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Is Age Discrimination Really Age Discrimination?:  
The ADEA's Unnatural Solution

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# IS AGE DISCRIMINATION REALLY AGE DISCRIMINATION?: THE ADEA'S UNNATURAL SOLUTION

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*Through a series of reforms over the last two decades, the Age Discrimination in Employment Act (ADEA) has become the most far-reaching of the antidiscrimination statutes. In this Article, Professor Issacharoff and Ms. Harris provide a critical reexamination of both the ADEA itself and, more generally, the use of antidiscrimination law to address the problem of aging in employment. The authors distinguish the disadvantages that older employees face from classic claims of employment discrimination, noting the inapplicability of the antidiscrimination model underlying the ADEA to some of the problems associated with aging in employment. The authors then turn to the development of the ADEA and its amendments, examining the role of regulatory capture in the expansion of ADEA protections. They conclude that the broad use of antidiscrimination law to address the problem of aging in employment without accounting for the differences between classic claims of discrimination and the particular problems faced by older employees has resulted in a dramatic and unjustified shift in wealth toward older Americans. Accordingly, they propose a series of reforms designed to address both the specific problems faced by older employees and the reallocation of wealth imposed by recent ADEA amendments.*

## INTRODUCTION

The process of aging brings each organism closer to its eventual demise. Among advanced organisms, humans included, adaptation to aging and the approach of death marks a central feature of social organization. Such social responses are as diverse as the organisms that inhabit the planet, although the extremes are fairly recognizable. At one pole, we may identify complex societies, such as those found in parts of Asia, in which the aged are revered and care for the aged forms a central organizing feature of domestic life. At the other ex-

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treme are societies that treat the invalid or near-invalid elderly as burdens. Aging Eskimos take it upon themselves to end their own lives before becoming a burden upon their young.<sup>1</sup>

Without descending into the anthropological smorgasbord of varying social organizations, we wish to posit a simple hypothesis: Unique among the complex and consuming confrontations with aging and the approach of death stands the legal regime developed in the United States for addressing the problem of aging in the workplace. The American contribution is to fold the question of aging into the undifferentiated welter of antidiscrimination law through the Age Discrimination in Employment Act (ADEA or Act).<sup>2</sup>

The elderly lack the critical features of disadvantaged group status that give some elementary coherence to an antidiscrimination model. Far from being discrete and insular, the elderly represent the normal unfolding of life's processes for all persons. As a group, older Americans do not suffer from poverty or face the disabling social stigmas characteristically borne by black Americans at the start of the civil rights era. Indeed, we shall look to extensive evidence that older Americans are a relatively privileged social group sharing none of the characteristics of groups to which society may owe an ongoing obligation of remediation.

This Article proceeds along several fronts. First, we look at the formal use of antidiscrimination law to address the problem of aging in employment. The ADEA draws its inspiration from the vivid image of hiring signs that limited applicants to those under forty-five, for example. This invocation of "Elders Need Not Apply" allowed the incorporation of many of the statutory mechanisms of Title VII's prohibition on race and sex discrimination. Nonetheless, even the initial proponents of the ADEA acknowledged that the parallels to other antidiscrimination commands were imperfect—a point that apparently has been lost along the evolutionary trail of the ADEA. In order to draw out the unique features of age in the workforce, we conclude Part I by examining the economic structure of career employment. By reviewing the employment "life-cycle," we show both the unique disadvantages that older employees face and the distinction between these disadvantages and classic claims of discrimination in employment.

We next turn to the two central points of our argument. First, the ADEA statutory scheme misconstrues the antidiscrimination model.

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<sup>1</sup> See Edward M. Weyer, *The Eskimos* 248 (1932) (discussing means employed by Eskimos to commit suicide). Professor Weyer also reports that this practice is sometimes accelerated by outright geronticide. See *id.* at 137-39.

<sup>2</sup> 29 U.S.C. §§ 621-34 (1994).

Antidiscrimination laws have proved most effective at breaking down formal barriers to entry in employment markets. When employers constrict the full range of employees they are willing to consider for hiring, this taste for discrimination imposes costs because employers predictably have to pay higher wages in order to satisfy their demand from a smaller supply of labor. Antidiscrimination laws that break down such inefficient preferences are remarkably successful in promoting rapid integration.<sup>3</sup>

Unfortunately, the source of concern for older employees is overwhelmingly at the tail end of a lifetime of employment, not at the hiring stage. The antidiscrimination model not only does a poor job of explaining the late-career vulnerability of older employees but also understates the prevalence of such vulnerability. At heart, the antidiscrimination model works best when addressing aberrant behavior that departs from rational market commands. By contrast, the economic vulnerability of late-stage career employees is the norm rather than the exception and is made all the more complicated by the clear economic incentives that run counter to the interests of such employees.

This first point leads to the second and no doubt more controversial part of our thesis. The disjunction between the source of employment vulnerability of older employees and the antidiscrimination model underlying the ADEA has had consequences far beyond the theoretical. By unleashing a politically evocative and litigation-tested antidiscrimination law into the arena of the workplace, Congress created an invitation to special interest capture of unjustified wealth. To demonstrate this capture, we make three points. First, we show that the ADEA on its terms failed to alter significantly the difficulties of older employees seeking to enter the workforce. Second, we demonstrate that, particularly after the emergence of the American Association of Retired Persons (AARP) as a powerful lobbying presence, advocates of expansive ADEA remedies essentially abandoned the issue of job acquisition that had been at the heart of the initial passage of the Act. Third, we turn to the amendments of the ADEA in 1986 and 1990 to reveal how the Act became, paradoxically, the most far-reaching of the antidiscrimination statutes. Through a carefully

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<sup>3</sup> See James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 *Am. Econ. Rev.* 138, 173-74 (1989) (noting marked increase in number of blacks employed in textile industry in South Carolina after enactment of Title VII); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 *Yale L. & Pol'y Rev.* 276, 290 (1990) (noting that enactment of Title VII dramatically expanded pool of available workers in southern textile plants and that "economic incentive for nondiscrimination created a powerful leverage effect for the law").

orchestrated assault on mandatory retirement and targeted employee retirement incentive programs, the AARP-inspired amendments of the ADEA provoked a significant one-time transfer of resources to the generation whose members are currently drawing to the close of their working careers.

The final part of this Article returns to the problem of the actual incentives operating against older workers within individual firms. We propose a system of contract protections and an easing of mandatory retirement to grant some additional opportunity and dignity to older workers. At the same time, we part company with the wealth grabbing components of the recent ADEA amendments. Thus, we argue that employers should be relieved of the obligation to contribute to pension plans for employees beyond the age at which pensions and benefits vest. We will also argue that what are euphemistically termed "negative salary increases" of employees beyond the expected retirement age should not serve as *prima facie* evidence of employment discrimination but, rather, should be expected as employee tenure advances.

Our goal in this paper is to find a middle ground between the loss of dignity and capture. With an increase in longevity and with the emergence of attachment to work as a central social institution, the portrayal of abrupt and mandatory removal from the workforce as an assault on the dignity of senior employees should come as no surprise. At the same time, the dramatic shift in wealth toward older Americans and the diminished job prospects of the young provoke grave concerns that a misguided antidiscrimination model has allowed a concerted and politically powerful group of Americans to engage in a textbook example of what economists would term "rent seeking."

## I

### AGING UNDER EMPLOYMENT CONTRACTS

#### A. *The Original Understanding*

In 1967, half of all private job openings were barred to applicants over fifty-five, and a quarter to those over forty-five.<sup>4</sup> This "Elders Need Not Apply" attitude was found to be the cause of a growing

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<sup>4</sup> See Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor, 90th Cong. 7 (1967) [hereinafter 1967 House Hearings] (statement of W. Willard Wirtz, Secretary of Labor). Some members of Congress had been urging age discrimination legislation since 1951, but Congress did not give the issue serious consideration until 1967. See S. Rep. No. 90-723, at 13 (1967) (individual views of Sen. Jacob V. Javits) (discussing history of efforts to legislate against age discrimination in employment).

problem among America's elderly: long-term unemployment.<sup>5</sup> Relying on a Department of Labor report, Congress found that the burden of unemployment was falling disproportionately on older workers,<sup>6</sup> that employers were operating under mistaken assumptions about the effects of aging,<sup>7</sup> and that age barriers to hiring were the root of the unemployment problem.<sup>8</sup> The Department of Labor's Commissioner on Aging reported that, although older workers were "frequently preferred over the younger"<sup>9</sup> workers when it came to promotions and treatment within the workplace, older *applicants* were treated with disdain.<sup>10</sup> Testimony before Congress condemned this type of age dis-

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<sup>5</sup> See 1967 House Hearings, *supra* note 4, at 61 (statement of Peter J. Pestillo, Labor Counsel, U.S. Chamber of Commerce) ("In 1965, unemployment for workers under 45 lasted an average of 13.1 weeks. Workers who were over 45, however, remained idle for 19.1 weeks."); *id.* at 151 (statement of Rep. Joshua Eilberg) (citing unemployment statistics for older workers); *id.* at 153-54 (statement of William D. Bechill, Commissioner on Aging) (noting problem of long-term unemployment amongst elderly); *id.* at 422 (statement of Rep. Claude Pepper) (reporting that numerous studies demonstrated problem of long-term unemployment among older workers).

<sup>6</sup> See Amendments to the Age Discrimination in Employment Act of 1967: Hearing on H.R. 14879 and H.R. 15342 Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. and Labor, 94th Cong. 40 (1976) (statement of W. Willard Wirtz, Secretary of Labor) (arguing that "[t]he unemployment costs of a distressed economy *must not* be thrown disproportionately on older people").

<sup>7</sup> See 1967 House Hearings, *supra* note 4, at 7 (statement of W. Willard Wirtz, Secretary of Labor) (reporting that large part of age discrimination is due to "a failure on the part of employers to realize how technology and the life sciences have combined to increase the value of older people's work"); *id.* at 45 (statement of Norman Sprague, Director, Employment and Retirement Program, National Council on the Aging) (relating age discrimination "to the inaccurate views often held concerning the physical abilities, learning capacities, and psychological flexibility of older persons"); *id.* at 154 (statement of William D. Bechill, Commissioner on Aging) (stating that "stereotyped attitudes about the ability of older people . . . play a major role in barring older workers from fair employment consideration").

