified age-correlated factors with virtual impunity to rid their workforces of older employees. For example, an employer could eliminate all high-salaried employees or all employees with more than ten years of service. Without the disparate impact theory and without requiring the employer to justify the use of age-correlated factors under the disparate treatment theory, the use of any age-correlated factor will be a legitimate nondiscriminatory reason. The burden will then be imposed on the employee to show that the age-correlated factor is a pretext for age discrimination—a difficult task.

The now too-common corporate practice of downsizing presents a graphic illustration of the problem of allowing employers to use unjustified age-correlated criteria. Since *Hazen Paper*, courts are rejecting the idea that higher wages can be a proxy for age, which encourages employers to target older late-career employees for lay-off. One author suggests that "[b]y downsizing aging late-career workers for cost containment reasons, however, the corporation is in reality favoring younger workers over older workers. Age thus becomes a factor, albeit an unstated one, in the decision to downsize, even though the express reason given is cost savings."

Whether the employer is intentionally trying to rid the workforce of older workers because of their age or whether the employer may be accomplishing the same thing by getting rid of higher-salaried employees, the ADEA must provide some protection. Furthermore, not only do employers use age-correlated factors other than higher salary to eliminate older workers, but other reasons such as age stereotyping and subconscious discrimination may also be coming into play. Nevertheless, regardless of the specific age-correlated factor used or the stated reason for using it, the most likely motive of employers who use age-correlated factors is to rid the workforce of older workers who are perceived as not worth their salaries. While cutting costs by eliminating higher-salaried workers should not be illegal, the ADEA should be interpreted to require the employer to justify imposing the cost-savings on older workers.

46. See Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 Wis. L. Rev. 507, 530 n.127 (noting only two successful cases as of the date of the author’s research).


49. Minda, *supra* note 1, at 536.

50. *Id.* at 532.
The implication that was obvious to the courts in earlier ADEA cases was that employers are making assumptions about the value of older employees and should have to justify any decision that impacts older workers, whether in an intentional or merely a predictable manner. The question is not whether the ADEA was intended to prevent such behavior on the part of employers—or whether it would have been if the current employment climate had been contemplated. It clearly was intended for such a purpose: the ADEA was designed to prevent discrimination based on negative stereotypical thinking regarding older workers.\(^5\)

Instead, given the present interpretation of the law, the question is how to rehabilitate the ADEA so that it will fulfill its purpose of protecting older workers. This protection is especially crucial today when older workers are bearing the brunt of current business forces that encourage employers to disregard values other than economically advantageous simple solutions, such as laying off higher-salaried workers.\(^5\)

The ADEA was particularly designed to eliminate the ability of the employer to act based on stereotypical views of older workers.\(^5\) Without the application of the disparate impact theory and the proper use of RFOA, employers can act based on age-correlated factors that can be used to disguise age stereotyping. Because a legislative solution is unlikely, the only judicial solution is to interpret the ADEA’s RFOA

\(^5\) See *Eglit*, *supra* note 3, at 582–83. The Supreme Court seems to agree with this view of the ADEA, having recently commented on the history of the Act, as follows:

> Congress chose not to include age within discrimination forbidden by Title VII of the Civil Rights Act of 1964.... Instead it called for a study of the issue by the Secretary of Labor, who concluded that age discrimination was a serious problem, but one different in kind from discrimination on account of race. The Secretary spoke of disadvantage to older individuals from arbitrary and stereotypical employment distinctions (including then-common policies of age ceilings on hiring), but he examined the problem in light of rational considerations of increased pension cost and, in some cases, legitimate concerns about an older person's ability to do the job. When the Secretary ultimately took the position that arbitrary discrimination against older workers was widespread and persistent enough to call for a federal legislative remedy, he placed his recommendation against the background of common experience that the potential cost of employing someone rises with age, so that the older an employee is, the greater the inducement to prefer a younger substitute....

> ... The record thus reflects the common facts that an individual’s chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype.


\(^52\) See *Kaminshine*, *supra* note 13, at 238–40 (discussing occasions when it may be economically rational to engage in prohibited classification of employees by protected class, which are nevertheless prohibited by law).

\(^53\) *Id.* at 287–95.
defense to require an employer to justify the use of age-correlated factors under either theory of discrimination, disparate treatment or disparate impact.

This article will describe the ADEA generally in Section II. Section III will discuss how the ADEA was interpreted before Hazen Paper and will discuss the Hazen Paper case in Section IV. Section V will explore the lower court opinions interpreting the ADEA since Hazen Paper and why these courts hold that the disparate impact theory should not apply. Section VI will sample recent lower court cases illustrating the effect on recent ADEA decisions stemming from not applying the disparate impact theory and RFOA. Section VII will analyze and suggest the proper interpretation of RFOA and the application of the disparate impact theory to the ADEA as the solution to preventing the unjustified use of age-correlated factors.

II. The Age Discrimination in Employment Act

The ADEA prohibits discrimination based on age against persons over the age of forty. Because the wording of the prohibitions against age discrimination in the ADEA was taken word for word from Title VII, the ADEA provides the same basic protections based on age for people over forty that Title VII provides against discrimination based on race, sex, religion, color and national origin. As a result of this similarity


55. Lorillard, A Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 584 (1978). Congress rejected age as a basis for discrimination under Title VII but directed the Secretary of Labor to study the problem of age discrimination. See 110 Cong. Rec. 2596-99; 9911-13; 13,490-92 (1964). For the actual report, see U.S. Dep't of Labor, the Older American Worker, Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), and U.S. Dep't of Labor, the Older American Worker, Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 Research Materials (1965). For a discussion of the report, see Kaminshine, supra note 13, at 287-306, and Alfred W. Blumrosen, Interpreting the ADEA: Intent or Impact, reprinted in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 68 (M. Lake ed., 1982). Professors Kaminshine and Blumrosen have dissected the Secretary's report for evidence of whether the ADEA was intended to prohibit practices that have a disparate impact, coming to contrary conclusions. See Blumrosen, supra, at 73; Kaminshine, supra note 13, at 290-97.


It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges
between the two Acts, the courts have generally interpreted the ADEA consistently with Title VII. 57

The principal differences between the two Acts are in the remedial provisions and some of the defenses. The remedial provisions of the ADEA were drawn from the Fair Labor Standards Act (FLSA) and provide for liquidated damages for willful violations. 59 Although the ADEA and Title VII 60 share the defenses of bona fide occupational qualification (BFOQ) and seniority, other defenses such as actions taken pursuant to "reasonable factors other than age" or a bona fide employee benefit plan, and discipline or discharge for good cause are specific to the ADEA. 61

The similarity in the prohibitory provisions of the two Acts leads to the inescapable conclusion that, absent a strong indication in the legislative intent to the contrary, the understanding of discrimination developed under Title VII, which encompasses both the disparate impact and disparate treatment theories of discrimination, must be applied to the ADEA. Nevertheless, since Hazen Paper, a majority of lower courts now hold that the disparate impact theory does not apply to the ADEA and ignore or misuse the defense of RFOA in disparate treatment actions. The only plausible argument for not applying the disparate impact theory to the ADEA relies on a broad interpretation of the RFOA defense, which is not found in Title VII. This argument, which requires RFOA to mean "any" factor other than age, must be examined and refuted.


59. 29 U.S.C. § 626(b).

60. 42 U.S.C. § 2000e-2(e), (h). The BFOQ defense under Title VII only applies to sex, religious and national origin discrimination. Id. § 2000e-2(e). Race discrimination cannot be defended as a BFOQ. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 25-26 (1993) (Ginsburg, J., concurring). There are defenses under Title VII that are not contained in the ADEA as well, such as action taken pursuant to a merit system or a system which measures quantity or quality of production or a professionally developed test. Id. § 2000e-2(h).

61. 29 U.S.C. § 623(f). See infra note 142 for the full text of this section.
III. How the ADEA Was Interpreted Before Hazen Paper

As discussed above, because of the similarity between Title VII and the ADEA, the courts generally applied both the disparate impact and the disparate treatment theory of discrimination to the ADEA before Hazen Paper. The Supreme Court developed the disparate impact theory in Griggs v. Duke Power Co., holding that Title VII prohibits not just intentional discrimination, but also discrimination that is "fair in form but discriminatory in effect." When the Court said that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices," discriminatory impact became, not a different kind of discrimination, but a part of the definition of what it means to discriminate in employment. Because of the similarity between the two statutes, part of the understanding of discrimination developed under Title VII was necessarily incorporated into the ADEA. The ADEA must, therefore, also be interpreted to prohibit the unjustified use of selection criteria that are neutral on their face but which adversely impact the protected class.

Although disparate impact is generally associated with unintentional discrimination, it also ferrets out intentional discrimination that is difficult to prove. Before Hazen Paper, the majority of courts recognized that disparate impact applied to the ADEA. In fact, disparate impact was not necessary at that time to prohibit the use of many neutral criteria that had an adverse effect on older workers because a majority of courts simply assumed that an employer using

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62. See supra note 57 and infra text accompanying note 68.
64. Id. at 431.
65. Id. at 430.
66. See Kaminshine, supra note 13, at 234.
68. See Johnson, supra note 2, at 27-28. Most courts held that the use of age-correlated factors was discriminatory per se. This probably accounts for why the disparate impact defense was not actually applied to the ADEA very often and why it was rarely successful. See Sloan, supra note 46, at 538, in which the author notes only two successful cases as of the date of his research.
criteria that correlated with age, such as overqualification, high salary, tenure and seniority, was intentionally discriminating. Such courts went so far as to hold that the use of such criteria was discriminatory per se. Many of these decisions were made shortly after the ADEA was enacted, contributing to the consensus regarding the intent and meaning of the ADEA at that time. Several years after the enactment of the ADEA, however, the consensus regarding age-correlated factors and the applicability of the disparate impact theory to the ADEA began to change.

In 1981, Justice Rehnquist made the first important contention that the courts had erroneously applied the disparate impact theory to the ADEA. In a dissent from a denial of certiorari, Justice Rehnquist said that the Court had never held that the disparate impact theory applied to


In Leftwich, 702 F.2d at 691, for example, the defendant tried to justify its reduction in force plan which had a disparate impact on older employees as a cost-saving measure required by business necessity. The defendant had reserved certain positions for non-tenured faculty, because they were paid less than tenured faculty. Id. The court said that "economic savings derived from discharging older employees cannot serve as a legitimate justification under the ADEA." Id. Although the plan was based on tenure status rather than age, the court recognized that because of the close relationship between tenure status and age, the plain intent and effect of the defendants' practice was to eliminate older workers who had built up, through years of case satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, the purpose of the ADEA will be defeated. Although this was a disparate impact case, the court evidently believed that the policy was discriminatory per se, as did the court in Geller, which was also a disparate impact case. 635 F.2d at 1027.

In the Geller case the employer refused to hire teachers with more than five years of experience, a policy which impacted 92% of the teachers over forty. The court said that this policy was discriminatory per se and could not be justified by business necessity. 635 F.2d at 1033-34.

In Reichman, the court was reviewing a jury verdict in favor of the plaintiff. 818 F.2d at 278. The court said that evidence that the defendant would have saved $60,000 in pension costs in firing the plaintiff ten months before her pension vested was sufficient to support the verdict. The court assumed without analyzing the point that desire to save pension costs would violate the ADEA. Id. at 280-81.

In Jardien, the court approved the instruction to the jury in the lower court that "salary savings that can be realized by replacing a single employee aged sixty, with a younger, lower-salaried employee does not constitute a permissible, nondiscriminatory justification." 888 F.2d at 1157. In this case the defendant complained that the plaintiff was a new hire so that his salary did not reflect his seniority. Nevertheless, the court said that his salary did reflect his greater experience in the workforce which was the equivalent. Id. at 1157-58.

Similarly, the court in Laugeson, said that if "too many years on the job" meant length of service, which is inevitably related to age, that would show discrimination. 510 F.2d at 313.