<sup>8</sup> See *id.* at 7 (statement of W. Willard Wirtz, Secretary of Labor) (stressing that "it is *opportunity* which people want" and providing examples of older workers who could not find employment); *id.* at 60 (statement of Peter J. Pestillo, Labor Counsel, U.S. Chamber of Commerce) ("The underlying goal of the proposed legislation is a laudable one: that of opening up greater job opportunities to older people."); *id.* at 81-82 (statement of Dr. Harold L. Sheppard, Upjohn Institute for Employment Research) (discussing difficulties faced by older workers looking for work); *id.* at 84 (comments of Rep. John H. Dent) (discussing problem of older workers trying to find reemployment after layoff); *id.* at 155 (statement of William D. Bechill, Commissioner on Aging) (noting that ADEA would be "effective tool in reducing the incidence of this problem of discriminatory hiring practices based solely on chronological age"); see also *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 n.9 (1977) (citing H.R. Rep. 90-805, at 4 (1967), reprinted in 1967 U.S.C.C.A.N. 2213) (noting primary purpose of ADEA was to promote hiring of older workers).

<sup>9</sup> 1967 House Hearings, *supra* note 4, at 154 (statement of William D. Bechill, Commissioner on Aging).

<sup>10</sup> See *id.*

crimination as inhumane,<sup>11</sup> unjust,<sup>12</sup> and cruel.<sup>13</sup> This testimony called for legislation to break down stereotypes used by employers<sup>14</sup> and to open opportunities to older workers.<sup>15</sup> Although there was some variation amongst the proposed bills,<sup>16</sup> there was broad agreement that antidiscrimination legislation was the answer. At its most basic, the argument ran: "[T]o prohibit age discrimination in employment is so plainly and unarguably right, that to belabor it is to dull it, . . . nobody defends such discrimination, and . . . there is general agreement that it ought to be stopped."<sup>17</sup>

Thus, after little debate and even less public attention,<sup>18</sup> Congress passed the Age Discrimination in Employment Act of 1967.<sup>19</sup> Modeled on Title VII of the Civil Rights Act,<sup>20</sup> the ADEA made it illegal for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."<sup>21</sup>

From the ADEA's inception, however, an unmistakable current recognized that, despite tracking the statutory form of Title VII, the

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<sup>11</sup> See *id.* at 7 (statement of W. Willard Wirtz, Secretary of Labor) (characterizing problem of age discrimination in employment as "inhuman . . . *bad* business . . . [and] indecent").

<sup>12</sup> See *id.* at 156 (statement of William D. Bechill, Commissioner on Aging) (urging Congress to combat "arbitrary, unjust discrimination"); *id.* at 450 (statement of Rep. James A. Burke) (commenting that age discrimination is "unfair and inequitable").

<sup>13</sup> See *id.* at 9 (statement of W. Willard Wirtz, Secretary of Labor) (quoting President Johnson describing age discrimination as "cruel sacrifice in happiness and well-being"); *id.* at 404 (statement of Charles Rowan, Chairman, Jobs After 40 Committee, Fraternal Order of Eagles) (stating that "the cruel, senseless discrimination against older people in employment goes on unchecked").

<sup>14</sup> See *id.* at 155 (statement of William D. Bechill, Commissioner on Aging) (commenting on educational benefits of legislation).

<sup>15</sup> See *id.* at 60 (statement of Peter J. Pestillo, Labor Counsel, U.S. Chamber of Commerce) (citing opportunity as "underlying goal" of legislation).

<sup>16</sup> See *id.* at 55-56 (comments of Rep. Roman C. Pucinski) (reviewing proposal that employers be given tax credit for hiring older workers).

<sup>17</sup> *Id.* at 426 (statement of Francis O'Connell, Legislative Director, Transportation Workers Union); see also *id.* at 6 (statement of W. Willard Wirtz, Secretary of Labor) (making nearly identical comments).

<sup>18</sup> See Daniel P. O'Meara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act 14* (1989) ("[T]here was no significant opposition to the ADEA in Congress. The popular press paid very little attention to the bill.").

<sup>19</sup> Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (1994)).

<sup>20</sup> See George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. Legal Stud. 491, 496 (1995) (noting that "the ADEA simply paraphrases the corresponding prohibition in Title VII").

<sup>21</sup> Age Discrimination in Employment Act § 4, 81 Stat. at 603 (codified as amended at 29 U.S.C. § 623(a)(1) (1994)).

Act addressed something other than traditional discrimination.<sup>22</sup> The legislative history reflects Congress's understanding that "age discrimination in employment [is] a complex phenomena [sic] based on many interrelated factors."<sup>23</sup> Unlike the victims of traditional forms of discrimination, aging employees confront a question of "economics; it is not discriminatory or malice [sic], it is simply that it costs more money to employ [older workers]."<sup>24</sup> As one individual explained:

The problem of age discrimination is a complex one because it is seldom a matter of blind or arbitrary prejudice which often exists for reasons of race, creed, color, national origin, or sex. Age discrimination is a more subtle series of problems based upon a combination of institutional factors and stereotyped thinking.<sup>25</sup>

Because age discrimination was considered to be independent of other forms of discrimination, Congress declined to place enforcement of the Act with the Equal Employment Opportunity Commission (EEOC). As originally codified, the ADEA applied to individuals aged forty to sixty-five<sup>26</sup> and was administered by the Department of Labor.<sup>27</sup>

From the very beginning, the most striking feature of the ADEA as applied, rather than as intended, was the marked disparity between the stated congressional aim of redressing barriers to job acquisition by older employees and the actual effect of the statute. While the Act had an immediate impact on formal barriers to employment, such as maximum age listings for job openings, the removal of these barriers failed to solve, or even reduce, the problem of long-term unemployment.<sup>28</sup> At the 1976 "Impact of the ADEA" hearings, the clear weight of the testimony was that the 1967 Act had no discernible im-

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<sup>22</sup> See Older Workers Benefit Protections Act: Joint Hearing on S. 1511 Before the Subcomm. on Labor of the Comm. on Labor and Human Resources and the Special Comm. on Aging, 101st Cong. 231 (1989) [hereinafter OWBPA Hearings] (statement of Mark S. Dichter, on behalf of the Association of Private Pension and Welfare Plans, U.S. Chamber of Commerce, National Association of Manufacturers, and ERISA Industrial Committee) (noting that in 1967, "Congress understood that age discrimination is by nature different from discrimination on the basis of race or sex").

<sup>23</sup> 1967 House Hearings, *supra* note 4, at 5 (comments of Rep. John H. Dent).

<sup>24</sup> *Id.* at 69 (statement of Peter J. Pestillo, U.S. Chamber of Commerce).

<sup>25</sup> *Id.* at 45 (statement of Norman Sprague, Director, Employment and Retirement Program, National Council on Aging).

<sup>26</sup> See Age Discrimination in Employment Act § 12, 81 Stat. at 604 (codified as amended at 29 U.S.C. § 631(a) (1994)).

<sup>27</sup> See *id.* § 6, 81 Stat. at 607 (codified as amended at 29 U.S.C. § 632 (1994)).

<sup>28</sup> See O'Meara, *supra* note 18, at 22-23 (citing Bureau of Labor Statistics, U.S. Dep't of Labor, Unemployed Persons by Duration, Sex, Age, Color and Marital Status, Employment and Earnings 25 (1967)) ("The ADEA has ultimately failed at its primary purpose, the reduction of long-term unemployment among older workers.").

pact on the long-term unemployment problem for older employees.<sup>29</sup> Despite the growing number of ADEA suits,<sup>30</sup> long-term unemployment amongst the elderly had in fact increased by 2.8% between 1967 and 1976.<sup>31</sup>

### *B. The Life-Cycle Model*

The ADEA failed in its stated objective because it rested on a misunderstanding of the sources of employment barriers for older workers. Employers' reluctance to hire older workers was not necessarily attributable to an inaccurate assumption of older workers' capabilities based on animus or lack of familiarity with a socially isolated group of potential employees. Rather, the barriers to employment stemmed from an accurate understanding of the relation between wages and age, borne out by the actual workplace experience of employers. That relationship is most accurately depicted by the life-cycle model of career employment.

Although detailed in several other articles (including some written by the authors), a brief overview of this model is necessary to communicate why the ADEA failed to fulfill its initial purpose. With the indulgence of readers already steeped in this literature, an understanding of the relation between pay scales and productivity over the employment career is, we propose, the central explanatory variable in identifying the unique employment hurdles facing older employees.

Employment markets have a unique feature that sets them apart from the neoclassical economic depiction of supply and demand curves dictating price. The typical long-term employment relationship that emerged in the American workplace after World War II featured a steady pattern of wage increases for employees up until the moment of retirement.<sup>32</sup> These wage increases persisted in cases where identifying any increase in productivity was impossible and even in circumstances where one could establish that productivity either leveled off earlier in the employee's career or was actually falling. The life-cycle

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<sup>29</sup> See, e.g., Impact of the Age Discrimination in Employment Act of 1967: Hearings Before the Subcomm. on Retirement Income and Employment of the Select Comm. on Aging, 94th Cong. 5 (1976) [hereinafter Impact Hearings] (statement of Norman Sprague, Director, New Life Institute) (stating that "for workers covered by this Act . . . the employment situation is still not at all good").

<sup>30</sup> See *id.* at 25 (statement of Rep. William Randall) (stating that "backlog" of ADEA cases has increased every year).

<sup>31</sup> See Bureau of Labor Statistics, U.S. Dep't of Labor, Unemployment Rate by Sex, Race and Age, 1947-1979 Handbook of Labor Statistics 67 (1980).

<sup>32</sup> Although some dispute the effect of inflation on real wage structures, particularly after the 1970s, nominal wages (the actual dollar figure for wages) still follow the pattern of steady increases over time.

model was developed to explain the paradox of what economists would term the absence of wage elasticity or, simply, the failure of wages to fluctuate in response to the actual productivity of employees.<sup>33</sup>

If wages rise without a corresponding increase in productivity, what explains the willingness of employers in the late stages of an employee's career to pay more than the cost of obtaining cheaper substitute labor from a younger employee? In the absence of some external constraint introducing a monopoly-like distortion in the labor market,<sup>34</sup> no employer could pay wages above employee productivity without inviting market challenge from more efficient competitors. So long as one focuses exclusively on wages and productivity at a particular point or even a single day in the career of a senior employee, the

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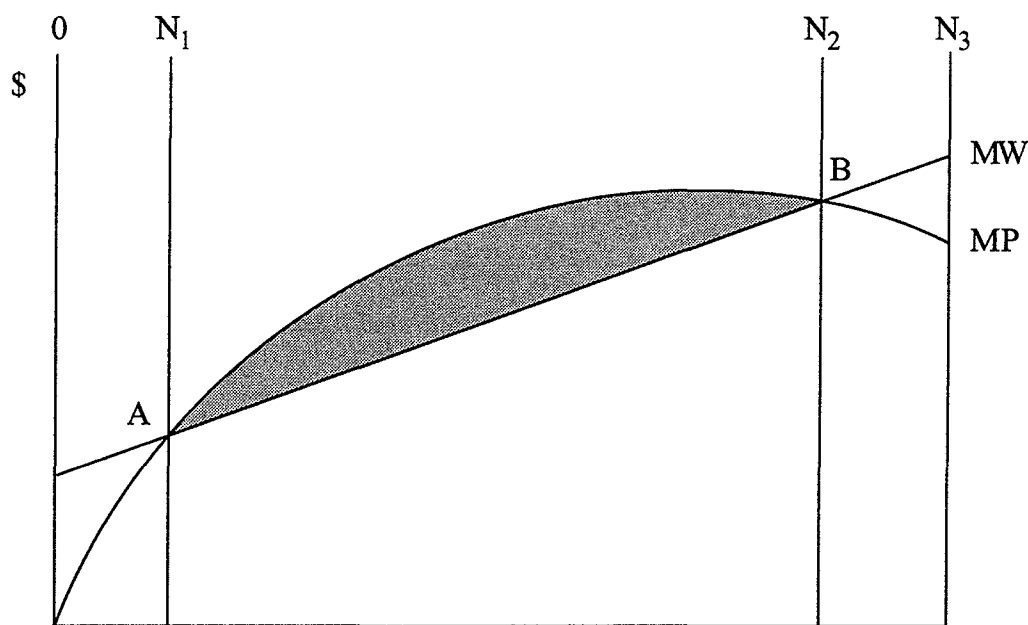
<sup>33</sup> This implicit contract was first described by Edward Lazear. See Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 J. Pol. Econ. 1261, 1262 (1979) (developing what is now recognized as the life-cycle model). Lazear's model of life-cycle employment has been generally accepted, receiving much empirical support. See, e.g., Robert Hutchens, *Delayed Payment Contracts and a Firm's Propensity to Fire Older Workers*, 4 J. Lab. Econ. 439, 440 (1986) (determining that certain jobs for which older workers are employed but not hired have characteristics associated with delayed payment contracts, in accordance with Lazear's life-cycle model); George Loewenstein & Nachum Sicherman, *Do Workers Prefer Increasing Wage Profiles?*, 9 J. Lab. Econ. 67, 68 (1991) (reporting that even in careers in which "productivity would seem to be relatively static, workers receive wages that rise substantially with tenure") (citing Robert F. Frank & Robert M. Hutchens, *Feeling Good vs. Feeling Better: A Life-Cycle Theory of Wages* (1988) (unpublished working paper, Cornell University, Department of Economics)); James L. Medoff & Katharine G. Abraham, *Are Those Paid More Really More Productive? The Case of Experience*, 16 J. Hum. Resources 186, 186 (1981) (summarizing results of empirical study showing that experience cannot adequately explain experience-earnings profile); Jacob Mincer & Boyan Jovanovic, *Labor Mobility and Wages*, in *Studies in Labor Markets* 21, 25-28 (Sherwin Rosen ed., 1981) (finding that wages within firm rise relative to alternative opportunities as job seniority increases); see also Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 Mich. L. Rev. 8, 11 (1993) (using life-cycle employment model to argue that contract protections should be provided for employees at beginning and end of cycle); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. Pa. L. Rev. 1349, 1356-64 (1988) (using life-cycle model of employment to analyze efficiency of internal labor markets). But see J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 Wis. L. Rev. 837, 912-13 (1995) (arguing that these implicit commitments should not be basis for implied contractual obligations).

<sup>34</sup> This concept is at the heart of the charge that unions inevitably seek monopoly rents by introducing a cartel in the labor market. See Richard A. Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988, 990 (1986) (arguing that "American labor law is best understood as a device for facilitating . . . the cartelization of the labor supply by unions"). This argument is somewhat undercut by matching actual union contracts to the career-wage pattern favored by both employees and many employers. See Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 9-10 (1984); Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* 74-76 (1990).

paradox of apparent overpayment is unresolvable. Shifting the focus to the entire worklife of a career-term employee, however, exposes that wages and marginal productivity are separated not only at the late stages of employment, but throughout a typical employee's career.

An illustration of the career-wage model helps clarify the issue:

**Figure 1.**



**Legend**

MW:	Marginal Wage of Employee
MP:	Marginal Product of Employee
Shaded Area:	Period in mid-career where employee's wage is less than employee's marginal productivity
0-N <sub>1</sub> :	Training Period
N <sub>1</sub> -N <sub>2</sub> :	Mid-Career
N <sub>2</sub> -N <sub>3</sub> :	Later Career
A & B:	Cross Points

In simple economic terms, the model depicts the employee receiving a wage premium during the training stages of employment and again at the end stages of his or her career. During the middle stages, however, the employer is actually paying the employee less than the employee's marginal productivity. Accordingly, in order to ensure an increasing wage structure, employers paid workers more than their worth during the beginning and the ending phases of their careers.<sup>35</sup>

<sup>35</sup> See Lazear, *supra* note 33, at 1264.

They were willing to suffer this loss in exchange for an intermediate period of superprofitability from the employee's services.<sup>36</sup>

This exchange depended on two further steps. First, the employer had to resist the temptation to discharge the employee in the late stages of employment. This discharge would be opportunistic because the employer would have already received the benefits of the bargain during the middle stages of employment. Furthermore, the employee would be in no position to recapture his or her legitimate late-stage compensation from any other employer.

Second, the system of mandatory retirement made the exchange possible by providing the necessary endpoint to the bargain.<sup>37</sup> The mandatory retirement age allowed for a predesignated moment at which the employment relationship could be revisited. In fields characterized by formal tenure, such as academia, this could mean that productive senior faculty would be termed emeritus but would continue teaching or conducting research on shorter-term contracts or grants. Viewed in this way, mandatory retirement provided not so much the compelled endpoint of employment but rather a prearranged point of renegotiation. This prearranged renegotiation provided career employees some security against constant reviews of productivity and some dignitary protection should their skills begin to ebb later in their careers. For employers, mandatory retirement afforded a point at which employees could be reevaluated without imposing the stigma of having been singled out for potential termination as nonperforming individuals. Mandatory retirement also enabled employers to avoid the corresponding costs to overall employee morale if employees were seen to be "picked upon" in their later years.<sup>38</sup> Without a clear termination point, no employer could afford to contract either expressly or implicitly for an open ended escalating wage

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<sup>36</sup> See *id.*

<sup>37</sup> See *id.*; see also Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 *Tex. L. Rev.* 1219, 1248 (1992) (describing mandatory retirement as "integral element of a long-term contractual relationship").

<sup>38</sup> One of the consequences of the end of mandatory retirement in academia has been renewed attention to periodic reviews of productivity throughout a professor's career. For example, the Texas A&M Board of Regents directed all 10 schools in the system to draft policies for removal of tenured professors whose annual reviews reflected poor performance. One draft by the Texas A&M University Faculty Senate proposed that professors be given six years to improve their performance before being fired. See A. Phillips Brooks, *Tenure, Academia's Inviolable Code, Becomes Legislative Target*, *Austin Am. Statesman*, July 8, 1996, at A1 (discussing allegations that legislative proposal to eliminate tenure would hurt Texas's universities' ability to hire best and brightest faculty); see also Nancy Youssef, *U. Va. Wants More Reviews of Tenured Professors*, *The Virginian-Pilot*, Apr. 23, 1995, at B3 (discussing University of Virginia proposal to review tenured professors every six years).

package that was neither tethered to actual productivity nor accompanied by more formal periodic reviews, a point to which we shall return in the concluding section of this Article.

Two alternative explanations illuminate the desirability of the life-cycle arrangement for employers and employees. Most economists who have looked at life-cycle employment emphasize the importance of this arrangement as a check against employee shirking.<sup>39</sup> By having rewards postponed, employees have a large investment in continued employment with the same firm, particularly as the employees age and become less marketable. This investment is particularly valuable in jobs where productivity is hard to measure and shirking is difficult to detect. By introducing an added measure of vulnerability, employees are given a strong disincentive to slack off, even if the actual chance of detection is small. A similar result obtains if the career exchange is examined from a psychological perspective focusing on the satisfaction of the preferences of the contracting parties. From the employee's side, a long-term upward salary trend appears to correspond to strong psychological desires for a sense of improvement over time and for the deferral of rewards—even when the aggregate economic return to the employee is no better than if payment were pegged directly to productivity.<sup>40</sup> There is also a sense of improved overall morale when employees can be retired with a celebratory party rather than at the tail end of a terminal review decision. The life-cycle arrangement thus appears to satisfy the contracting desires of both employers and employees through the major parts of an employee's worklife.

Unfortunately, the life-cycle employment model also illustrates the vulnerability of older employees and explains why employers do not want to hire older workers, independent of any matter of discrimination. An employee in an arrangement that holds out pay in excess of productivity in the later stages of an employee's career faces distinct risks. The primary risk is that an employer under financial stress may come to see an expensive senior employee as an unaffordable luxury, regardless of implicit contractual obligations. Consider, for example, the current age discrimination lawsuit against Westinghouse Electric Corp., an old-time manufacturer that has discovered greener

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<sup>39</sup> See, e.g., Lazear, *supra* note 33, at 1264; Schwab, *supra* note 33, at 17.

<sup>40</sup> See Loewenstein & Sicherman, *supra* note 33, at 68. In experimental settings, Professors Loewenstein and Sicherman found that subjects placed in the position of new hires preferred an upwardly sloping wage scale even when clearly confronted with a situation in which the deferral of payment had negative aggregate effects because employees would be foregoing the time value of money paid immediately. See *id.* at 75.

pastures in its ownership of CBS, Inc.<sup>41</sup> A rather candid memo unearthed during discovery states simply, "In many of our businesses we have an older work force . . . Additionally, our low-growth businesses can strain opportunities for younger workers . . . We have to get the 'blockers' out of the way."<sup>42</sup>

A second risk directly tied to the first is that if an employee were to lose her employment, there would be a strong disincentive to any subsequent employer hiring her. Any new employer hiring a senior employee at her then-current wage scale would be assuming a wage premium for services delivered to another employer.<sup>43</sup> An older employee already at (or near) the end stage of the employment cycle would present an unduly expensive investment for a new employer. The employer would have to invest in firm-specific training of the older worker, the worker would expect a high wage, and the older employee might be retiring within a few years. For an employer to hire an older employee at the wage such an employee would normally command within the firm's employment scale simply would be economically irrational. Further, because a reduction in pay to a level approximating productivity would appear to be a dignitary affront to the employee and would be potentially disruptive within the firm, the life-cycle wage pattern has the predictable effect of freezing unemployed older workers out of the job market altogether.

Thus, the 1967 Act, which set its sights on express age discrimination in hiring, was insufficient to solve the problem of long-term unemployment. The "No Elders Need Apply" signs came down, but the reluctance to hire older workers remained.