70. See supra note 69.
71. Id.
the ADEA and suggested that it should not. The support for this contention was weak. Justice Rehnquist cited part of the general prohibitory section of the ADEA, § 4(a)(1), as support for the proposition that the ADEA permits policies that have a disparate impact. However, the dissent omitted any reference to § 4(a)(2), the other part of the prohibitory section, which was copied from a provision in Title VII that has been interpreted to authorize the disparate impact theory. Justice Rehnquist also cited the RFOA defense for the proposition that the ADEA allows the employer to defend using any factor other than age, ignoring the important word "reasonable" in the RFOA defense. Justice Rehnquist's position gathered little support in the lower courts until the Supreme Court's next reference to disparate impact and the ADEA in Hazen Paper in 1993.

Thus, at the time Hazen Paper was decided, the majority of the lower courts still held that age-correlated factors could be attacked under the disparate impact theory, and the majority of courts viewed the use of age-correlated criteria as discriminatory per se. After Hazen Paper, the situation changed dramatically.

IV. HAZEN PAPER CO. V. BIGGINS

At the outset, the Court in Hazen Paper said that it had granted certiorari to decide two questions, only the first of which is important to

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72. Markham v. Geller, 451 U.S. 945, 947 (1981) (Rehnquist, J., dissenting from denial of petition for certiorari). In that case the lower court had decided that a policy of refusing to hire teachers with more than five years of experience had a disparate impact on teachers over forty. Justice Rehnquist noted that "[t]his Court has never held that proof of discriminatory impact can establish a violation of the ADEA." Id. at 948 (Rehnquist, J., dissenting).

73. Justice Rehnquist insisted that since the policy made no reference to age, it could not violate the ADEA, citing two bases for this conclusion: 1) the first part of the anti-discrimination provision contained in the ADEA, § 4(a)(1), which provides that it is unlawful to fail or refuse to hire or to discharge any individual or to discriminate with regard to any term or condition of employment because of age. Id. at 947 (citing 29 U.S.C. § 623(a)(1)) (Rehnquist, J., dissenting), and 2) the ADEA's defense of "reasonable factors other than age." Id. at 949 (Rehnquist, J., dissenting). See infra Section V for a discussion of this argument.

74. See discussion infra accompanying notes 117-19.

75. Markham, 451 U.S. at 949. See Johnson, supra note 2, at 55, for a further discussion.

76. "There has been a modicum of judicial resistance to the infusion of disparate impact analysis into the ADEA context." Egliit, supra note 57, at 1099 n.18.

77. See, e.g., Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992); MacPherson v. Univ. of Montevallo, 922 F.2d 766, 770-71 (11th Cir. 1991); Abbott v. Fed. Forge, Inc., 912 F.2d 867, 872-73 (6th Cir. 1990); Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986); Shutt v. Sandoz Crop Protection Corp., 934 F.2d 186, 189 (9th Cir. 1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690-91 (8th Cir. 1983) (all holding that the disparate impact theory applied to the ADEA). The idea that disparate impact should apply to the ADEA was attacked in a frequently cited dissent by Judge Easterbrook. Metz, 828 F.2d at 1211 (7th Cir. 1987) (Easterbrook, J., dissenting).
this article: "Does an employer's interference with the vesting of pension benefits violate the ADEA?"78 The plaintiff in Hazen Paper had been discharged shortly before his pension was to vest.79 The jury found that the employer discharged the plaintiff because of his age in violation of the ADEA and to keep his pension from vesting in violation of ERISA.80

The Court addressed the question of whether the lower courts were correct in holding that an employer's decision based on pension vesting, a factor that correlated with age, was discriminatory per se under the ADEA. The Court said that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."81 In this case, although pension vesting or "years of service" correlated with age, the Court found that it was not perfectly correlated with age.82 The pension vesting period was ten years, allowing people under forty to be close to vesting.83

The Court, expressly prefacing Hazen Paper with a statement that it was a disparate treatment case, not a disparate impact case, said:

Disparate treatment... captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. [citations omitted] Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.84 When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.85

The Supreme Court equated a "factor other than age" with a legitimate nondiscriminatory reason, the judicially-created defense to Title VII actions also applied to the ADEA, and "clarified" that defense as well.86 The Court noted that a legitimate nondiscriminatory reason or a "factor other than age" can be any reason, regardless of how improper or

78. 507 U.S. 604, 608 (1993). The second question related to the issue of what constitutes a willful violation for purposes of liquidated damages. Id.
79. Id. at 606.
80. Id.
81. Id. at 609 (emphasis added). This was correct because the employer should be given the opportunity to justify an age-correlated criterion as an RFOA. See discussion infra accompanying notes 193–94.
82. Id. at 612. The Court did not review, but simply noted that the lower court had properly affirmed the jury's verdict regarding the ERISA violation. Id.
83. Id. at 611.
84. Id. at 610–11.
85. The Court said that "[a]lthough some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, ... this reading is obviously incorrect." Id. at 612 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (a Title VII disparate treatment case)). See infra text accompanying notes 158–67 for a discussion of legitimate nondiscriminatory reason.
illegal, as long as it does not violate the particular act under which the plaintiff is suing. "For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA." 86

In the Hazen Paper case, therefore, the Court decided that an employer does not engage in intentional discrimination under the ADEA if the employment decision is based on any factor "other than age," even if the factor correlates with age, as long as the factor does not correlate perfectly with age or is not a pretext for discrimination. 87 The question presented was whether the lower court was correct in holding that pension vesting was discriminatory per se. 88 That is all the Court was deciding. The Court did not determine the proof necessary to show that the employer actually acted on a factor other than age. Most importantly for the purposes of this article, the Court did not mention the RFOA defense. 89

The holding in Hazen Paper was simply that the use of an age-correlated factor is not discriminatory per se. 90 As another author has noted, the Supreme Court

did not foreclose the use of the proxy theory [that age-correlated factors can be a proxy for age discrimination] in all cases. The Court stated that factors like pension status 'may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent... but in the sense that the employer may suppose a correlation between the two factors and act accordingly.' 91

Nevertheless, the courts continue to ignore the defense of RFOA and not only hold that basing an employment decision on an unjustified age-correlated factor is not discriminatory, but that use of an age-correlated factor is not considered evidence of discrimination. 92

86. Hazen Paper, 507 U.S. at 612.
87. Id. at 611.
88. Id. at 608.
89. In fact, the courts have generally failed to analyze RFOA. See Eglit, supra note 38, at 169–70. The principal cases analyzing RFOA involved explicit use of age as a factor and should have been analyzed under the affirmative defense of bona fide occupational qualification, see EEOC v. Chrysler Corp., 733 F.2d 1183, 1185 (6th Cir. 1984), or used a factor that correlated perfectly with age, pension eligibility. See EEOC v. Local 350, Plumbers and Pipefitters, 982 F.2d 1305, 1307 (9th Cir. 1993); EEOC v. Westinghouse Elec. Corp., 869 F.2d 696, 706 (3d Cir. 1989), cert. granted and jmt. vacated, 493 U.S. 801 (1989); EEOC v. City of Altoona, 723 F.2d 4, 5 (3d Cir. 1983), cert. denied, 467 U.S. 1204 (1984).
90. Although in my first article I was inclined to believe that Hazen Paper effectively precluded an interpretation of the defense of RFOA different from "any" factor other than age, I am now taking a more optimistic view, held by other scholars. Neither the Supreme Court nor the lower courts have yet to define the scope of RFOA. 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, 392 (1994); Sloan, supra note 46.
91. Gregory, supra note 90, at 392 (citing Hazen Paper, 507 U.S. at 613).
92. See infra Section VI.
To compound this overreading of *Hazen Paper*, courts are also citing the case for the proposition that disparate impact does not apply to the ADEA. The Court in *Hazen Paper* said that "we have never decided whether the disparate impact theory of liability is available under the ADEA, and we need not do so here. Respondent claims only that he received disparate treatment." Despite these statements regarding what the case was about—and, more importantly, what it was not about—lower courts have used *Hazen Paper* as authority that disparate impact should not apply to the ADEA.

Three members of the Court joined in a concurrence, authored by Justice Kennedy, stating that there are "substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." The "substantial arguments" cited by the concurrence were comprised of Justice Rehnquist's 1981 dissent from the denial of a petition for certiorari discussed above, a student casenote and a lower court dissent. Even the concurrence, however, did not expressly conclude that disparate impact does not apply to the ADEA.

The lower courts are patently wrong in citing *Hazen Paper* for the proposition that disparate impact does not apply to the ADEA. The Court in *Hazen Paper* said only that in a disparate treatment case if the employer interposes a factor other than age that is not a pretext for discrimination, he is not guilty of intentional discrimination. Thus, the possibility remains that if the employer uses a factor other than age that

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93. See infra Section V.C.
95. See infra Section V.C.
98. Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982). This casenote was written in 1982 and is largely outdated, given subsequent changes in the law. The note asserts that the disparate impact theory is not appropriate under the ADEA. One of the reasons the author cites is that Title VII cases should only be authoritative for the ADEA when such cases involve a statutory provision having a counterpart in the ADEA. At that time, the statutory basis for disparate impact in Title VII had been identified, although, perhaps, only in passing. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976). *See infra note 111 for additional discussion. Shortly after the note was written, however, the Supreme Court clearly found statutory support for the disparate impact theory in § 703(a)(2). The note was published in April 1982, before *Connecticut v. Teal*, which explicitly identified the statutory basis for disparate impact, and was decided in June 1982. 457 U.S. 440, 445-46 (1982).
99. The dissent in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1211 (7th Cir. 1987) (Easterbrook, J., dissenting), overruled by, Anderson v. Baxter HealthCare Corp., 13 F.3d 1120, 1125-26 (7th Cir. 1994), which Justice Kennedy's concurrence cited, was a disparate treatment case. The majority decided that the employer had discriminated in using a factor that correlated with age. The dissent thought that the majority had reached its conclusion by confusing the disparate impact and disparate treatment theories and questioned whether the employer discriminated even applying the disparate impact theory. *Id.* at 1216-20. In the explication of its opinion, the dissent questioned in passing whether disparate impact applied at all to ADEA cases. *Id.* at 1220.
100. *See infra Section V.B.*
strongly correlates with age, such employer must bear more of a burden under the RFOA defense in order to show that the factor is not disguising intentional discrimination. Furthermore, because the Court stated that the decision did not involve disparate impact, *Hazen Paper* does not preclude a requirement that the employer justify an age-correlated factor as an RFOA under the disparate impact analysis. In fact, if the RFOA defense has no place in a disparate treatment case after *Hazen Paper*, then the statutory language has no meaning at all unless it is a defense to a disparate impact case.

V. LOWER COURT OPINIONS SINCE *HAZEN PAPER* DISCUSSING HOW THE ADEA SHOULD BE INTERPRETED AND WHY DISPARATE IMPACT DOES NOT APPLY

At this point, little more than ten years after *Hazen Paper*, only a minority of circuit courts hold that the disparate impact theory applies to the ADEA.101 The other circuits hold that disparate impact does not apply or that there are serious questions in this regard.102 These circuits base their decisions on arguments made before *Hazen Paper* and

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101. With regard to whether the disparate impact theory applies to the ADEA, the courts hold as follows: The First, Fifth, Seventh, Tenth and Eleventh say unequivocally that the theory does not apply. See Smith v. City of Jackson, 351 F.3d 183, 191 (5th Cir. 2003), cert. granted, 72 U.S.L.W. 3614 (Mar. 29, 2004); Adams v. Fla. Power Corp., 255 F.3d 1322, 1325 (11th Cir. 2001), cert. granted, 534 U.S. 1054 (2001), cert. dismissed as improvidently granted, 555 U.S. 228 (2002); Mullin v. Raytheon Co., 164 F.3d 696, 700–01 (1st Cir. 1999); Ellis v. United Airlines, 73 F.3d 999, 1006–07 (10th Cir. 1996). In the Seventh Circuit, *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), the court set out the arguments against disparate impact, but failed to expressly preclude it. *Id.* at 1078 (Cudahy, J., dissenting). The Seventh Circuit now holds without analysis that disparate impact does not apply to the ADEA. See Gehring v. Case Corp., 43 F.3d 340, 342 (7th Cir. 1994).

The Third and Sixth Circuits have not said that disparate impact does not apply, but express such serious misgivings that it is unlikely that the theory will be applied in these circuits. See DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732–735 (3d Cir. 1995) (detailing the arguments against disparate impact and concluding that it was unnecessary to say that it would never apply but that it did not apply in the instant case). See also *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998) (citations omitted), where the court stated:

> Although we stated in *Abbot v. Federal Forge Inc.*, that a disparate-impact theory of age discrimination may be possible, we have subsequently noted that in light of the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, there is now 'considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory.'

The Second, Eighth and Ninth Circuits continue to allow disparate impact claims. See Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000); 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). However, the Eighth Circuit has indicated some doubt whether disparate impact applies. Allen v. Entergy, 193 F.3d 1010, 1015 n.5 (8th Cir. 1999) (citing *Hazen Paper* for the proposition that the Supreme Court has "suggested that the ADEA does not permit such actions").

The Fourth Circuit and the D.C. Circuit have not addressed this issue. See *Adams*, 255 F.3d at 1325 n.5. In a case on an unrelated issue, however, the D.C. Circuit has interpreted *Hazen Paper* to cast doubt on the applicability of the disparate impact theory to the ADEA. Contractors' Labor Pool, Inc. v. NLRB, 323 F.3d 1051, 1060 (D.C. Cir. 2003) (noting in a National Labor Relations Act case, "the Court has been reluctant to extend the disparate impact theory to other laws prohibiting discrimination even where the statutory language bears greater resemblance").

102. *Contractors' Labor Pool*, 323 F.3d at 1060.
referenced in Justice Kennedy's concurrence as substantial reasons for why disparate impact does not apply to the ADEA. Courts also rely on rationales used before, but not referenced in *Hazen Paper*, and some courts are contriving rationales not used before *Hazen Paper*.

The following rationales for not applying the disparate impact theory to the ADEA were used, but not accepted, before *Hazen Paper*: 1) The text of the ADEA only prohibits intentional discrimination because of age; 2) the defense of RFOA precludes disparate impact, a rationale that analogizes RFOA to a defense under the Equal Pay Act that may preclude disparate impact under that statute; and 3) the legislative history of the ADEA precludes disparate impact.

The following rationales for not applying the disparate impact theory to the ADEA are derived from *Hazen Paper*: 1) Even though the Court in *Hazen Paper* said that disparate impact was not an issue, the Court did say that it is an open question; 2) the Court in *Hazen Paper* said that basing an employment decision on a factor other than age is acceptable under the ADEA, which necessarily precludes a disparate impact analysis; and 3) *Hazen Paper* said that disparate treatment captures the essence of the ADEA, thus precluding disparate impact.

The following rationales are in addition to arguments made before, or alluded to in, *Hazen Paper*: 1) Congress amended Title VII in 1991 to codify the disparate impact theory and did not similarly amend the ADEA; and 2) Title VII was designed to eliminate the effects of past discriminatory experiences, while age discrimination correlates with
contemporaneous and not past discriminatory practices.113

These reasons, alone or in concert, are not sufficiently persuasive to justify the damage their acceptance is doing to the statutory scheme of the ADEA. Some of the rationales are disingenuous. The most obvious of these is the rationale suggesting that the text of the ADEA applies only to intentional discrimination.

A. STATUTE-BASED RATIONALES FOR NOT APPLYING THE DISPARATE IMPACT THEORY TO THE ADEA

1. Section 4(a) only forbids intentional discrimination

The rationale that the text of the ADEA applies only to intentional discrimination relies on § 4(a)(1), which provides that it is unlawful "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."114 The section was taken word for word from its counterpart in Title VII, § 703(a)(1).115

Congress, however, prohibited more than these specific forms of intentional discrimination in both Title VII and the ADEA. In particular, Congress added § 4(a)(2) to the ADEA, copied from Title VII's § 703(a)(2), which serves as the statutory basis for the disparate impact theory.116 Section 4(a)(2) provides that it is also an illegal practice for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."117 To the extent that the Supreme Court has developed the disparate impact theory based on § 4(a)(2)’s Title VII counterpart, the argument is simply foreclosed that the ADEA’s § 4(a)(2) can be interpreted differently from the statute from which it was taken.118 The only superficially appealing argument that

113. See, e.g., Smith, 351 F.3d at 195; Mullin, 164 F.3d at 701.
115. See Johnson, supra note 2, at 8 n.27 for a direct comparison of the two statutes.
116. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136, 141 (1977). In a later development, the Supreme Court, albeit in a bit of revisionist history, clearly revealed in Teal, 457 U.S. at 445-46, that § 703(a)(2), quoted above, had been the basis for the Court’s articulation of the disparate impact theory in Griggs. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In fact the Court had not indicated in Griggs that it was interpreting any particular part of Title VII, but only that the "Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Id. at 431.
118. See, e.g., Kaminshine, supra note 13, at 230. The only major difference in the two provisions is that Title VII specifically applies to applicants in § 703(a)(2), and the ADEA does not have the word applicant in the statute. Congress amended Title VII after the ADEA was enacted to clarify that it did apply to applicants, as the courts had always held. The ADEA has always been held to apply to applicants. See Johnson, supra note 2, at 8 n.27. See Johnson, supra note 2, at 48–53, for a more complete discussion of legislative history and statutory interpretation of the ADEA.
§ 4(a)(2) of the ADEA should be interpreted differently from its counterpart in Title VII is the fact that the ADEA has the RFOA defense, not contained in Title VII.

2. The defense of RFOA precludes disparate impact

Some courts opine that because the ADEA allows employers to defend based on "reasonable factors other than age," disparate impact is precluded.119 As discussed above, the prohibitory provisions of the ADEA were copied from Title VII; however, Congress added some defenses to the ADEA that are not found in Title VII. The most important defense for the purpose of this article, the RFOA defense, is found in § 4(f)(1) which provides, "[i]t 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."120 The meaning of this defense is pivotal to the issue of whether the ADEA will survive as an effective deterrent to discrimination against older workers.

a. RFOA and the Equal Pay Act

There is scant legislative history on RFOA,121 but there is little doubt about the origin of the defense.122 Although the prohibitory portion of the ADEA was patterned after Title VII, the remedial provisions of the ADEA were derived from the Fair Labor Standards Act.123 Congress modeled the RFOA defense124 on a part of the Fair Labor Standards Act125 known as the Equal Pay Act (EPA).126 Specifically, the RFOA defense is based on the EPA's similar defense of "any other factor other than sex."127

The EPA prohibits employers from paying a salary differential for equal work where such differential is based on sex.128 Once the employee shows that an employee of the opposite sex is performing equal work and that the employer pays more to one than the other, the burden of persuasion shifts to the employer to prove one of four defenses.129 One of the defenses to the EPA is paying a salary differential based on "any other factor other than sex" (hereinafter FOTS).130

119. See infra Section V.A.2.
121. See Kaminshine, supra note 13, at 193–94.
122. Id. at 194.
127. Id.
130. Id.
Congress was referencing FOTS when it added RFOA to the ADEA. As opposed to the EPA, the ADEA affirmatively added the word “reasonable” to “factors other than age.” Looking at the statutory language alone, Congress meant to require the employer to justify the use of a factor other than age because it added the term “reasonable” to the same defense under the ADEA. The interpretations of the agencies that have administered the ADEA, the Labor Department and the EEOC, also support this interpretation.

The Supreme Court has said in dicta in County of Washington v. Gunther that FOTS may preclude application of the disparate impact theory under the EPA, and some courts cite Gunther for the same proposition under the ADEA. Nevertheless, even under the much less

131. Eglit, supra note 38, at 195.
132. The legislative history of the RFOA is sparse and inconclusive. See Eglit, supra note 38, at 180–81.
133. Kaminshine, supra note 13, at 302–03; Eglit, supra note 38, at 195 (citing 29 C.F.R. § 860.103(e) (1985) (rescinded)). The current EEOC position is as follows:

Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that [. . .] it shall not be unlawful for an employer, employment agency, or labor organization [. . .] to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section [. . .] where the differentiation is based on reasonable factors other than age [. . .]

(b) No precise and unequivocal determination can be made as to the scope of the phrase “differentiation based on reasonable factors other than age.” Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a “factor other than” age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as “reasonable factors other than age” will be scrutinized in accordance with the standards set forth at Part 1607 of this title.

(e) When the exception of “a reasonable factor other than age” is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the “reasonable factor other than age” exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

29 C.F.R. § 1625.7 (2003).
134. Eglit, supra note 38, at 195–96 (citing 29 C.F.R. § 1625.7(d)).
136. See, e.g., Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting), overruled by Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125–26 (7th Cir. 1994). In a frequently cited dissent, Judge Easterbrook suggested that the Supreme Court’s reasoning in Gunther, 452 U.S. at 170–71 (that the “other factors other than sex” defense precludes disparate impact wage cases under the Equal Pay Act) should also apply to the ADEA. Metz, 828 F.2d at 1220.

In Gunther, the Supreme Court was faced with interpreting the Bennett Amendment to Title VII which provided that the employer could differentiate on the basis of sex in compensation if authorized to do so by the Equal Pay Act. 452 U.S. at 170–71. The Supreme Court decided that the Bennett Amendment incorporated the four affirmative defenses of the EPA into Title VII. Id. The Court recognized that the Equal Pay Act applies only to equal pay for equal work, while Title VII
equivocal language of “any other factor other than sex,” most lower courts interpret the EPA’s FOTS defense to require some business justification if the factor has historically had an adverse impact on women.37 According to this interpretation, a factor that correlates with sex may require additional justification, therefore revealing that “any” factor other than sex may not be a sufficient defense under the EPA.38 Thus, the fact that the RFOA defense is derived from the FOTS defense, which is interpreted to require an employer justification, strengthens the case that Congress meant to require at least as much employer justification in adding the word “reasonable” to the ADEA.

Furthermore, FOTS is an affirmative defense.39 The question of whether RFOA under the ADEA should be an affirmative defense, with regard to which the defendant bears the burden of persuasion, should be decided with reference to its prototype, the EPA. As Professor Eglit observed, the Supreme Court has said in the context of interpreting other provisions of the ADEA drawn from the Fair Labor Standards Act and the EPA:

Given the settled readings of both the FLSA generally, and of the EPA specifically, the observations of the Court in Lorillard v. Pons, an ADEA case, are particularly relevant. . . . [I]n devising the proper interpretation of the statute, the Lorillard Court noted the presumption that when “Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have applies to other types of discriminatory compensation claims, and did not limit Title VII sex-based wage claims to claims involving equal work. Id. The Court in Gunther left the question open as to how sex-based wage discrimination litigation under Title VII should be structured. Id. The comment that FOTS may preclude a disparate impact case is clearly dicta. Id.

Other than this comment, the Supreme Court has not addressed disparate impact wage claims. Most lower courts, however, require “other factors other than sex” to be justified as relating to the employer concerns, see Player, supra note 57, at 419, which is not that different from the definition of business necessity in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989), superseded in part by statute. See discussion infra accompanying note 173. Therefore, FOTS would not preclude disparate impact compensation claims under Title VII in any event. See Player, supra note 57, at 418.

137. See, e.g., Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982).
138. See Player, supra note 57, at 419. An illustration of how courts have interpreted FOTS is in the treatment of whether the use of previous salary to determine present salary is a FOTS because past salary tends to perpetuate historical discrimination against women. In Kouba, 691 F.2d at 876, the court concluded that the employer cannot use such a factor “which causes a wage differential between male and female employees absent an acceptable business reason.” In Taylor v. White, 321 F.3d 710, 719 (8th Cir. 2003), the court rejected the “reasonableness” requirement, but said that the record must be carefully reviewed “for evidence that contradicts an employer’s claim of gender-neutrality.”

In Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570–71 (11th Cir. 1988), the Eleventh Circuit went even further and said that relying on past salary was per se not a FOTS, except in limited circumstances. The court relied on Coming Glass Works v. Brennan, 417 U.S. 188, 195 (1988), in which the Court rejected the market force theory that allowed women to be paid less because this was the evil the Act was designed to eliminate. Id. If even a factor that correlates with sex must be justified in some way to be “any other factor other than sex,” it is even more evident that “reasonable factors other than age” must be justified.

139. See Player, supra note 57, at 419.
had knowledge of the interpretations given to the incorporated law, at least insofar as it affects the new statute." The Court reasoned that this presumption was particularly appropriate regarding consideration of the ADEA, since in enacting the age statute, Congress "exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretations and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation."

The Supreme Court’s direction on interpreting the ADEA’s remedial provisions derived from the FLSA and the EPA applies equally well to the ADEA’s prohibitory provisions, which were derived from Title VII.

b. RFOA and Title VII

In contrast to Title VII, for which Congress provided no general defenses,\(^{141}\) Congress provided five defenses, including the RFOA defense, to an ADEA action.\(^{142}\) For Title VII, the Supreme Court

\(^{140}\) Eglit, supra note 38, at 195 (quoting Lorillard, A Div. of Loew’s Theatres, Inc. v. Pons, 434 U.S. 575, 581 (1978) (citations omitted)).

\(^{141}\) As does the ADEA, Title VII provides a defense for a bona fide seniority system and a bona fide occupational qualification. See 42 U.S.C. § 2000e-2(e), (h) (2000). The BFOQ defense is not absolute under Title VII but only applies to sex, religious and national origin discrimination. See id. § 2000e-2(e).

There are defenses under Title VII which are not contained in the ADEA as well, such as action taken pursuant to a merit system or a system which measures quantity or quality of production or a professionally developed test. See id. § 2000e-2(h).


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 age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

\(^{143}\) Id.
developed business necessity and legitimate nondiscriminatory reason as the general defenses. Therefore, because Title VII and the ADEA have been interpreted in pari materia, the lower courts have applied Title VII's judicially created defenses to the ADEA. To the extent that Congress provided all the possible defenses by statute for the ADEA, however, grafting defenses judicially created for Title VII onto the ADEA was unnecessary and has undermined the statutory scheme of the ADEA.

Title VII and the ADEA do have some statutory defenses in common. Both statutes allow the employer to act pursuant to a bona fide seniority system or because of a bona fide occupational qualification (BFOQ). For purposes of this article, the only important defense under the ADEA, found under both Acts, is the defense of BFOQ. Under Title VII, an employer may explicitly use sex, national origin or religion (but not race) as a basis for distinction if such characteristic is a BFOQ. Similarly, under the ADEA, the employer may take an employment action based explicitly on the employee's age, such as mandatorily retiring persons in the protected age group, if age is a BFOQ. This defense under both statutes is governed by the same decisional law and is narrowly construed. Therefore, under both statutes, the BFOQ defense must be interposed if the employer acts explicitly based on the employees' membership in the protected class.

Beyond the defenses of bona fide seniority system and BFOQ, other ADEA defenses are not found in Title VII. Under the ADEA and not explicitly under Title VII, therefore, the employer may make decisions based on a bona fide employee benefit plan, for good cause, and

145. See discussion supra accompanying notes 54–57.
146. See supra notes 69 & 77; infra note 247; discussion infra accompanying notes 177–78.
150. The Supreme Court has said that "[t]he BFOQ defense is written narrowly, and this Court has read it narrowly [citing Title VII and ADEA cases]. We have read the BFOQ provision in Title VII, just as narrowly." UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (citation omitted).
151. 29 U.S.C. § 623(f)(2). Congress was concerned that employers would be reluctant to hire and retain older employees because their benefits could be more costly. See Kaminshine, supra note 13, at 249–50. In addition, Congress specifically added to the bona fide employee benefit plan exception that it could not be used to refuse to hire or to mandatorily retire any employee. Id. This provision allows employers to adjust benefits for older employees so that in this regard they do not cost more than younger employees. The presence of this defense also indicates that Congress was assuming that cost would not otherwise be a defense to an ADEA action. Id. In fact, shortly after the Act, efforts to rely on the higher costs often associated with older workers "generated particularly emphatic rejection in most instances." Eglit, supra note 38, at 183–84. See supra note 142 for full text of the section.
152. 29 U.S.C. § 623(f)(3). There is no statutory equivalent under Title VII for disciplines or discharges for "good cause;" rather the employer may interpose the legitimate nondiscriminatory
based on "reasonable factors other than age." Where in this scheme should the RFOA defense fit? Logically, for any other situation in which one of the other defenses is not appropriate, the defense should be RFOA. Thus, RFOA would be the defense to any action for which the defenses of good cause, bona fide seniority system, bona fide benefit system or BFOQ are not applicable.

If the employer uses age as an explicit criterion, the defense of BFOQ, rather than RFOA, must be interposed. On the other hand, if the employment criterion is strongly correlated with age, the employer should justify it using the RFOA defense. However, because courts havegrafted the Title VII defenses onto the ADEA, the defense of legitimate nondiscriminatory reason rather than RFOA has been substituted as the usual justification for employer actions. RFOA has been ignored and misinterpreted, principally because of the almost universal application of the defense of legitimate nondiscriminatory reason to the ADEA.

Under the legitimate nondiscriminatory reason defense of Title VII, developed by the Court in McDonnell Douglas Corp. v. Green, if the defendant is acting based on a reason other than the plaintiff's protected class, the defendant is not guilty of intentional discrimination. However, under Title VII, if the defendant is not intentionally discriminating but his selection criteria nevertheless have a disparate impact on the plaintiff's protected class, the defendant is guilty of discrimination unless he justifies the use of such criteria as a business necessity. Business necessity is the other judicially-created defense developed in the absence of general statutory defenses for Title VII. Due to their importance to this discussion, these defenses and their relationship to RFOA will be discussed in some detail below.

Because Congress provided little guidance for analyzing a

reason defense under decisional law. See discussion infra accompanying notes 158–67. Professor Howard Eglit has opined that the addition of the good cause defense was "a form of statutory insurance—assuring any doubters that indeed the ADEA does not constitute an impediment to discharge based on cause. In any event, it seems proper to regard discharge for good cause simply as one particular subspecies of reasonable factors other than age." Eglit, supra note 38, at 179. Furthermore, because of the application to the ADEA of Title VII's legitimate nondiscriminatory reason defense, "good cause" has become unnecessary because discharge for good cause would be a legitimate nondiscriminatory reason.

154. Johnson Controls, 499 U.S. at 187. Compare Johnson v. New York, 49 F.3d 75, 80 (2d Cir. 1995) (holding that a policy which correlated perfectly with age must be justified using the BFOQ analysis), with DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 727 (3d Cir. 1995) (indicating that "a plan cannot be said to be facially discriminatory [if it] required referencing a fact outside the ADEA").
156. See Eglit, supra note 38, at 169–70.
157. Id.
circumstantial evidence case of disparate treatment under Title VII, the Supreme Court developed the legitimate nondiscriminatory reason defense when it constructed a model of proof for disparate treatment in *McDonnell Douglas*. In establishing a prima facie case, the plaintiff must show that 1) he was a member of a protected class; 2) he applied and was qualified for a position for which the employer was seeking applicants; 3) despite his qualifications, he was rejected; and 4) the employer continued to seek applicants with the plaintiff's qualifications. The Court later explained that if the plaintiff eliminated the common causes for rejection—lack of qualifications and unavailability of a position—the most likely reason remaining for the decision was discrimination. Thus, satisfying the *McDonnell Douglas* prima facie case is sufficient to require some explanation from the employer, who must articulate a legitimate nondiscriminatory reason for rejecting the plaintiff.

The Court later clarified that the employer must produce evidence of a reason for rejecting the plaintiff, but need not persuade the court that she was motivated by that particular reason. The Court said that the plaintiff's initial burden was not onerous and that the burden of persuasion remains on the plaintiff at all times. Once the employer produces evidence of a legitimate nondiscriminatory reason, the plaintiff bears the burden of persuading the court that the reason given by the employer was not the true reason for the employer's action, but rather was a pretext for discrimination.

Again, Congress provided all the necessary defenses for the ADEA, and unlike Title VII, the ADEA did not need judicially-created defenses. Nevertheless, the courts generally apply the Title VII defenses of legitimate nondiscriminatory reason and business necessity to the ADEA, which have now taken the place that should have been filled by RFOA.

161. 411 U.S. at 792.
162. *Id.* at 802. The Court noted that there are other ways to prove a prima facie case. *Id.* at 802 n.13. For a good discussion of burdens of proof, see Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1235-40 (1981).
163. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). That proposition may be debatable at this point in time for Title VII cases, as well as ADEA cases, but that is beyond the scope of this article.
164. *Id.* at 253.
165. *Id.* at 254.
166. *Id.* at 253.
167. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514-15 (1993). In that case, the Court said that the trier of fact may resolve the ultimate issue of discrimination vel non based on its disbelief of the employer's reason for its action, but that such disbelief does not necessarily satisfy the plaintiff's ultimate burden of proving discrimination. *Id.* The plaintiff must prove not only that the employer's reasons were untrue, but that they were a pretext for discrimination. *Id.* at 514-15.
168. See *SCHLEI & GROSSMAN*, supra note 57, at 497-98.
169. See *supra* note 69.
Business necessity is currently less often recognized as a defense because of the controversy surrounding the applicability of the disparate impact theory to the ADEA, but some courts still apply the defense to the ADEA. In *Griggs v. Duke Power Co.*, the Supreme Court held that business necessity is the defense to a claim of disparate impact under Title VII. The Court first articulated the theory of disparate impact in the *Griggs* case, so that if the employer uses an employment criterion that has a disparate impact on a protected class under Title VII, the employer must justify it as a business necessity. Business necessity generally means that the employer must prove that the employment criterion having the disparate impact was job-related, that is, that the criterion predicted success in the job.

Business necessity comports more with RFOA than does legitimate nondiscriminatory reason. As opposed to legitimate nondiscriminatory reason, which does not have to be reasonable, business necessity requires the employer to justify the reason as related in some way to his employment requirements. Shortly after the ADEA was enacted, the Secretary of Labor, who was originally responsible for administering the

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170. See supra notes 77 and 101.
172. Id.
173. See Johnson, supra note 2, at 39–45 for a discussion of the meaning of business necessity. Prior to the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), proof of business necessity usually required at least that the employer prove that the employment criterion was job-related, that is, that the criterion predicted success in the job. See *Schleif & Grossman*, supra note 57, at 112–14. The Supreme Court has not provided a well-defined meaning of business necessity. *Id.* In *Griggs*, the Court said the employer had to prove “business necessity,” then said that the employer had to show a “manifest relationship to the employment in question.” 401 U.S. at 431–32. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (quoting 29 C.F.R. § 1607.4(c)), the Court said that the message of the EEOC’s Selection Guidelines is that “discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be ‘predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.’” Thus, the Supreme Court at this point had sent mixed signals regarding the meaning of business necessity.

In *Wards Cove*, however, the Supreme Court said that the employer’s burden of proof was to show “whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer…. A mere insubstantial justification… will not suffice…. [but] there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business….” 490 U.S. at 659 (citations omitted).

*Wards Cove* served as a primary reason for passage of the 1991 Civil Rights Act. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.). Congress then codified the disparate impact test and clarified the burden of proof by providing that once the plaintiff has shown disparate impact, the employer must bear the burden of proof and persuasion to show that the practice is “job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k) (2000). It is not at all clear what Congress intended by adding this definition and the consternation is further exacerbated by Congress’ inclusion in the legislation of a memorandum which indicated that its sole intent regarding business necessity was to return to the law before *Wards Cove* and that other legislative history had no effect. See id. As set forth above, the law was not at all clear before *Wards Cove*, so the memorandum is not very helpful.
ADEA, issued guidelines providing that to be an RFOA, the criterion must be "reasonably necessary for the specific work to be performed' or 'shown to have a valid relationship to job requirements." Thus, that the RFOA should require proof of a business reason is supported by "the Department of Labor's contemporaneous understanding of the newly passed statute [which] is unusually germane, given its involvement and influence in the legislation." The ADEA's defense to a disparate impact case should be RFOA, not business necessity.