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<sup>41</sup> See Paulette Thomas, *Restructurings Generate Rash of Age-Bias Suits*, Wall St. J., Aug. 29, 1996, at B1.

<sup>42</sup> *Id.* (alteration in original).

<sup>43</sup> An interesting example comes with demands for long-term contracts in professional sports. At their peak, sports stars routinely seek long-term contracts to protect against the risk of injury and to continue compensation even as their skills begin to decline. Teams, particularly those operating under salary caps, are quite eager to defer payment. For example, teams that want to keep their stars often give them the long-term contracts they demand but use a variety of methods including signing bonuses and structured payouts to insure that they will have room under the cap in the future. See Andrew E. Serwer, *How High?*, Sports Illustrated, Nov. 8, 1993, at 88, 88 (reporting terms of NBA forward Larry Johnson's 12-year, \$84 million contract with Charlotte Hornets). These long-term obligations become an issue when teams attempt to trade aging stars. The result is that younger players with shorter-term contracts are more marketable than older players with several years left on sizeable contracts. See Clifton Brown, *Davis Traded by Knicks to Raptors for '97 Pick*, N.Y. Times, July 25, 1996, at B13 (reporting efforts of Knicks to trade excess shooting guard and ability to trade Hubert Davis with one remaining contract year rather than John Starks with four remaining contract years).

### C. *The ADEA Plaintiff*

In 1967, Congress had a clear image of whom it sought to protect. The ADEA was for a common man, not old, but older, with gray at his temples and a few lines on his face, with years of experience in his field, who, upon reading the classifieds, found several jobs for which he was qualified but for which applications from those over forty were not accepted.

The actual ADEA plaintiff, however, has turned out to be radically different. Rather than challenging barriers to job seeking, the typical litigant is concerned about holding onto a job he or she already has.<sup>44</sup> Empirical studies of ADEA litigation show that 76% of ADEA cases involve employee termination, while only 9% involve a refusal to hire claim.<sup>45</sup> Other actions involve failure to promote (6.6%), demotion (6.3%), and compensation and benefits (1.9%).<sup>46</sup> The numbers are in complete conflict with what had been predicted by the original legislators and are inconsistent with the original intent of the ADEA. This trend was accentuated in 1986 with the amendment of the ADEA to forbid mandatory retirement for all but a small number of employees.<sup>47</sup> Without a natural termination point for long-term employment relations, employers faced increasing competitive pressures to remove older employees from their payrolls, which in turn prompted more ADEA litigation.

Once again, an understanding of the life-cycle model of employment could have predicted the outcome. Because older employees are being paid more than their marginal productivity at the end of the

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<sup>44</sup> See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *Stan. L. Rev.* 983, 984 (1991) ("Although the authors and early architects of employment discrimination laws envisioned them as tools for opening employment opportunities to blacks, women, and other minorities, this is no longer their primary use. Instead, the antidiscrimination laws are predominantly used to protect the existing positions of incumbent workers."); Rutherglen, *supra* note 20, at 495 ("[M]ost claims of employment discrimination are now claims of discriminatory discharge. Litigation under the ADEA, which concerns such claims almost exclusively, exemplifies this trend in its most extreme form.").

<sup>45</sup> See Michael Schuster & Christopher S. Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 *Indus. & Lab. Rel. Rev.* 64, 64 (1984).

<sup>46</sup> See Cathie A. Shattuck, *ADEA Litigation Survey* (1983), reprinted in *Recipients of ADEA Settlements Are Mostly Long-Term Male Employees*, 7 *Daily Lab. Rep. (BNA)* A-3 (Jan. 12, 1984); see also Billie Brandon & Robert A. Snyder, *ADEA Update: Case Law And "Cost" as a Defense*, *Personnel Admin.*, Feb. 1985, at 116, 117-18 (finding similar results: termination - 73% (discharge - 56% and involuntary retirement - 17%); refusal to hire - 7%; failure to promote - 8%; demotion - 5%; involuntary transfer - 2%; employment conditions - 5%).

<sup>47</sup> *Age Discrimination in Employment Amendments of 1986*, Pub. L. No. 99-592, § 2, 100 Stat. 3342, 3342 (1986) (codified as amended at 29 U.S.C. § 623 (1994)).

life cycle, they are at risk for opportunistic firings by their employer.<sup>48</sup> Having enjoyed the period of superprofitability during the intermediate phase of employment, an unscrupulous employer could fire an older worker in the final stage and, in essence, cut off a clear liability.<sup>49</sup> Traditionally, employers refrained from this opportunistic behavior because of the adverse impact on employee morale and the firm's reputation;<sup>50</sup> encouraging highly productive midstage employees to stay with the firm would be difficult if they observed widespread termination of employees at the next stage of employment.<sup>51</sup> Nonetheless, competitive pressures for downsizing in the 1980s and an increase in global competition provided sufficient incentive for employers to engage in such opportunistic breaches of long-term contract obligations.<sup>52</sup> The temptation to discharge long-term employees was compounded by the mergers and acquisitions boom of the 1980s as the management that inherited the obligations to long-term employees viewed itself as divorced from, and consequently not subject to the

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<sup>48</sup> See Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 *Tex. L. Rev.* 1813, 1821, 1830 (1996) (describing cost-based decisionmaking phenomenon at later stages of employment); Schwab, *supra* note 33, at 19 (noting that late-stage employees are paid more than they produce and become vulnerable to opportunistic firing).

<sup>49</sup> Richard Posner uncharacteristically misses this point in his insightful work on the effects of aging. He dismisses arguments in favor of the ADEA by claiming that "employers have their own incentives, unrelated to law, to avoid firing competent employees of any age, even if replacements are available. The employer has invested in the employee, and if the employee is still productive the employer is continuing to earn a return on the investment." Richard A. Posner, *Aging and Old Age* 334 (1995). Posner errs by confusing the concept of "productivity" with "profitability," the latter being adversely affected by the upward slope of the career-wage trajectory. As Christine Jolls clearly expresses, "[w]hen wages rise above marginal revenue product . . . the individual is no longer profitable, though from the employee's standpoint the high wages are simply restitution for low wages earned early on." Jolls, *supra* note 48, at 1821.

<sup>50</sup> The importance of reputation is summarized as follows: "[I]n the absence of an explicit contract, applicants will seek information from other workers about the employer's past performance. Applicants are obliged to judge the employer, in part, by reputation." Arthur M. Okun, *Prices and Quantities: A Macroeconomic Analysis* 51 (1981); see also Oliver E. Williamson, *The Economic Institutions of Capitalism* 259-61 (1985); Bengt Holmstrom, *Contractual Models of the Labor Market*, 7 *Am. Econ. Rev.* 308, 311-13 (1981).

<sup>51</sup> For an example of a defense of employment at will on the grounds that reputational interests of employers make cheating unlikely, see generally Richard A. Epstein, *In Defense of the Contract at Will*, 51 *U. Chi. L. Rev.* 947 (1984).

<sup>52</sup> For arguments that the reputational interests of employers are insufficient to overcome the temptation of opportunistic discharges, see Freeman & Medoff, *supra* note 34, at 9-10; Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 *U. Pa. L. Rev.* 1953, 1970 n.27 (1996); Schwab, *supra* note 33, at 26-27; Weiler, *supra* note 34, at 74-76. For a defense of the ADEA as a prohibition on such opportunistic discharges, see Jolls, *supra* note 48, at 1829-40.

obligations of, the management that had enjoyed the peak years of productivity of these same employees.

Moreover, the end-stage employees have the greatest incentive to bring suit. First, an opportunistic firing renders such individuals essentially unemployable because no other employer would assume the burden of the high-wage, late-stage employee. Second, "[a]n individual who is not hired will rarely build up the bitterness and hostility toward the prospective employer that is necessary to carry a suit through to trial."<sup>53</sup> Potential plaintiffs in discharge cases are far more likely to find lawyers since potential damages are higher than in refusal-to-hire cases.<sup>54</sup> Finally, refusal-to-hire cases are much more difficult to prove where the number of applicants outnumbers positions available and where many factors unknown to the potential litigant could have been taken into consideration. In contrast, a terminated employee has nothing to fear from and plenty of animosity toward his former employer, has a significant amount of damages, and can more readily build a case of discrimination.<sup>55</sup> Thus, the empirical evidence is hardly counterintuitive.

Those studies also reveal another interesting development in ADEA cases: Plaintiffs are mostly older white male professionals. Almost 86% of ADEA plaintiffs are male.<sup>56</sup> This discrepancy may be due to the greater number of males in the workforce, the greater likelihood that men have pushed through to the end stage of career-term employment,<sup>57</sup> or the ability of female plaintiffs to seek relief under alternative statutes. Regardless, the trend is notable. Moreover, more than 79% of plaintiffs are white-collar employees.<sup>58</sup> This overrepresentation may be a statistical artifact as well, reflecting the fact that employees in blue-collar employment are subject to greater physical strain and tend to be forced into retirement earlier;<sup>59</sup> again, however, the trend must be noted. Although the race of plaintiffs is not often reported, from the cases that do provide a description of the plaintiffs, apparently a disproportionately large number of ADEA

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<sup>53</sup> O'Meara, *supra* note 18, at 27.

<sup>54</sup> See Posner, *supra* note 49, at 329 (arguing that monetary amounts and chances of winning are higher in discharge cases).

<sup>55</sup> See O'Meara, *supra* note 18, at 27-28.

<sup>56</sup> See Brandon & Snyder, *supra* note 46, at 41; Shattuck, *supra* note 46, at A-3.

<sup>57</sup> For a discussion of the interruption in career-term employment caused by childbirth and childrearing by women, see generally Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 *Colum. L. Rev.* 2154 (1994).

<sup>58</sup> See Shattuck, *supra* note 46, at A-3.

<sup>59</sup> This proposition is advanced in Posner, *supra* note 49, at 344.

plaintiffs are white.<sup>60</sup> Finally, the majority of plaintiffs, 55%, are between fifty and fifty-nine years old.<sup>61</sup> Only 27% are over sixty and 18% are in the forty to forty-nine age bracket.<sup>62</sup>

This profile of both the typical ADEA plaintiff and the subject of litigation suggests that the ADEA has developed into a wrongful termination cause of action for employees entering the final stage of employment rather than the protection against categorical action based on the sort of invidious motivation generally associated with the term "discrimination" and originally envisioned by Congress.<sup>63</sup> Several commentators have noted that the ADEA has become "a wrongful discharge statue for white male professionals and managers."<sup>64</sup> Again, this evolution is not surprising. As discussed above, under the life-cycle contract, employers pay employees more than they are worth at the end of their life-cycle. At that stage, employers have a financial incentive to fire the older worker.<sup>65</sup> Without mandatory retirement, those financial incentives have increased exponentially. Because there is no universal protection against wrongful discharge in this country, older white male workers are turning to the one piece of legislation that protects them—the ADEA.<sup>66</sup>

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<sup>60</sup> See Schuster & Miller, *supra* note 45, at 68 (inferring from infrequency of reported decisions mentioning plaintiff's race that most are white); see also Rutherglen, *supra* note 20, at 496 (providing data showing that large majority of ADEA plaintiffs are white).

<sup>61</sup> See Schuster & Miller, *supra* note 45, at 68; see also Shattuck, *supra* note 46, at A-3.

<sup>62</sup> See Schuster & Miller, *supra* note 45, at 68.

<sup>63</sup> We leave aside discussion of the apparently rising "contingent workforce" of individuals holding multiple part-time jobs, itinerant positions, or other employment lacking any prospect of lifetime tenure with one employer. See Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 Wash. & Lee L. Rev. 863, 868 (1995) (documenting sizable growth of temporary, part-time business service, and self-employed workers between 1980 and 1993, and estimating that 25-30% of workforce employed in contingent, nonpermanent jobs); Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 Wash. & Lee L. Rev. 739, 743-53 (1995) (advocating broad-scale legal regulation of contingent employment market); Maria O'Brien Hylton, *The Case Against Regulating the Market for Contingent Employment*, 52 Wash. & Lee L. Rev. 849, 862 (1995) (arguing that regulation of contingent workforce is likely to be counterproductive due to little indication that regulation will cause incorporation of contingent workers into core workforce). The demographic profile of the ADEA shows that such employees are as unlikely to bring claims under the ADEA as they are under common law wrongful discharge laws. See O'Meara, *supra* note 18, at 25-26.

<sup>64</sup> O'Meara, *supra* note 18, at 48; see also Jolls, *supra* note 48, at 1829-40 (justifying ADEA as protection against late-career opportunism); Rutherglen, *supra* note 20, at 496 (noting that justifications for the ADEA "have a surprising resemblance to the justification for recognizing claims for wrongful discharge").

<sup>65</sup> See Schwab, *supra* note 33, at 43.

<sup>66</sup> See *id.* ("At the end of their lifecycle, they often earn more than their current productivity. If they do, the employer has a financial incentive to terminate them . . . . The Age Discrimination in Employment Act provides one check against late-career opportunism."); see also Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*,

To the extent that the ADEA turned out to provide protection against terminations (be they discriminatory, arbitrary, or perhaps just undesired) rather than discriminatory refusals to hire, the Act foreshadowed the development of other antidiscrimination laws. The profile of cases litigated under Title VII reveals that the antidiscrimination laws are increasingly used to "protect the existing positions of incumbent workers."<sup>67</sup> Thus, the most comprehensive study of antidiscrimination litigation concludes that, "[w]hile most [Title VII] cases formerly attacked discrimination in hiring, today the vast majority of all litigation suits challenge discrimination in discharge."<sup>68</sup> Nonetheless, the ADEA stands apart in offering protection based on a category that does not correspond to the traditional indicia of discriminatory victimization.

#### D. Antidiscrimination with a Difference

In *Furnco Construction Corp. v. Waters*,<sup>69</sup> then-Justice Rehnquist articulated the justification for the relaxed use of presumptions of discrimination in favor of black plaintiffs:

A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus . . . it is more likely than not the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.<sup>70</sup>

Justice Rehnquist's attention in *Furnco* focused on the shifting of the burden of production upon a relatively minimal plaintiffs' showing, which is known as the *McDonnell Douglas* approach in Title VII law.<sup>71</sup> While the *Furnco* rationale may hold in the context of race or

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74 Tex. L. Rev. 1655, 1671-74 (1996) (describing pressure on antidiscrimination statutes from discharged employees lacking other means of redress).

<sup>67</sup> Donohue & Siegelman, *supra* note 44, at 984.

<sup>68</sup> *Id.*

<sup>69</sup> 438 U.S. 567 (1978).

<sup>70</sup> *Id.* at 577 (citation omitted).

<sup>71</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (setting forth burden shifting under Title VII disparate treatment claims). But see *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-12 (1993) (restricting *McDonnell Douglas* burden shifting by forcing plaintiff to prove ultimate issue of discriminatory treatment even where defendant has failed to discharge intermediate burden of production); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2232-35 (1995) (describing shift in *Hicks*).

even sex, it fails to justify a presumption of age discrimination.<sup>72</sup> First, and most simply, the ADEA is not concerned with a constitutionally protected class. Unlike race and sex,<sup>73</sup> age is not a suspect classification and no credible claim has ever been made that older Americans are subject to arbitrary state laws inspired purely by animus.<sup>74</sup> In *Massachusetts Board of Retirement v. Murgia*,<sup>75</sup> the Supreme Court explained that "old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span."<sup>76</sup> As summarized by Professor Rutherglen, the ADEA "cannot be justified in terms of opening opportunities to a historically disfavored group."<sup>77</sup>

Second, in age cases, as opposed to racial discrimination claims, the alternative explanation is everpresent. In simple doctrinal terms, courts have been forced to recognize that cost-based discrimination

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<sup>72</sup> Almost immediately after the decision in *Furnco*, courts began to question the applicability of a strict *McDonnell Douglas* test to age discrimination cases. As expressed by the Sixth Circuit, "[t]his factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex, and national origin. . . . Thus we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age." *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 n.4 (6th Cir. 1975); see also *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981) (holding that replacement of older employee by younger employee does not raise same presumption of discrimination as replacement of black employee by white employee). As a general matter courts developed a more demanding application of evidentiary presumptions in age cases. The resulting standard requires a plaintiff to establish a "nexus" that directly ties the age of the complainant to the complained of conduct, rather than a mere showing that an employee from a protected class was displaced. See *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238-41 (4th Cir. 1982) (developing nexus test). In *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996), the Supreme Court recently ruled that in order to establish a prima facie case, an ADEA plaintiff alleging unlawful discharge could not satisfy his prima facie burden merely by showing that he was replaced by an employee under 40. See *id.* at 1310. For example, a displaced 40-year-old employee could not satisfy his initial burden by showing that he was replaced by a 39-year-old from outside the protected class. Rather, the ADEA plaintiff must show that his replacement is "substantially younger." This holding contrasts with the *McDonnell Douglas* regime in place for other discrimination claims requiring proof that a discharged employee was replaced by someone from outside the protected class.

<sup>73</sup> See, e.g., *United States v. Virginia*, 44 F.3d 1229, 1235 (4th Cir. 1995) (noting that classifications based on gender are held to heightened level of scrutiny).

<sup>74</sup> This concept of state action that is comprehensible only on the grounds of class-based animus was the rationale by which the Supreme Court struck down a Colorado constitutional amendment limiting conferral of legal benefits to homosexuals. See *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996). The Court did so despite the fact that homosexuals as such do not enjoy constitutional protection as a discrete and insular group. See generally *Bowers v. Hardwick*, 478 U.S. 126 (1986).

<sup>75</sup> 427 U.S. 307 (1976) (per curiam).

<sup>76</sup> *Id.* at 313-14 (citation omitted).

<sup>77</sup> Rutherglen, *supra* note 20, at 521.

may serve as a defense to an age-based classification in circumstances in which comparable defenses would be unavailing were the challenged classification to be triggered by race or sex. For example, several courts have held that a legitimate business reason or economic purpose could justify a differentiation in benefits based on age.<sup>78</sup> The question of the relation between age and seniority-sensitive employee rights came to the fore in *Hazen Paper Co. v. Biggins*,<sup>79</sup> in which the Supreme Court ruled that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age"<sup>80</sup>—even if that feature happens to correlate with age. *Hazen* seemed to doom attempts to prove a prima facie case of age discrimination by showing that employer reliance upon a proxy for age—such as seniority, income level, or pension status—was sufficient to establish the discriminatory intent necessary for liability under the Act.<sup>81</sup>

This result in turn exposes the paradox of the ADEA. Concern about employer opportunism against older employees is well founded. As demonstrated by the life-cycle model, employers have a significant incentive to breach their part of the implicit bargain. Having enjoyed the period of superprofits during the middle stages of employee careers, employers in economic straits may seek to evade the obligations that underlie the career-wage relationship. By providing older employees a legal remedy for an opportunistic breach, the ADEA has been recast from a statute providing access to the workplace for older Americans into the most dramatically far reaching of the antidis-

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<sup>78</sup> See, e.g., *Potenze v. New York Shipping Ass'n*, 804 F.2d 235, 238 (2d Cir. 1986) (ruling that plan that offset Social Security benefits for those workers over 65 choosing to participate in employee retirement incentive program (ERIP) was not subterfuge because plan was justified by legitimate business reasons); *Cipriano v. Board of Educ.*, 785 F.2d 51, 57-58 (2d Cir. 1986) (reasoning that ERIP with age ceiling would not constitute subterfuge to avoid ADEA if employer could provide legitimate reason for excluding workers over 60 from participating); *Crosland v. Charlotte Eye, Ear & Throat Hosp.*, 686 F.2d 208, 215 (4th Cir. 1982) (holding that provision excluding workers over 55 from pension plan was not illegal if "the provision was motivated by a legitimate business or economic purpose which, objectively assessed, reasonably justified it"); see also 29 U.S.C. § 623(f)(2)(B) (1994) (allowing age-based discrimination when observing terms of bona fide employee benefit plan).

<sup>79</sup> 507 U.S. 604 (1993).

<sup>80</sup> *Id.* at 609.

<sup>81</sup> For an excellent discussion of the tension in ADEA law after *Hazen*, 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, 427 (1994) (arguing that many ADEA claims cannot survive unless plaintiffs can rely on proxy theory to "challenge employment criteria that can readily mask age discrimination").

crimination statutes.<sup>82</sup> As a result, ADEA claims in the federal courts are mushrooming. In 1988, they accounted for more than 25% of the work of the EEOC, and between 1989 and 1993 the number of claims filed with the EEOC jumped 34%.<sup>83</sup>

While the ADEA may indeed serve the purpose of providing legal redress to one sector of the older workforce, whether antidiscrimination legislation is the proper vehicle for redressing this concern remains unclear. If the source of the risk to older workers is economics, in general, and opportunistic breaches, in particular, a real question emerges as to why this problem should be folded into the antidiscrimination rubric. Professor Jolls defends the Act as "handstying" by which employers are deterred from cheating on their implied contractual obligations.<sup>84</sup> Not only is this explanation a rather significant departure from the original stated purpose of the Act, but it constitutes a peculiar use of the antidiscrimination model. Protection of long-term employees could be accomplished by recognizing the important role of common law actions, as described by Professor Schwab,<sup>85</sup> by relaxing the at-will presumption found in the common law, as proposed by Professors Estlund<sup>86</sup> and Kamiat;<sup>87</sup> by creating a statutory abrogation of employment at will, as has already been done in Montana,<sup>88</sup> by creating compulsory arbitration over the termination

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<sup>82</sup> See OWBPA Hearings, *supra* note 22, at 420 (introductory remarks of Sen. Metzenbaum) (describing reformed ADEA as "this Nation's fundamental civil rights law safeguarding older Americans in the workplace").