If the ADEA were being interpreted in a vacuum, the most obvious function for the RFOA defense would be to assume the roles taken by legitimate nondiscriminatory reason and business necessity under Title VII. With regard to the legitimate nondiscriminatory reason defense, while the Supreme Court continues to "assume without deciding" that *McDonnell Douglas* applies to the ADEA, the overwhelming majority of courts have applied the *McDonnell Douglas* model of proof to the ADEA. Thus, instead of requiring the employer to interpose an RFOA whenever the plaintiff proves a prima facie case under the ADEA, the employer need only articulate a legitimate nondiscriminatory reason. This reason can be anything that on its face does not discriminate based on age. If the reason is facially discriminatory, then the employer must prove BFOQ. Certainly, "reasonable factor other than age" assumes a higher burden of proof for the defendant than legitimate nondiscriminatory reason, which need not be reasonable. In fact, in *Hazen Paper*, the Court said that an "improper" reason can be a legitimate nondiscriminatory reason, as long as it is not facially discriminatory.

RFOA cannot simply be judicially eliminated from the statute as a defense and replaced in all cases with the legitimate nondiscriminatory


175. Id.


177. *In Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000) (citations omitted), for example, the Supreme Court said that "{t]his Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964 also applies to ADEA actions." The Court in *Reeves* had also assumed without deciding that *McDonnell Douglas* applied to the ADEA in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993). *Id.* at 142-43. It seems ironic that the Court has made important interpretations of *McDonnell Douglas* in ADEA cases without deciding whether *McDonnell Douglas* even applies.


179. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (noting a legitimate nondiscriminatory reason can be any reason, regardless of how improper or illegal as long as it does not violate the particular act under which the plaintiff is suing). The Court said, "{f]or example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA."* Id.


181. 507 U.S. at 612.
reason defense imported from Title VII, which has no statutory analogue to RFOA. Instead, the RFOA defense should preclude the use of legitimate nondiscriminatory reason as a defense because Congress explicitly required the employer's reason to be reasonable in the language of the RFOA defense.

The fact that the Court continues "to assume without deciding" that *McDonnell Douglas* applies to ADEA cases does not preclude the Court from deciding ultimately that it does not. It would be ironic indeed if the Court decides that legitimate nondiscriminatory reason is the defense to disparate treatment in all cases under the ADEA and then also decides that disparate impact does not apply to ADEA cases because of the RFOA defense. In that event, RFOA would never be interposed and would be surplusage. Congress cannot have intended that result.

There is another resolution, which I favor, that involves continuing to apply *McDonnell Douglas* to the ADEA. If the plaintiff is able only to produce evidence sufficient to satisfy the *McDonnell Douglas* prima facie case (showing his membership in the protected class, applying and being rejected for an available position), this should be insufficient to require the employer to shoulder the burden of persuasion to prove RFOA. As the Court has said, the plaintiff's burden to show a prima facie case under *McDonnell Douglas* is not onerous. In that case, retaining the *McDonnell Douglas* method of proof would be logical because the plaintiff has not adduced strong evidence of discrimination. Only in the case in which the plaintiff has proven a more obvious connection between the employer's action and the plaintiff's age should the employer have to prove RFOA.

The conflict can be resolved, therefore, without eliminating years of precedent in which the courts have applied legitimate nondiscriminatory reason as the principal defense to ADEA disparate treatment cases. Legitimate nondiscriminatory reason and the *McDonnell Douglas* order of proof could continue to apply to claims of intentional discrimination in which the plaintiff has only adduced a bare prima facie case under

182. See supra note 177.
184. Eglit, supra note 38, at 218–19. Professor Eglit said that the RFOA defense should be a variable defense, depending on the context. Id. at 219. I think that a more acceptable solution would be to interpret the RFOA defense to require the same amount of proof in every situation, but that it should only be used when an affirmative defense is appropriate. Thus, the RFOA defense should be the defense to the use of an age-correlated factor, and, as Professor Eglit recommended in his article in 1986, RFOA should be an affirmative defense when a facially neutral policy has a disparate impact, a pattern or practice of discrimination is involved, or when there is direct evidence of discrimination: In other words, when the plaintiff has shown more of a connection between age discrimination and the challenged employment action than the plaintiff is required to show to satisfy a bare *McDonnell Douglas* prima facie case. Id. at 196. See supra text accompanying notes 161–67 for a discussion of the *McDonnell Douglas* order of proof.
McDonnell Douglas. In a case involving more substantial proof of discrimination such as the use of age-correlated criteria, the burden of persuasion should shift to the defendant to prove RFOA.\textsuperscript{185} If the statutory scheme of the ADEA is to have any meaning, RFOA must be interposed as an affirmative defense to the use of age-correlated criteria, either under the disparate treatment theory or the disparate impact theory or both.

Shortly after the ADEA was enacted, the majority of courts that considered age-correlated factors, such as seniority and higher salary, recognized that these factors so obviously correlated with age that the employer must have intended to discriminate by using such a factor.\textsuperscript{186} It seems logical that if these courts, as well as the Secretary of Labor\textsuperscript{187} and the EEOC,\textsuperscript{188} thought so, it is not unlikely that Congress thought so, too. Courts cannot simply at this point in time put on blinders and refuse to see the reality of the situation that these earlier authorities recognized.

Before Hazen Paper, the prevailing view was that to qualify as an RFOA, the factor could not be correlated with age.\textsuperscript{189} As Professor Mack Player said, factors which are “inherently time-based, such as experience, years on the job, and tenure... are inherently age-related and thus cannot be considered ‘factors other than age.”'\textsuperscript{190} The lower courts generally followed this position prior to Hazen Paper.\textsuperscript{191}

Some courts went too far and decided that age-correlated criteria were discriminatory per se.\textsuperscript{192} These courts were incorrect, as Hazen Paper confirmed.\textsuperscript{193} Congress certainly intended that employers' business justifications should be considered.\textsuperscript{194} The opposite position is just as untenable, however, and the lower courts have swung to this opposite extreme by ignoring altogether the evidentiary value of the use of an age-correlated factor\textsuperscript{195} and even allowing an age-correlated factor to serve as a legitimate nondiscriminatory reason.\textsuperscript{196}

In adding the RFOA defense, Congress was apparently concerned with both employees and employers.\textsuperscript{197} With regard to employees,

\begin{itemize}
\item \textsuperscript{185} Eglit, supra note 38, at 196.
\item \textsuperscript{186} See Johnson, supra note 2, at 27–29.
\item \textsuperscript{187} See supra note 133.
\item \textsuperscript{188} See supra note 134.
\item \textsuperscript{189} See cases cited supra note 69; Mack A. Player, Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?, 14 U. Tol. L. Rev. 1261, 1274–78 (1983). Professor Player thought that RFOA as here defined should be the defense to disparate impact cases under the ADEA. Id. at 1278–83.
\item \textsuperscript{190} Id. at 1278.
\item \textsuperscript{191} See supra note 69.
\item \textsuperscript{192} See supra note 69.
\item \textsuperscript{193} Hazen Paper Co. v. Biggins, 507 U.S. 604, 608–09 (1993).
\item \textsuperscript{194} See Kaminshine, supra note 13, at 289; see also infra text accompanying notes 197–98.
\item \textsuperscript{195} See Kaminshine, supra note 13, at 231–32.
\item \textsuperscript{196} See infra Section VI.
\item \textsuperscript{197} See Kaminshine, supra note 13, at 288–98.
\end{itemize}
Congress directed its concern at arbitrary discrimination that caused older employees to lose their jobs and to become unemployable. 198 With regard to employers, Congress wanted them to be able to make decisions based on reasonable factors other than age, so that employers would not be forced to retain employees who cannot perform. A balance must be struck here.

_Hazen Paper_ is correct that the use of age-correlated factors should not be treated as discriminatory per se; however, the employer should have to justify the use of age-correlated factors. Only by ignoring the word “reasonable” can the argument be made that the ADEA allows the employer to defend by relying on any factor other than age, thus not only precluding disparate impact, but allowing the employer to utilize unjustified age-correlated factors. The very presence of the RFOA defense demonstrates that Congress intended that the use of a factor that implicated age should have to be justified as reasonable. Because it is an affirmative defense, the conclusion is inescapable that the employer must have a business reason to justify using a factor that implicates age. Unless the employer is required to justify the use of an obviously age-correlated factor under some theory of discrimination, there is otherwise no place for the RFOA defense, and the statutory scheme will be irreparably damaged.

RFOA is not the appropriate defense if the employer explicitly uses age as a criterion; instead, the defense should be BFOQ. The courts are having a problem finding a place for RFOA. In fact they do not even appear to be looking. 199 If _Hazen Paper_ does not allow RFOA to be used in the intentional discrimination situation, then it is even more obvious that disparate impact must apply to the ADEA to defend the use of an obviously age-correlated factor or a factor shown to be age-correlated in a particular situation.

Even if the Supreme Court ultimately recognizes disparate impact under the ADEA, without properly applying RFOA, the ADEA will retain inconsistencies. If the Court determines that disparate impact does not apply, the ADEA statutory scheme will be virtually destroyed, as the lower courts are currently accomplishing. Employers will be able to interpose an age-correlated factor as a legitimate nondiscriminatory reason, which the employee would have to prove was a pretext for discrimination. The fact that the age-correlated factor has an obvious disparate impact would be irrelevant.

B. **ARGUMENT THAT THE LEGISLATIVE HISTORY OF THE ADEA PRECLUDES DISPARATE IMPACT**

Despite the congressional mandate to forbid age discrimination,
courts are parsing the legislative history to justify allowing discriminatory practices that impede the employment of older workers. In Ellis v. United Airlines, Inc., for example, the Tenth Circuit said that the report by the Secretary of Labor that preceded the passage of the ADEA differentiated between arbitrary or intentional discrimination and problems that result from factors that affect older workers more adversely. The court said that the report recommended that workers be protected only from intentional or arbitrary discrimination by the ADEA and that other measures should be undertaken to correct practices that affect older workers adversely. The ADEA's stated purposes also reflect a different approach to these problems, according to Ellis.

In Adams v. Florida Power Corp., the Eleventh Circuit adopted this same rationale. However, Judge Barkett, specially concurring, responded to the contention that the ADEA was not designed to correct discrimination based on the use of factors that adversely affect older workers. The concurrence said, with reference to the majority's citation of the report of the Secretary of Labor, that the report differentiated between what it termed "arbitrary discrimination" based on age and problems resulting from factors that "affect older workers more strongly, as a group, than they do younger employees." The majority concludes that this precludes disparate impact claims because these are claims that only address "factors that affect older workers more strongly," not arbitrary discrimination. But this begs the question. The very question disparate impact analysis seeks to answer is whether the challenged policy that disproportionately impacts older workers is derived from a reasonable business judgment or whether the policy is the result of arbitrary discrimination.

In formulating the disparate impact theory, Griggs itself said that the theory was designed to ferret out arbitrary discrimination.