<sup>83</sup> See Posner, *supra* note 49, at 330 (citing EEOC reports); Bimal Patel & Brian H. Kleiner, *New Developments in Age Discrimination*, 45 *Lab. L.J.* 709, 712 (1994) (reviewing EEOC filing data from 1989-1993, originally compiled in Sara Marley, *Age-Related Suits Increase*, *Bus. Ins.*, Jan. 17, 1994, at 1, 1); Rutherglen, *supra* note 20, at 507-08 (producing tables recording charges filed with EEOC); see also Jolls, *supra* note 48, at 1814 (reviewing data).

<sup>84</sup> Jolls, *supra* note 48, at 1829. Professor Jolls, however, seems to accept the view that "the ADEA cannot be justified on traditional distributive or rights-based grounds." *Id.* at 1814.

<sup>85</sup> See Schwab, *supra* note 33, at 43-47; Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 *Tex. L. Rev.* 1943, 1943-47 (1996) (noting that most states, with the "notable exception of New York," recognize the tort of wrongful discharge if the discharge violated public policy and arguing that analyzing third-party effects is the appropriate method for defining public policy); see also Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 *Tex. L. Rev.* 1693, 1693 (1996) (defending employees' use of collateral torts such as intentional infliction of emotional distress and defamation on grounds that courts are capable of screening out nonmeritorious claims).

<sup>86</sup> See Estlund, *supra* note 66, at 1657 (arguing that at-will presumption undermines effectiveness of wrongful discharge law and frustrates important policy objectives).

<sup>87</sup> See Kamiat, *supra* note 52, at 1957-68 (suggesting that bargaining impediments between employers and individual employees show current contractual model is "broken").

<sup>88</sup> See *Wrongful Discharge From Employment Act*, Mont. Code Ann. §§ 39-2-901 to 2-915 (1995).

of long-term employees, as proposed by the Model Employment Termination Act;<sup>89</sup> or by establishing administrative mechanisms to deter employer misconduct.<sup>90</sup> Using the ADEA to substitute for a "for cause" rule of employment law provides only patchwork protection to a handful of successful plaintiffs. Additionally, those few plaintiffs who do succeed tend to be drawn disproportionately from the ranks of the most privileged employees.

Furthermore, the expense of this solution may very well overwhelm any stopgap protection that is obtained. The 1984 transfer of enforcement power over the ADEA from the Department of Labor to the EEOC<sup>91</sup> should not obscure the significant advantages available to ADEA plaintiffs over other antidiscrimination complainants. Unlike pre-1991 Title VII plaintiffs, ADEA plaintiffs received the right to jury trials and liquidated damages.<sup>92</sup> Although these changes were hardly noticed at the congressional hearings, they proved to be highly significant in the subsequent onslaught of litigation. The ADEA emerged as the most potent of the antidiscrimination statutes with remedies that included injunctive relief,<sup>93</sup> reinstatement,<sup>94</sup> front pay,<sup>95</sup> and reasonable costs and attorneys' fees.<sup>96</sup> Moreover, unlike the pre-1991 version of Title VII, the ADEA's right to back pay is not discre-

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<sup>89</sup> See Model Employment Termination Act § 6, 7A U.L.A. 89-90 (Supp. 1996), reprinted in 9A Lab. Rel. Rep. (BNA) § 540:21, at 37-38 (1991). See generally Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 Wash. L. Rev. 361, 376-79 (1994) (reporter for Acts Drafting Committee discussing rationale for Act's preference for arbitration as means of enforcement).

<sup>90</sup> See Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 Tex. L. Rev. 1783, 1806-11 (1996) (proposing no-fault severance administrative model).

<sup>91</sup> See O'Meara, *supra* note 18, at 248-51.

<sup>92</sup> See 29 U.S.C. § 626(c)(2) (1994) (jury trials); 29 U.S.C. § 626(b) (1994) (liquidated damages); Rutherglen, *supra* note 20, at 496 (noting ADEA "allowed for the right to jury trial and for liquidated damages—procedures that were not available under Title VII as originally enacted"); see also T. Mark Sandifer, Casenote, *No Exclusion for ADEA Claims Under I.R.C. § 104(a)(2): An Analysis of Commissioner v. Schleier*, 47 Mercer L. Rev. 637, 640 (1996) ("[U]nlike the pre-1991 version of Title VII, the ADEA provides for jury trials and liquidated damages.").

<sup>93</sup> See 29 U.S.C. §§ 217, 626(b) (1994); see also *Farkas v. New York State Dep't of Health*, 554 F. Supp. 24, 28-29 (N.D.N.Y. 1982) (finding plaintiff met test for granting preliminary injunction because he made prima facie showing of age discrimination); *Cannister v. FAA*, 24 FEP Cases 1621 (D.D.C. 1979) (restraining employer from transferring employees).

<sup>94</sup> See 29 U.S.C. § 626(b) (1994).

<sup>95</sup> See, e.g., *O'Donnell v. Georgia Osteopathic Hosp.*, 748 F.2d 1543, 1551 (11th Cir. 1984) (noting that "front pay is an available remedy under the ADEA"); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984) (recognizing future damages), vacated on other grounds, 469 U.S. 1154 (1985); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir. 1982) (same).

<sup>96</sup> See 29 U.S.C. §§ 216(b), 626(b) (1994).

tionary, it is a matter of right.<sup>97</sup> Liquidated damages provide double recoveries where the employer committed a willful violation of the statute,<sup>98</sup> and awards of back pay include damages for lost wages, pension benefits, insurance benefits, profit sharing benefits, and accrued sick leave.<sup>99</sup>

More critically, the relaxed reliance on the antidiscrimination model as a panacea for all employment problems served as an invitation to other forms of opportunistic behavior—this time by the beneficiaries of the ADEA statutory scheme.

## II

### REFORMS AND CAPTURE

#### A. *The Emergence of an Interest Group Strategy*

The ADEA has had a long and complex history. Since 1967, there have been several series of initiatives, some successful, some not. The first significant amendment to the Act came as Congress began to examine seriously the condition of an aging workforce. In the early 1970s, Congress not only approved significant increases in Social Security benefits<sup>100</sup> and passed the Employee Retirement Income Security Act of 1974,<sup>101</sup> but also extended the ADEA to cover employees of federal and state governments.<sup>102</sup> By 1976, the Gray Lobby and its allies in Congress moved to eliminate the age cap of the ADEA altogether in both the public and private sectors.<sup>103</sup> In fact, one group wanted not only the end of mandatory retirement, but also affirmative action programs "comparable to those contained in Title VII."<sup>104</sup> More moderate proposals simply would have raised the statutory age

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<sup>97</sup> See Maureen E. McClain, *Litigating an Age Discrimination Case: Special Litigation Problems and Techniques*, in *Advanced Strategies in Employment Law*, 439, 451 (PLI Litig. & Admin. Practice Course Handbook Series No. 342, 1987) (citing *Lorillard v. Pons*, 434 U.S. 575 (1978)).

<sup>98</sup> See 29 U.S.C. §§ 216(b), 626(b) (1994).

<sup>99</sup> See Barbara L. Schlei & Paul Grossman, *Employment Discrimination Law* 522-23 nn.215-19 (2d ed. 1983).

<sup>100</sup> See Michael D. Hurd, *Research on the Elderly: Economic Status, Retirement, and Consumption and Saving*, 28 J. of Econ. Lit. 565, 590 (1990) (projecting values of 1968, 1970, 1971, and 1972 changes in Social Security benefit schedule to represent 72% increase).

<sup>101</sup> Pub. Law No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994)).

<sup>102</sup> See Joseph E. Kalet, *Age Discrimination in Employment Law* 3 (1986).

<sup>103</sup> See Amendments to the Age Discrimination in Employment Act of 1967: Hearings on H.R. 65 and H.R. 1115 Before the Subcomm. on Employment Opportunities of the Comm. on Educ. and Labor, 95th Cong. 7 (1977) [hereinafter 1977 House Hearings] (statement of Rep. Claude Pepper) (introducing his bill, H.R. 65, which would prohibit discrimination on basis of age in both public and private employment).

<sup>104</sup> 1967 House Hearings, *supra* note 4, at 185.

cap from sixty-five to seventy,<sup>105</sup> a position that finally won out in the 1978 amendments to the Act.<sup>106</sup> In 1984, Congress transferred enforcement to the EEOC,<sup>107</sup> the enforcement agency for Title VII legislation, and held additional hearings on eliminating the age cap for private sector employees.<sup>108</sup> In 1986, these objectives were realized as all workers over the age of forty were brought under the statutory umbrella and, notably, virtually all mandatory retirement was eliminated.<sup>109</sup> Finally, in 1990, Congress passed the Older Workers Benefits Protection Act (OWBPA),<sup>110</sup> a far ranging statute prohibiting the use of many targeted retirement inducement programs, the implications of which we will discuss below.<sup>111</sup>

These amendments to the ADEA did not occur in a vacuum. Over the same twenty-five-year period, the number of older Americans increased,<sup>112</sup> their percentage of the national wealth soared,<sup>113</sup> and they brought a steadily increasing number of cases under the ADEA.<sup>114</sup> Interestingly, there is a stunning mismatch between the expansion of ADEA litigation and the dramatic improvement in the economic status of the elderly. For example, between 1970 and 1984, the median real income of households comprised of persons over sixty-five rose by 35%, compared to less than 1% for those comprised

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<sup>105</sup> See S. Rep. No. 95-493, at 31 (1977), reprinted in 1978 U.S.C.C.A.N. 504, 525 (additional views of Sen. Jacob K. Javits) (describing proposal to raise age cap to 70 as "the more conservative position").

<sup>106</sup> See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3, 92 Stat. 189 (codified as amended at 29 U.S.C. § 631(a) (1994)).

<sup>107</sup> The transfer was originally effected in 1978 pursuant to Reorganization Plan No. 1, which was authorized by the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (1977) (codified as amended at 5 U.S.C. §§ 901-12 (1994)). However, because of an unusual procedural mechanism that was subsequently determined to be unconstitutional, Congress had to reaffirm the transfer in a separate bill. See Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705 (codified as amended at 5 U.S.C. § 906 (1994)).

<sup>108</sup> See generally Amendments to the Age Discrimination in Employment Act: Hearings on H.R. 2161, H.R. 3093, and H.R. 5310 Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor, 98th Cong., 2d Sess. (1984).