As set out more fully in my earlier article, Professors Kaminshine and Blumrosen have written excellent articles on the legislative intent

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201. Ellis, 73 F.3d at 1008.
202. Id.
203. Id. at 1007.
204. Adams, 255 F.3d at 1322-26.
205. Id. at 1330.
206. Id. (citations omitted).
207. Id. at 1330 (Barkett, J., specially concurring). Judge Barkett was referring to the statement in Griggs that said "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. 424, 431 (1971).
208. See Johnson, supra note 2, at 48-51.
209. See Kaminshine, supra note 13, at 235, 287-306.
210. See Blumrosen, supra note 55, at 73.
regarding disparate impact and the ADEA, coming to opposite conclusions. Professor Blumrosen decided that Congress identified two types of discrimination against older people: the setting of arbitrary age limits and other practices that disadvantaged older people.211 His conclusion was that in enacting the ADEA, Congress intended to prohibit the setting of arbitrary age limits, which would forbid only intentional discrimination, and to deal with other types of disadvantages in other ways.212

Professor Kaminshine surveyed the legislative history and found no persuasive support for the conclusion reached by Professor Blumrosen, that Congress intended to foreclose disparate impact as a theory of liability for ADEA.213 Professor Kaminshine found that Congress was anxious that employers consider older people based on ability and not on stereotyped views of the effects of the aging process.214 He concluded that the legislative history is consistent with the view that Congress did not intend to allow employers to use age-correlated criteria that do not relate to ability.215

Professor Kaminshine has the better position. In response to Professor Blumrosen's contention that Congress was concerned only with the setting of arbitrary age limits, Professor Kaminshine contends that if Congress was concerned with arbitrary age limits, it simply could have prohibited such age limits instead of copying the broad Title VII proscriptions into the ADEA.216

Regardless of which view one accepts, the legislative history is not sufficiently clear on this point to provide a resolution of the argument. Because the Supreme Court interpreted § 703(a)(2) of Title VII to prohibit discrimination on the basis of disparate impact, the fact that the ADEA contains the same provision in § 4(a)(2) must end the debate and make the legislative history fairly irrelevant. It is impossible to say that Congress intended to foreclose disparate impact as a theory of discrimination for the ADEA when it used the same provision for both statutes. As discussed above, the prohibitory language is plain and, in the absence of some other provision, § 703(a)(2) and § 4(a)(2) simply cannot

211. Id. at 77.
212. Id. at 114-15.
213. See Kaminshine, supra note 13, at 287-95.
214. Id.
215. Id.
216. Id. at 299. See also Eglit, supra note 38, at 221, for the view that Congress meant to include practices which commonly have a disparate impact on older people as "arbitrary" age discrimination. Professor Eglit acknowledges that Congress did find age discrimination to be different from race discrimination, but the "fact that an employer does not overtly rely upon age as a basis for decisionmaking does not necessarily diminish the opportunity for inflicting harm.... Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent." Id. at 222.
be interpreted to have different meanings. 217

The argument that the statute itself prohibits disparate impact must then depend on RFOA as indicating Congressional intent to prohibit disparate impact for the ADEA. As set forth above, if Congress had meant that "any" factor other than age would be a defense, it knew how to say so, as it did in the EPA. 218 The defense of RFOA stands squarely in the way of reading Hazen Paper to allow an unjustified (or unreasonable) factor other than age as a defense to a disparate treatment case and to disallow disparate impact. Again, RFOA must be accorded its proper role in the statutory scheme. Lower courts have been ineffective in this regard, especially since Hazen Paper.

C. RATIONALES BASED ON HAZEN PAPER

The part of Hazen Paper that discussed age-correlated factors contains about ten paragraphs. 219 The defense of RFOA was not the question nor did the Court refer to it. Similarly, the Court plainly said the case did not involve disparate impact. 220 Thus, Hazen Paper simply cannot be interpreted to eviscerate the statutory scheme of the ADEA by precluding disparate impact and holding that RFOA means any factor other than age.

Several courts have nevertheless concluded that Hazen Paper precludes the application of the disparate impact theory to the ADEA. 221 In Adams v. Florida Power Corp., the Eleventh Circuit said that in Hazen Paper, "the Supreme Court explicitly left open the question of 'whether a disparate impact theory of liability is available under the ADEA.'" 222 In the face of this statement, the court inexplicably went on to determine that Hazen Paper nevertheless precludes the use of disparate impact under the ADEA based on two other statements by the Supreme Court in Hazen Paper, both of which were limited to cases of disparate treatment. 223

First, the Adams court, mimicking other lower courts, cited the holding in Hazen Paper, in which the Court said that basing an employment decision on any factor other than age is not intentional age

217. See supra Section V.A.1.
218. See supra Section V.A.2.a.
220. Id. at 610-12.
221. In Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999), Ellis v. United Airlines, Inc., 73 F.3d 999, 1066-07 (10th Cir. 1996), and EEOC v. Francis W. Parker School, 41 F.3d 1073, 1075-77 (7th Cir. 1994), the courts cited Hazen Paper as support for deciding that the disparate impact theory does not apply to the ADEA. In Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047-48 (6th Cir. 1998) (quoting Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995)), the Sixth Circuit cited Hazen Paper for the proposition that there is "considerable doubt" as to whether a disparate impact claim can be brought under the ADEA.
222. 255 F.3d 1322, 1325 (11th Cir. 2001) (citing Hazen Paper, 507 U.S. at 610).
223. Id. at 1326.
discrimination, as support for concluding that the Court in *Hazen Paper* intended to preclude disparate impact.\(^{224}\) The second statement these courts cite from *Hazen Paper* is that "disparate treatment... captures the essence of what Congress sought to prohibit under the ADEA."\(^{225}\) Both statements were taken out of context and were clearly referring to disparate treatment and whether the use of age-correlated factors was discriminatory per se.

Neither of these statements from *Hazen Paper* supports, much less precludes, the application of disparate impact to the ADEA. Even the concurrence in *Hazen Paper* said that there were substantial reasons why the disparate impact theory should not apply, but did not say that the theory did not in fact apply.\(^{226}\)

Since *Hazen Paper*, the courts have devised some additional arguments that disparate impact should not apply to the ADEA. The principal new arguments are based on aspects of Congressional intent in passing the ADEA and Title VII (other than that discussed earlier\(^{227}\)) and on the passage of the Civil Rights Act of 1991.\(^{228}\)

D. OTHER RATIONALES CONTRIVED BY THE COURTS SINCE *HAZEN PAPER*

1. **Title VII was designed to eliminate past discriminatory practices, while age discrimination correlates with contemporaneous discriminatory practices**

In *Mullin v. Raytheon Co.*,\(^{229}\) the First Circuit said that Congress enacted Title VII to correct past discrimination and, therefore, only prohibited practices that had a disparate impact on victims of past discrimination.\(^{230}\) This being the case, the court had "ample reason to construe the language of Title VII to bar such practices."\(^{231}\) The court said that age discrimination "correlates with contemporaneous employment-related conditions, not past discriminatory practices"\(^{232}\) and that Congress was trying "to protect older workers against the disparate

\(^{224}\) Id. at 1325.

\(^{225}\) *Hazen Paper*, 507 U.S. at 610.

\(^{226}\) 507 U.S. at 618 (Kennedy, J., concurring).

\(^{227}\) See supra Section V.B.

\(^{228}\) There is a third argument presented in *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996), and followed in *Mullin v. Raytheon Co.*, 164 F.3d 696, 700 (1st Cir. 1999), that there was difficulty in defining a class under the ADEA because "the line defining the class that is disparately impacted by a challenged policy is an imprecise one, which could be manipulated to either strengthen or weaken the impact of a policy on some age group." While it may be true that some facially neutral factors will have different impacts on different age groups, this hardly seems to be a cogent reason for deciding that Congress never intended that the theory should apply. See infra text accompanying notes 306-08 for a further discussion of this issue.

\(^{229}\) 164 F.3d at 699-704, in which the First Circuit said that disparate impact did not apply to the ADEA.

\(^{230}\) Id. at 701.

\(^{231}\) Id.

\(^{232}\) Id.
treatment that resulted from stereotyping them as less productive and therefore less valuable members of the work force because of their advancing years."^{233}

The obvious answer to this contention, again, is that the language construed under Title VII to authorize disparate impact is indistinguishable from the same language Congress used in the ADEA.\(^{234}\) Regardless of the speculation regarding Congressional intent, the same language cannot be construed differently without a clear Congressional mandate, and the legislative history is far from clear, as set out above.\(^{235}\) Furthermore, past discrimination is not a requirement for a disparate impact case under Title VII.\(^{236}\)

Disparate impact may be viewed from two perspectives: that it ferrets out intentional discrimination that cannot be proven by the disparate treatment model or that it simply removes barriers to employment opportunity whether intentionally or unintentionally imposed.\(^{237}\) According to another possibility, disparate impact is the only theory that reaches subconscious discrimination.\(^{238}\)

Age discrimination, in common with other types of discrimination, involves "a systematic undervaluation by the dominant culture of workers, motivated by stereotypical thinking about old people, people of color, women, gays, lesbians and other groups."\(^{239}\) In fact, as Congress noted, age stereotyping is a particular problem for older workers.\(^{240}\) "Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent."\(^{241}\) Stereotyping can often only be effectively identified using the disparate impact theory.

However one views the purpose of the disparate impact theory, it is clear that courts have applied the theory in many situations that do not involve past discrimination\(^{242}\) and that the argument that the disparate impact theory does not apply to the ADEA on this basis is simply wrong. Similarly misguided is the view that Congressional failure to explicitly

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233. Id.
234. See supra Section V.A.1.
235. See supra Section V.A.1.
236. See generally McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) (holding that white males were covered by Title VII, despite the fact that they had not been the victims of past discrimination).
237. See generally Kaminshine, supra note 13, at 311–21, for an excellent discussion of this issue.
238. See supra note 67 and accompanying text.
239. Minda, supra note 1, at 566.
240. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." Id.
241. Eglit, supra note 38, at 222.
242. See Kaminshine, supra note 13, at 317. For example, strength and size requirements that discriminate against women are not based on past discrimination, but rather are disqualifying traits that are linked to sex. See id.
include the ADEA in the 1991 amendments pertaining to disparate impact precludes the theory for the ADEA.

2. In the 1991 Civil Rights Act, Congress amended Title VII to codify the disparate impact theory and did not include the ADEA

In the late 1980s, the Supreme Court decided a series of Title VII cases that were considered "detrimental to federal civil rights protections," and which roused Congress to pass the Civil Rights Act of 1991 (the "1991 Act") to remedy the effect of these decisions. The 1991 Act was particularly directed at Wards Cove Packing Co. v. Atonio, a case involving disparate impact. The 1991 Act specifically amended Title VII, not the ADEA, at least in part because Wards Cove was a Title VII case.

Before the Supreme Court decided Wards Cove, it was generally agreed that once the plaintiff demonstrated a prima facie case by showing that an employment practice had an adverse impact, the employer had to bear the burden of proof and persuasion to show that the practice was justified by business necessity. The Supreme Court announced in Wards Cove, among other things, that the burden of persuasion should remain at all times on the plaintiff.

The Statement of Congressional Findings in the 1991 Act states that, "the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, has weakened the scope and effectiveness of Federal civil rights protections." Congress then codified the disparate impact test and
clarified the burden of proof by providing that, once the plaintiff has shown disparate impact, the employer must bear the burden of proof and persuasion to show that the practice is "job related to the position in question and consistent with business necessity."²²¹

Since the amendments that overruled Wards Cove for Title VII did not specifically include the ADEA, the question has been raised as to whether the 1991 Act model of proof for disparate impact applies to the ADEA or whether the Wards Cove model of proof applies to the ADEA.²²³ The current contention of some lower courts that Congress was intending to send a message in the 1991 Act that the disparate impact model does not apply at all to the ADEA has never been seriously considered in the scholarship.²²⁵ Nevertheless, the scholarship

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(1) additional remedies under Federal Law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Id. ²⁵¹. See 42 U.S.C. § 2000e-2(k) (Supp. III 1991), which in whole states:

(k) Burden of proof in disparate impact cases.

(i) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.


²⁵². See Eglit, supra note 57, at 1149-50.

²⁵³. See infra text accompanying note 250. "[T]he Supreme Court has repeatedly cautioned the lower courts as to the dangers inherent in attempting to infer some affirmative intention from congressional silence or inaction. Congress simply may not have given adequate consideration to the issue of whether the disparate impact doctrine should be extended to the ADEA." Douglas C. Herbert & Lani Schweiker Shelton, A Pragmatic Argument Against Applying the Disparate Impact
concerning whether \textit{Wards Cove} applies to the ADEA is equally applicable on this point.

Professor Howard Eglit wrote the most complete article on the effect of the 1991 Act on the ADEA and why Congress did not include the ADEA in the amendments that codified disparate impact.\textsuperscript{254} It is clear in his discussion of the legislative history that there is no support for the proposition that Congress was sending some kind of message that disparate impact did not apply at all to the ADEA. Because Professor Eglit’s article provided extensive treatment of the effect of the 1991 Act on the ADEA, the fact that he did not discuss the possibility that the 1991 Act precluded disparate impact altogether leads to the conclusion that he found no support for the proposition.\textsuperscript{255}

The question that primarily concerned Professor Eglit was whether and why Congress left the ADEA to the mercy of \textit{Wards Cove} in the face of the Statement of Congressional Findings that the case had weakened the protections of Federal Civil Rights Laws.\textsuperscript{256} He exhaustively surveyed the legislative history and other sources for evidence of why Congress amended Title VII and not the ADEA in this regard. He notes that there is scant legislative history to guide the resolution.\textsuperscript{257}

The most obvious reasons are either that there was no need to amend the ADEA because \textit{Wards Cove} is not an ADEA case or that Congress merely overlooked the ADEA. Professor Eglit, however, was not persuaded by either of these reasons because the ADEA clearly follows Title VII jurisprudence,\textsuperscript{258} and Congress amended the ADEA in other parts of the 1991 Act.\textsuperscript{259} Professor Eglit concluded that in this case, legislative silence indicates acquiescence, and unless the Supreme Court abandons \textit{Wards Cove} or Congress amends the ADEA, \textit{Wards Cove} applies to the ADEA.\textsuperscript{260}

\textit{Doctrine in Age Discrimination Cases}, 37 S. Tex. L. Rev. 625, 649 (1996) (quoting Hiatt v. Union Pac. R.R., 859 F. Supp. 1416, 1435 (D. Wyo. 1994), aff’d on other grounds, 65 F.3d 838 (10th Cir. 1995)). The authors’ “pragmatic argument” in this article relates to why Congress limited damages under the 1991 Act to cases of intentional discrimination. The authors’ contention is that Congress did not want to require a jury trial for disparate impact cases under Title VII because they involve the resolution of complicated statistical evidence. \textit{Id}. at 628. Thus, it follows that disparate impact should not apply to the ADEA which allows damages for all types of cases. I believe that it is more likely that Congress was more concerned with limiting damages to cases of intentional discrimination, not whether juries would be confused by statistical evidence in disparate impact cases.

\textsuperscript{254} \textit{See} Eglit, supra \textit{note} 57 at 1093–1216.

\textsuperscript{255} \textit{Id}. at 1099 n.18. Professor Eglit notes that there is a “modicum” of authority that disparate impact does not apply to the ADEA. \textit{Id}. Other than this comment, he does not refer to the possibility that the legislative history provides any support for the proposition. \textit{Ibid}..


\textsuperscript{257} \textit{See} Eglit, supra \textit{note} 57, at 1127.

\textsuperscript{258} \textit{Id}. at 1174–75.

\textsuperscript{259} \textit{Id}. at 1106–25.

\textsuperscript{260} \textit{Id}. at 1215. See Johnson, supra \textit{note} 2, at 46 n.183, for another view and a further discussion.
Other very good reasons exist for why Congress did not include the ADEA in the disparate impact amendment to Title VII. First, at the time Congress passed the 1991 Act, the predecessor legislation, the Civil Rights Act of 1990, had failed to win enough votes to override a presidential veto. Substantial compromise was necessary to pass the 1991 Act.\(^ {261}\) Apparently, the most pressing objective for proponents of the 1991 Act was to reverse the effects of *Wards Cove* for Title VII cases.\(^ {262}\) A few commentators and one member of the Supreme Court had already expressed reservations about the application of the disparate impact theory to the ADEA,\(^ {263}\) so amending the ADEA may not have been an issue worth adding to the battle for passage of the 1991 Act.\(^ {264}\)

Second, the defense to a disparate impact case under the ADEA should be RFOA,\(^ {265}\) not business necessity, which was codified as the defense to disparate impact for Title VII in the 1991 Act.\(^ {266}\) A third problem is that the 1991 Act added punitive and compensatory damages for Title VII to the equitable remedies previously available, but limited such damages to disparate treatment cases.\(^ {267}\) Remedies in disparate impact cases remain exclusively equitable under Title VII,\(^ {268}\) while the ADEA provides for liquidated damages, regardless of the theory of the case.\(^ {269}\) Congress would have had obvious problems amending the remedial provisions of the ADEA to be consistent with the remedies added to Title VII by the 1991 Act.

Thus, Congress did not include the ADEA specifically in the substantive amendments to Title VII. The reasons for this are far from clear. Nevertheless, some courts have accepted the argument that Congress was silently disapproving of the application of the disparate impact theory to the ADEA. The courts' acceptance of this weak argument,\(^ {270}\) along with the other arguments discussed above, is changing substantially the direction of ADEA jurisprudence.


\(^ {264}\) This is especially likely since the law had been vetoed in the previous year, and Congress had failed to override the veto. See Lilling, *supra* note 257, at 219–20. The Act passed only after much compromising. *Id.*

\(^ {265}\) See Player, *supra* note 189, at 1278–83. In my earlier article on this subject, I argued that business necessity should be the defense to a disparate impact case under the ADEA. See Johnson, *supra* note 2, at 60. During the nine years which have intervened, I am now convinced that the defense must be RFOA.

\(^ {266}\) See *supra* Section V.D.2.


\(^ {270}\) See Eglit, *supra* note 57, at 1172–91, for an excellent discussion of the significance of legislative silence.
VI. LOWER COURT INTERPRETATION OF DISCRIMINATION UNDER THE ADEA AFTER HAZEN PAPER

The lower courts were quick to apply the holding in Hazen Paper, not only to conclude that age-correlated factors were no longer per se intentionally discriminatory, but also that age-correlated factors could not be attacked using the disparate impact theory. In addition, courts are now often declining to consider the use of age-correlated factors as probative of age-discrimination at all and even regard an age-correlated factor as a legitimate nondiscriminatory reason. The following recent cases exemplify the damage that Hazen Paper has done to the statutory scheme of the ADEA by allowing employers to use age-correlated factors with virtual impunity.

For example, in Ellis v. United Airlines, Inc., the plaintiff who was over age forty was not hired by the airline as a flight attendant because she exceeded the weight limit for new hires. The airline used different weight standards for its flight attendants, depending on whether they were new hires or current employees. The standard for employees made allowances for the fact that people generally gain weight as they age; however, the standard for initial job applicants did not make allowance for such weight-gain. The plaintiff argued that the weight requirement was intentionally discriminatory and that it had a disparate impact. The Tenth Circuit affirmed the district court’s grant of summary judgment on both claims. The court of appeals held that the disparate impact theory does not apply to the ADEA and that the plaintiff had not shown that the employer intentionally discriminated on the basis of age because it did not show that the standard did not screen out younger applicants.

271. See Johnson, supra note 2, at 30–33.
272. See supra Section V.
274. 73 F.3d 999, 1001 (10th Cir. 1996).
275. Id.
276. Id. at 1003.
277. Id.
278. Id. at 1009.
279. The Ellis court said:
Given the age-sensitive criteria applied to flight attendants once hired, United’s continued use of age-neutral hiring criteria, at first glance, might make little sense; however, United justified this practice in the district court by asserting that it does not inquire into the age of its applicants because, in many states, such an inquiry is illegal. In any event, an employer’s exercise of erroneous or even illogical business judgment does not, by itself, constitute pretext.
Id. at 1006.
280. Similarly, in Mullin v. Raytheon Co., 164 F.3d 696, 698 (1st Cir. 1999), the employer conducted various cost-saving measures, including layoffs, plant closings, wage freezes and reassignments. As part of its cost cutting plan, it “assayed the commensurability of upper-level salaried employees’ assigned labor grades and actual responsibilities.” Id. at 698. The court affirmed the summary judgment for the employer on the issue of disparate treatment, despite the obvious impact of only considering higher salaried employees for demotion. Id. at 699.
Obviously, if the plaintiff had been allowed to argue disparate impact, the employer would have been required to prove a business reason as an RFOA for the policy, which would have been difficult in view of the fact that higher weight limits were tolerated for current employees. This appeared to be an obvious case of age discrimination, and the court’s reliance on Hazen Paper allowed the employer to be completely exonerated without having to justify the blatant use of a factor that disadvantages older workers.

Using even more obvious factors, in EEOC v. McDonnell Douglas Corp., the plaintiff had identified the criteria that allegedly caused the discrimination: salary, retirement eligibility and seniority. The Eighth Circuit affirmed the lower court’s grant of summary judgment for the employer and said that, even if correlated with age, such factors do not constitute age discrimination.

With regard to the disparate treatment claim, the court said that no reasonable jury could believe that there was a pattern or practice of age discrimination. The evidence showed that people over fifty-five were twice as likely to be laid off as people under fifty-five. Several managers testified that retirement eligibility was a factor and some managers’ files contained retirement-related data of employees, including age, retirement date, and years of service. Employees also testified that they were told they were being laid off because of their age, seniority, salary,
and retirement benefits. Other witnesses testified that the company manipulated its evaluation system to evaluate older employees less favorably than younger employees. The court nevertheless determined that no reasonable jury could conclude that managers chose retirement-eligible employees for the reduction in force (hereinafter "RIF") because of their age even though retirement eligibility and salary were factors in layoff decisions. The court stated, "[a]s we have already said employment decisions motivated by factors other than age (such as salary, seniority, or retirement eligibility), even when such factors correlate with age, do not constitute age discrimination." As other courts have recognized, factors such as retirement eligibility do not merely correlate with age, they are actually based on age and, thus, employers should be required to defend such factors as a BFOQ. The Eight Circuit, in contrast, did not think these factors were even evidence of age discrimination.

In another case, *Broaddus v. Florida Power Corp.*, the plaintiff was terminated in a RIF, which he claimed violated the ADEA and ERISA. The court dismissed the ERISA claim at the end of the evidence. In his closing, the plaintiff's lawyer opined that the RIF was designed to get rid of older higher-priced employees because salary generally increases with age, as do costs of benefits such as retirement and health benefits. The jury asked for clarification on whether they could consider evidence that related to health issues since the ERISA claim had been dropped. The judge replied that they could consider all the evidence, but only as it related to age discrimination.

The Eleventh Circuit found the clarification insufficient based on *Hazen Paper* and remanded for a new trial. The court relied on *Hazen Paper* in stating that the ADEA does not prohibit decisions based on "higher salaries, increased benefits, pension status, or claims for medical expenses even though these characteristics are often correlated with an employee's age." The court found that the closing statements which

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283. *Id.* at 953.
284. *Id.* (citation omitted). The court discounted the remainder of the evidence as isolated. The court also disregarded evidence that senior management officials expressed a strong preference for younger employees. Furthermore, the EEOC presented various documents including a memorandum from the president of the company in 1986 stating that the company had to attract and retain capable young people to stay competitive; a 1989 document targeting candidates under forty years of age; and other company documents expressing concern over the aging workforce and management team. *Id.* The court found most, if not all, of this documentation too remote in time to be considered. *Id.* The RIF at issue, however, occurred between 1991 and 1993. *Id.* at 950.
286. 145 F.3d 1283 (11th Cir. 1998).
287. *Id.* at 1285–86.
288. *Id.* at 1286.
289. *Id.* at 1287 (citation omitted).
“insinuated that older workers often have increased medical costs and that this factor plays a role in employers’ decisions to terminate older workers,” misstated the law and improperly blurred the line between the ADEA and ERISA claims. 290

Hazen Paper did not state that age-correlated factors cannot violate the ADEA, but rather that such factors are not per se discriminatory or, at least, that there must be additional evidence to show that the factors were used as a proxy for age discrimination. 291 The Broaddus case, however, finds the use of such factors irrelevant.