<sup>109</sup> See Age Discrimination in Employment Act of 1986, Pub. L. No. 99-592, § 2, 100 Stat. 3342 (1986) (codified as amended in 29 U.S.C. § 631 (1994)).

<sup>110</sup> Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 623, 626, 630 (1994)).

<sup>111</sup> For additional information, see Staff of Senate Comm. on Labor and Human Resources, 102d Cong., Legislative History of the Older Workers Benefit Protection Act (S. 1511 and Related Bills), pt. I (Comm. Print 1991) (detailing legislative background of OWBPA).

<sup>112</sup> The elderly portion of the population has increased steadily. In 1900, only 4% of the population was 65 or older; in 1980, that number increased to 11%; by 2050, that figure is projected to reach 24%. See Hurd, *supra* note 100, at 565.

<sup>113</sup> See *id.* at 585-88.

<sup>114</sup> See O'Meara, *supra* note 18, at 29-33.

of persons aged twenty-five to sixty-four.<sup>115</sup> This increase reflects a steady and dramatic rise in individual income for senior citizens; between 1957 and 1990, the median income of persons in the over-sixty-five category more than doubled, a pace far outstripping the rate of the rest of the population.<sup>116</sup> With older Americans living longer and having more wealth and disposable time, we now confront a concern noted by Judge Posner:

[Our] concern is that the increase in nonworking life expectancy associated with the growing fraction of elderly people implies a decline in the ratio of productive to consuming years over the life cycle, and that the elderly will use their political muscle to force the productive young to support the consuming old.<sup>117</sup>

This opportunity for capture by a specific group is significant given the power of the elderly in this country. Older persons are more likely than any other group to vote,<sup>118</sup> to write members of Congress, and to join public interest organizations.<sup>119</sup> As summarized by Representative Claude Pepper, the enthusiastic champion of ever greater benefits for senior citizens, "[t]hey have money and they have power."<sup>120</sup> The result has been that, since the 1970s, "the elderly have reaped a steadily increasing proportion of governmental benefit programs."<sup>121</sup> From

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<sup>115</sup> See Alan J. Auerbach & Laurence J. Kotlikoff, *The Impact of the Demographic Transition on Capital Formation*, in *Demography and Retirement: The Twenty-First Century* 163, 174 (Anna M. Rappaport & Sylvester J. Schieber eds., 1993).

<sup>116</sup> See Posner, *supra* note 49, at 42. Judge Posner makes the critical additional observation that this increase is in actual income and does not include the imputed income from Medicare. It is possible to adjust this figure further by adding in the imputed income from owner occupied housing. Since the elderly are much more likely to live in their own homes and are likely to have less (if any) debt on these homes, imputing the income value of housing raises the expected living standard beyond that which would be projected from income stream alone. See Hurd, *supra* note 100, at 582 (noting imputation of income from housing equity increases income of elderly). As expressed by Professor Hurd, "[a] major finding of the research on economic status is that on average the elderly are as well off as the nonelderly and possibly much better off." *Id.* at 588.

<sup>117</sup> Posner, *supra* note 49, at 36. Put less diplomatically, the question is whether the ADEA reforms are part of a larger problem of "[a] system in which the taxpayer supports the retiree rather than the retiree supporting himself out of his own deferral of consumption [that] invites each generation of old people to use their [sic] concentrated political might to plunder the young." *Id.* at 283.

<sup>118</sup> See, e.g., Desda Moss, *AARP Pushes Health-Care, Aging Issues*, *USA Today*, May 10, 1988, at 1. See generally U.S. Census Bureau, *Voting and Registration* (last modified Aug. 16, 1996) <<http://www.census.gov/population/socdemo/voting/votetab2.dat>>.

<sup>119</sup> See, e.g., Moss, *supra* note 118, at 1; Leigh Page, *Seniors May Hold the Wild Card on Medicare Reform*, *Am. Med. News*, Sept. 4, 1995, at 1. See generally U.S. Census Bureau, *Voting and Registration* (last modified Aug. 16, 1996) <<http://www.census.gov/population/socdemo/voting/votetab2.dat>>.

<sup>120</sup> Moss, *supra* note 118, at 1.

<sup>121</sup> Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 *Hastings L.J.* 683, 707 (1991).

Medicare to Social Security, today's elderly comprise one of the most favored groups in the country with respect to legislative entitlements.<sup>122</sup> Unsurprisingly, that power clearly can be seen at play in the expansion of the ADEA.<sup>123</sup>

Most central has been the evolution of thinking about the problem of aging in the workforce. As we set out above, the image of the Act has changed from a reflection of a concern over entry barriers to a vehicle for addressing concerns at the end of an employee's worklife. No discussion of this transformation is possible, however, without addressing the critical role played by interest group pressures organized through the American Association of Retired Persons (AARP).<sup>124</sup> Although reforms of the ADEA may not appear as serious a problem as the viability of the Social Security system or the state of medical insurance, the reforms of the Act had every bit as much to do with an intergenerational struggle over societal goods. Moreover, while the changes in the Act's focus brought the ADEA in closer step with the problems identified by the life-cycle model, they also introduced the prospect of a direct financial benefit to an identifiable group of people.

### *B. Bad Statutes and the Invitation to Capture*

Although the initial ADEA vision may have been misguided, there is no evidence that it offered direct financial benefits to its proponents. The original legislation was primarily an attempt to eliminate the offensive categorical restrictions on hiring older workers. As

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<sup>122</sup> See *id.* at 715 (noting increase in such areas as Social Security, medical care, property tax relief, and subsidized housing); Peter G. Peterson, Will America Grow Up Before it Grows Old?, *Atlantic Monthly*, May 1996, at 55, 57-60 (citing statistical change in demographics resulting in imminent "age wave" expected to hit American Social Security system); Neal R. Peirce & Peter C. Choharis, The Elderly as a Political Force—26 Million Strong and Well Organized, 1982 *Nat'l J.* 1559, 1559-1562 (quoting retired Rep. Dan Mica as noting elderly may receive more federal aid than necessary "because of political concerns").

<sup>123</sup> See O'Meara, *supra* note 18, at 48 ("The continued expansion of the ADEA is also ensured by the involvement of special interest groups whose power in Congress is substantial."); Peirce & Choharis, *supra* note 122, at 1560 ("Elderly advocates . . . take some of the credit for . . . the 1978 law that repealed the mandatory retirement age for most federal workers and extended the retirement age from 65 to 70 for most private workers.").

<sup>124</sup> See The Removal of Age Ceiling Cap Under the Age Discrimination in Employment Act: Joint Hearing Before the Subcomm. on Employment Opportunities of the Comm. on Educ. and Labor and the Subcomm. on Health and Long-term Care of the Select Comm. on Aging, 99th Cong. 46-47 (1986) (statement of Dr. Erling Johnson on behalf of AARP) (noting "sharply limited" opportunities for older workers); H.R. Rep. No. 99-756, at 7-8 (1986), reprinted in 1986 U.S.C.C.A.N. 5628, 5633-34 (quoting earlier testimony of Dr. Johnson of AARP, characterizing mandatory retirement as denial of older Americans' "basic rights to remain as productive members of society").

is so often the case in the antidiscrimination context, that which appeared as undoubtedly necessary to the eradication of a societal wrong proved over time to be insufficient to accomplish the task alone.<sup>125</sup> Nonetheless, as the Secretary of Labor testified in 1967, there was no Gray Lobby to motivate the original Act.<sup>126</sup> Because of that absence, the original Act was considered a measured approach,<sup>127</sup> and its framers predicted that it would result in fewer than 1000 charges annually.<sup>128</sup> In stark contrast, the legislation that evolved during the 1986 and 1990 reforms was clearly aimed to benefit a discrete group that served, not coincidentally, as its chief champion.

The absence of an active interest group lobbying on behalf of the initial ADEA dispels concerns that the statute in its origins was prompted by concerted self-interest. Ultimately, however, the presence of self-interest cannot be the touchstone for evaluating legislative initiatives.<sup>129</sup> All legislation needs a push, a form of institutional force to overcome the natural inertia present in all political orders. To disqualify legislation, or to subject it to a near universally fatal form of judicial review, on this basis would condemn the regulatory state. The converse, however, is also true: The mere ability to articulate a public-regarding purpose cannot insulate legislation from a real concern that it is an expression of rent seeking interests. Our collective experi-

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<sup>125</sup> The classic example comes with *Griggs v. Duke Power*, 401 U.S. 424 (1971). A scant seven years after Congress passed Title VII, the Court had to confront the fact that "built-in headwinds," themselves the product of years of de facto and de jure segregation, had left the black citizens of North Carolina as vulnerable to disparate impact exclusion from desired employment as they had been to categorical prohibitions on their job seeking under formal segregation. See *id.* at 432.

<sup>126</sup> See 1967 House Hearings, *supra* note 4, at 7 (statement of W. Willard Wirtz, Secretary of Labor) (declaring that reason for no prior action to assure older employees opportunity was because "the 'has-beens' haven't a lobby").

<sup>127</sup> See *id.* at 8 (statement of W. Willard Wirtz, Secretary of Labor) (arguing that H.R. 4221 demonstrated "conservative" but "determined" approach to age discrimination in employment).

<sup>128</sup> See *Age Discrimination in Employment: Hearings on S. 830 & S. 788 Before the Subcomm. on Labor of the Comm. on Labor and Pub. Welfare, 90th Cong. 46* (1967); see also O'Meara, *supra* note 18, at 14 ("In short, Congress was totally unaware of the impact the ADEA would ultimately have.").

<sup>129</sup> For the contested positions on this issue, see James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 283-95, 305 (1962) (introducing public choice argument that legislative arena is source of special interest capture); Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 543 (1983) (arguing for strict literal construction of statutes in light of capacity for rent seeking behavior); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1731 (1984) (arguing for stricter judicial review of nonpublic-interest-protecting statutes).

ence from eyeglass prescriptions<sup>130</sup> to margarine availability<sup>131</sup> shows the ease with which claims of the public interest may be misappropriated on behalf of private gain.<sup>132</sup>

The experience of the ADEA suggests a somewhat different concern. Poorly crafted statutes, particularly those with significant remedial or redistributive potential, are open invitations to self-interested capture. Using an existing statutory vehicle for obtaining desired ends is simply easier than initiating the process of getting favorable legislation passed in the first place. Although this type of claim is difficult to "prove," there are several reasons to surmise that the claim is indeed true.