Even in circuits that nominally recognize disparate impact for ADEA cases, plaintiffs meet with little success because of the restricted application of the disparate impact theory. 292 In Criley v. Delta Air Lines, Inc., the court stated that the Second Circuit recognized disparate impact, requiring the plaintiff prove that the criterion has a disparate impact on the entire protected group, i.e., workers aged forty and over. 293 “Plaintiffs acknowledge that 94.1% of the pilots Delta hired were aged forty and older and that the hiring scheme had no negative impact on the overall group of Pan Am pilots aged 40 and older. . . . [thus], plaintiffs’ disparate impact claim cannot survive.” 294 In the Criley case, the plaintiffs complained that when Delta hired shuttle pilots from Pan American, they used a seniority system that disadvantaged older pilots. Although younger pilots were offered employment on the same basis, the plaintiffs produced evidence of statements that suggested that Delta was concerned about the economics of hiring older pilots who were near retirement age. The Second Circuit held that under Hazen Paper, “an employer’s concern about the economic consequences of employment decisions does not constitute age discrimination under the ADEA, even though there may be a correlation with age.” 295 The court found that to the extent the comments cited by the plaintiffs implicated age, the comments expressed concerns about the business effects of the plaintiffs’ ages, not assumptions about the plaintiffs’ ability. The court concluded that “[o]n the reasoning of Hazen, considering and acting on such factors is not age discrimination.” 296 If being concerned about the business effects of the plaintiffs’ ages is not age discrimination, what is?

Other recent decisions have rejected factors such as lack of or limited computer skills, 297 higher salary, 298 overqualification or too much

290. Id.
292. See Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1372–73 (2d Cir. 1989) (holding that the criterion must have a disparate impact on the whole protected class, not just a part of it).
293. 119 F.3d 102, 105 (2d Cir. 1997).
294. Id. at 105.
295. Id.
296. Id.
297. See, e.g., Hartsel v. Keys, 87 F.3d 795, 802 (6th Cir. 1996). The court said that the plaintiff’s complaining about this selection criterion supports just the stereotype the ADEA was trying to change
experience,"299 pension benefits,300 and seniority as evidence of age discrimination.301 While all of these factors may have valid uses as employment criteria in a particular situation, in the absence of a requirement that they be justified as a reasonable requirement for the job, such factors can be used to accomplish the wholesale elimination of older workers.

VII. ANALYSIS AND PROPOSED SOLUTION

Many employers suppose that older workers are less productive because they often make more money than their younger counterparts. This phenomenon is explained as the life cycle of productivity, which hypothesizes that workers are overpaid when first hired and underpaid when they gain experience. When they have been in the workforce a long time, workers are overpaid again because they are paid more than similarly performing workers who have been in the workforce less time.302

The supposition that older workers make too much money leads to what some authors term “opportunistic” terminations.303 These opportunistic terminations cause problems the ADEA was designed to prevent. As one author noted:

A profit maximizing employer who decides to downsize highly paid late-career employees will be motivated to terminate their positions because their salaries and benefits will likely exceed their current productivity. However, because these employees have worked hard during their careers and have invested in their own job training by accepting lower wages during their initial employment with the firm, they have “earned” the higher pay that they receive later in their career. They are thus earning an “efficient” wage and are not really being “overpaid.” These employees are entitled to the benefit of the bargain, and the employer should not be permitted to renege on an implicit promise establishing the long-term relationship and thereby take unfair advantage of the employees’ vulnerable position created by

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298. See e.g., Turney v. Beltservice Corp., No. 95-35063, 1996 WL 436511, at *2 (9th Cir. Aug. 2, 1996). The court said that discrimination could not be inferred because the plaintiff was fired for high salary and replaced by a “younger, cheaper” worker. Id. See also Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125-26 (7th Cir. 1994).

In Tichenor v. Sec’y of Army, No. 98-5244, 1999 WL 357813, at *3 (6th Cir. May 27, 1999), the plaintiff used the factor of “recent education” and attempted to show a disparate impact case. He was unsuccessful, but if disparate impact were not available, the employer could use such a factor that clearly adversely impacts older workers without justifying it.


302. See, e.g., Issacharoff & Harris, supra note 7, at 789.

303. Id. at 790.
substantial performance over years of service.\textsuperscript{304}

One counterargument to this point is that employers were willing to "overpay" older workers because they could be mandatorily retired at some point. Because this is no longer possible,\textsuperscript{305} some employers may fear being unable to get rid of employees who are being "overpaid," according to the life cycle of productivity theory. In other words, eliminating the ability of employers to retire workers mandatorily at a certain age without cause may encourage employers to terminate older workers at the first opportunity.\textsuperscript{306} It may be that if employers could be sure that employees would not work long past the time of their perceived decreased productivity, employers might be more likely to retain older workers.\textsuperscript{307} Perhaps allowing mandatory retirement at some elevated age, such as seventy-five, that could be adjusted to account for increasing longevity, would be a partial solution to the problem of opportunistic terminations.

There is no question that the life cycle of productivity is a generalization about older employees that may not be borne out in a particular situation, but which nevertheless is affecting older employees. A worker who has more experience may be receiving an efficient wage.\textsuperscript{308} Adverse actions by employers based on the assumption that older employees are not worth their wages also present a question of morality. This question was addressed in part by the ADEA, which explicitly prohibits opportunistic behavior on the part of employers, except under certain circumstances. For example, an employer cannot expressly use the employee's age as a proxy for other characteristics, such as quick reactions, without justifying it as a BFOQ.\textsuperscript{309} It is unlikely that Congress intended to allow the employer to circumvent the protections of the ADEA by designing an age-correlated criterion that would serve the same function as explicitly using age, but would not require some justification. The courts, however, are holding otherwise by requiring that only the explicit use of age has to be justified.

The ADEA must be rehabilitated in this regard by reviving the two interrelated components of the proposed solution that until Hazen Paper were being used by the courts to prevent opportunistic terminations and other methods of excluding older workers from the workforce. The first component is that the disparate impact theory should apply to the

\textsuperscript{304} Minda, supra note 1, at 520.


\textsuperscript{306} See Issacharoff & Harris, supra note 7, at 820-25.

\textsuperscript{307} See, e.g., id. These authors do not recommend a reinstitution of mandatory retirement, but rather other reforms to compensate for decreased productivity of older employers.

\textsuperscript{308} See, e.g., Minda, supra note 1, at 528.

\textsuperscript{309} See, e.g., Western Airlines, 472 U.S. at 411-12.
ADEA and the second is that the RFOA defense should prohibit the use of age-correlated factors that enable opportunistic firings and other targeting of older workers, unless the employer can justify cutting costs by burdening older workers. RFOA should be the defense to disparate impact and to certain types of disparate treatment cases. While this is not a perfect solution, it is the only likely one.

With regard to disparate impact, the plaintiff should be required to show a prima facie case as required by *Wards Cove Packing Co. v. Atonio.* That is, the plaintiff must pick out the criterion causing the discrimination and demonstrate a statistically significant disparate impact on older employees. At that point, the employer must justify the use of the factor as an RFOA. Some scholars and courts have suggested that definition of the class is the problem with applying the disparate impact theory to the ADEA. Not all age-correlated factors affect the entire class, but certainly affect a substantial and definable part of the class, such as "approaching... retirement age." As the Court said in *O'Connor v. Consolidated Coin Caterers Corp.*, the question is whether the discrimination is based on age, not whether the whole protected group is affected. Although *O'Connor* is a disparate treatment case, the same rationale should apply to disparate impact cases. If the criterion has a significant impact on some definable part of the protected class, this showing should be enough to shift the burden of persuasion to the employer to show RFOA.

What should the employer have to show to prove RFOA? Under the Equal Pay Act, most lower courts require the employer to justify using a

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310. *See discussion supra* accompanying note 245.

311. *See supra* note 244 for discussion of the difficulty of defining the class under the ADEA. The problem is whether the plaintiff can prove disparate impact by showing, for example, that a criterion impacts persons fifty-five and older or whether the plaintiff has to prove that the criterion has a disparate impact on persons over forty. *Compare* Finch v. Hercules Inc., 865 F. Supp. 1104, 1129 (D. Del. 1994), *with* Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1373 (2d Cir. 1989). The *Finch* court stated:

[F]ailure to accord protection to subsets of the protected class would allow an employer to adopt facially neutral policies which had a profoundly disparate impact on individuals over age 50 or 55, so long as persons under age 50 or 55 received sufficiently favorable treatment that the adverse impact on individuals over 40 was minimal.

865 F. Supp. at 1129. On the other hand, the *Lowe* court contended that dividing up the protected class bypasses the plain language of the ADEA which protects the entire class of persons between forty and seventy. 886 F.2d at 1373. The Second Circuit continues to adhere to this position. *See, e.g.*, Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997).

312. *See, e.g.*, Criley, 119 F.3d at 105.

313. 517 U.S. 308, 312 (1996). "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." *Id.*

The Court has also recently decided that the ADEA does not forbid discrimination against younger members in the protected group in favor of older members in the protected group. Gen. Dynamics Land Sys., Inc. v. Cline, 124 S. Ct. 1236, 1239, 1248-49 (2004). "The ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young." *Id.* at 1248.
factor that correlates with sex in order to succeed on the "any other factor other than sex" defense, from which RFOA was derived.  

RFOA should be interpreted to require at least as much justification. For example, if the employer is cutting costs, this should not be enough to satisfy his burden. Rather, the employer should prove a business reason for burdening older workers in his economizing. As the Secretary of Labor, who was originally responsible for administering the ADEA, said shortly after the ADEA was enacted: To be an RFOA, the criterion must be "reasonably necessary for the specific work to be performed" or "shown to have a valid relationship to job requirements."  

Arguments have been made that RFOA should be equated with business necessity as expressed in Wards Cove, which would require that the employer merely articulate "whether a practice serves, in a significant way, the legitimate employment goals of the employer." As I have argued throughout this article, however, RFOA is the statutorily-mandated affirmative defense in the ADEA, and it should be applied as originally understood to defend the use of age-correlated criteria. 

Similarly, with regard to disparate treatment, if a factor obviously correlates with age, the employer should bear the burden of persuasion to show RFOA. Also, RFOA should be the defense in any other situation in which the employer bears the burden of persuasion, such as cases involving direct evidence or a pattern or practice discrimination.

In other cases of disparate treatment, where the plaintiff can show only a bare prima facie case that satisfies McDonnell Douglas, the burdens of proof and persuasion from that case should continue to be applied. Thus, if the plaintiff can only show that he is a member of the protected class and was not hired, he should have to bear the burden of persuasion to show that he was discriminated against based on age.

While the typical ADEA plaintiff is portrayed as a white male in management in his fifties, women and minorities are just now getting to that age in management and that picture has changed. Now that sex and race discrimination are somewhat ameliorated, will minorities and women lose the places they have gained because of their ages?

314. See supra Section V.A.2.a.
315. Kaminshine, supra note 13, at 302–03.
316. See Eglit, supra note 57, at 1215.
318. See discussion supra accompanying notes 136–63.
319. See supra note 180.
320. See discussion supra accompanying notes 158–63.
321. See Eglit, supra note 3, at 609. Professor Eglit noted that in the first years of the ADEA, only 16% of the plaintiffs were women. Id. at 613. As of 1996, that percentage had risen to 32% women and has probably risen higher by now. Id. The data as to race of the claimants was not available. Id. Professor Eglit accounts for this increase in women claimants not only because of the rise of women in the workforce, but also because women are more willing to sue and have greater resources with which to do so. Id. at 612.
If the Supreme Court decides that the disparate impact theory does not apply to the ADEA, the present trend will continue. Older workers will find themselves in the same position they occupied when Congress passed the ADEA in 1967 and commented that because "the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave." 322