First, working through an existing statutory framework significantly lowers the entry barriers for strategic agitation. Not only does an existing statute provide a preexisting platform for making claims, but it vastly expands the available fora through which redress can be sought. In the absence of an existing statute, lobbying efforts must be directed at Congress to obtain an initial legal claim, or more uncertainly at the courts to read a new cause of action into existing law. A statute on the books, however, not only means that further legislative assistance can be sought, but also that advocacy groups can appeal to courts and regulatory agencies directly.<sup>133</sup> The Supreme Court confir-

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<sup>130</sup> See *Williamson v. Lee Optical*, 348 U.S. 483, 486-87 (1955) (discussing Oklahoma law that prohibited opticians from fitting "old glasses into new frames or supply[ing] a lens" without prescription from ophthalmologist or optometrist and upholding law even though it may "exact a needless, wasteful requirement in many cases").

<sup>131</sup> For a classic discussion of the concerted efforts of dairy farmers to block and/or tax the sale of margarine, see Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 Cal. L. Rev. 83 (1989).

<sup>132</sup> One of our favorite examples occurs presently in Texas. Texas is the only state in the nation that does not permit home equity loans secured by a lien on the homestead. As a result, consumers with large equity in their homes are unable to secure credit that not only is available at lower rates, but also is the only form of consumer credit that is tax deductible. Consequently, homeowners in need of funds are forced to sell their homes and refinance a new home in order to tap their equity. The most vocal opponents of allowing homeowner equity loans are those well known champions of consumer rights: the Texas real estate lobby and the Texas homebuilders lobby. See Earl Golz, *No Equity to Lend; Texas Law Still Prohibits Financing that Banks, Some Homeowners Want*, Austin Am.-Statesman, Aug. 18, 1996, at H1. Detecting a tad of self-interest in such sudden invocations of the public welfare by these business interests is not difficult.

<sup>133</sup> For examples of expansive regulatory interpretations of the ADEA, see, e.g., 29 C.F.R. §§ 1625.4(b), 1625.5 (1993) (stating that while using phrase "state age" in help-wanted advertisement or on employer application is not automatic violation of ADEA, possibility that this phrase may deter older workers will trigger close scrutiny to guarantee it is for lawful purposes only); 29 C.F.R. § 1625.7(c) (1993) (mandating that if age is used as "limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable"); 29 C.F.R. § 1625.12 (1993) (requiring that party asserting bona fide executive or high policy maker exemption bear burden of proof that elements have been met).

mation hearings of Justice Clarence Thomas provide an example. In defending his record as head of the EEOC, Thomas candidly described how the resources and energies of that agency had been shifted to age discrimination claims and away from the more traditional areas of concern—race and sex.<sup>134</sup> In addition, the presence of *federal* legislation enhances the rewards to be gained since the payoffs to successful agitation would be measured at the national rather than local level.<sup>135</sup>

Second, the presence of an established legislative format allows proponents of a particular agenda to adopt the posture of fighting a defensive battle for what is already theirs as opposed to an offensive battle for what they seek to obtain. As strategic thinkers going back to the time of Sun Tzu have recognized, defensive battles leverage the resources that may be delivered to battle.<sup>136</sup> Moreover, the capacity to pitch a claim as defending preexisting entitlements resonates with clearly developed legal principles granting a privileged position to rights already recognized. As expressed by Oliver Wendell Holmes:

It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.<sup>137</sup>

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<sup>134</sup> See Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 102d Cong. 315 (1991) (statement of then-Judge Clarence Thomas) (describing focus on age discrimination as "requir[ing] a redirection of an enormous amount of resources in the agency").

<sup>135</sup> This understanding is somewhat different than Professor Miller's conclusion about the effect of a federal system on the efforts to deter margarine consumption: "The existence of a federal system benefitted the dairy lobby because the industry could initiate campaigns for state legislation, where free-rider and organization costs were low relative to national politics." Miller, *supra* note 131, at 86.

<sup>136</sup> According to the great Chinese military strategist, "those skilled at making the enemy move do so by creating a situation to which he must conform; they entice him with something he is certain to take, and with the lures of ostensible profit they await him in strength." Sun Tzu, *The Art of War* 93 (Samuel B. Griffith trans., Clarendon Press 1963) (6th century B.C.). This tactic is part of the overall strategy by which "those skilled in war bring the enemy to the field of battle and are not brought there by him." *Id.* at 96.

<sup>137</sup> Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897). For a review of the bases for legal recognition of preexisting entitlements, see Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 Cornell L. Rev. 189, 215-18 (1992). For explicit examples of such defensive posturing by the AARP allegedly to protect preexisting entitlements in the debates over employee benefits, see *Has High Court Imperiled Older Workers' Benefits?*, *Occupational Hazards*, Oct. 1989, at 115 (quoting AARP attorney Chris Mackaronis that "[The Supreme Court's decision in *Public Employees Retire-*

A clear example of this principle can be found among a group drawn from within the protected class of the ADEA. As a result of a regulatory anomaly, a finite group of individuals—the so-called notch babies—fell within two classes of eligibility that allowed them to claim what was in effect double Social Security benefits.<sup>138</sup> While no conceivable affirmative strategy would have allowed this group any sort of credible claim on enhanced benefits, the hue and cry over having something “taken away” allowed the notch babies to beat back attempts at regulatory ordering.<sup>139</sup> This understanding dovetails with Geoffrey Miller’s conclusion that, in the context of organizing to thwart the challenge from margarine, dairy farmers were clearly “willing[ ] to pay more to protect a benefit they had than to purchase a benefit that they did not have.”<sup>140</sup>

The notch babies also illustrate the third advantage of fighting from within a preexisting statutory scheme. Every effort to obtain goods from the political system requires organization and costs. Economic analyses of group activity predict that the greater the number of potentially affected parties, the greater the cost and difficulty of forming a stable organization or coalition to press for change.<sup>141</sup> In

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*ment System v. Betts*] is incorrect” and “must be overturned through legislative action, thus explicitly restoring the rights older workers have had all along under the law”).

<sup>138</sup> “Notch babies” are so called because they were born between 1917 and 1921 and thus fell within a regulatory gulf erroneously created when Congress indexed Social Security benefits to keep up with inflation in 1972. In the 1972 law, Congress inadvertently granted Social Security recipients born between 1910 and 1916 double compensation for inflation. See Timothy Noah, *Notch Babies: The Hidden Issue of the ‘86 Campaign*, *New Republic*, Dec. 1, 1986, at 18, 20. Congress then tried to remedy this unintended windfall by tapering off excess payments for those born between 1917 and 1921. The claim of the notch babies was that although they received extra Social Security benefits which Congress never intended for them when revising the system in 1972, they did not receive as much extra as those born before them. See Julie Kosterlitz, *Little Can Match a Notch Baby’s Cry*, 1988 *Nat’l J.* 1081, 1081.

<sup>139</sup> The notch babies argued vociferously in Congress for added benefits to match fully the windfall received by those born in 1910-1916. Congress eventually capitulated on the issue, holding hearings on the notch issue and often addressing bills to mollify the notch babies’ claims that Congress unjustly failed to “find enough money to pay [them] what is rightfully [theirs].” Julie Kosterlitz, *Pension Penury*, 1992 *Nat’l J.* 1809, 1809; see also Kosterlitz, *supra* note 138, at 1081 (discussing hearings on issue and influence of “vocal” notch babies on legislators); Susan Kellam, *Social Security Riders Thrown From Senate Treasury Bill*, 50 *Cong. Q. Wkly. Rep.*, Sept. 12, 1992, at 2712, 2712 (noting that Senate was virtually evenly divided on whether to fund extra benefits for notch babies).

<sup>140</sup> Miller, *supra* note 131, at 87.

<sup>141</sup> See Mancur Olsen, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* 53-65 (1965). See generally Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991); Russell Hardin, *Collective Action* (1982). For a discussion of the specific problems of organizing coalitions to pursue legislative reforms, see Robert D. Tollison, *Public Choice and Legislation*, 74 *Va. L. Rev.* 339, 341-42 (1988).

the case of the notch babies, insuperable organizational barriers would prevent forming such a coalition to agitate for superbenefits. Even at the simplest level, defining the terms under which the preferred groups would be constituted would be impossible. Moreover, while a tremendous number of individuals would potentially benefit, no single prospective Social Security recipient would have a sufficient stake in the proposed benefits to undertake the arduous and expensive task of organizing a coalition to advocate such benefits. The presence of a preexisting statutory definition, however, gives an immediate organizational form to the affected group. In economic terms, the fact of a prior organization reduces the costs associated with group action. The group is defined externally and the problem of free riders is diminished because coalition members can be identified more readily and asked for assistance.<sup>142</sup>

### *C. The Capture of the ADEA*

If, as we propose, the conceptual shortcomings of the ADEA's antidiscrimination scheme made it a walking invitation to capture, the missing ingredient was the agent that would accept that invitation. That agent proved to be the American Association of Retired Persons (AARP). Although the organization had been founded in 1958, the AARP did not emerge as the pivotal agent for older Americans until the early 1980s.<sup>143</sup> During the 1976 congressional hearings on the ADEA, for example, the AARP was still a secondary player.<sup>144</sup> The incremental change in the age cap from sixty-five to seventy was mainly the result of efforts by other organizations such as the National Council on Aging (NCOA) and the Council on Aging (COA).<sup>145</sup>

The radical transformation of ADEA legislative reforms is inseparable from the corresponding transformation of the AARP. After

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<sup>142</sup> See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. Econ. 371, 380 (1983) (commenting on constant problem of free riding in political organization).

<sup>143</sup> See Jonathan Peterson, *19 Million Members: Association of Retirees a Major Force*, L.A. Times, Sept. 19, 1985, § 1, at 5 (counting only two million AARP members in 1971, but 12 million in 1981).

<sup>144</sup> See David DeVoss, *Empire of the Old: Old Age, Says the American Association of Retired Persons, is a Privilege, Not a Punishment*, L.A. Times, Feb. 12, 1989, Magazine, at 8 (citing cash flow problems and declining membership as reasons for AARP's ineffectiveness).

<sup>145</sup> See Peterson, *supra* note 143, at 5 (noting that in 1960s, the "AARP left it to other organizations, such as the National Council of Senior Citizens, to be the chief advocates"); *Getting Rid of 65-and-Out*, Bus. Week (Industrial ed.), Mar. 1, 1976, at 61 (citing "the militant Gray Panthers and the sedate American Association of Retired Persons" as being among opponents of mandatory retirement).

experiencing financial difficulties in the late 1970s,<sup>146</sup> the AARP began a vigorous marketing campaign to increase its membership.<sup>147</sup> In 1983, the AARP dropped its minimum membership age requirement from fifty-five to fifty, instantaneously adding thousands to its membership rolls.<sup>148</sup> By 1984, the AARP claimed "15% of the U.S. adult population."<sup>149</sup> That membership was quickly parlayed into a huge trust fund, which in turn was used to build "a public policy institute, [a team of] professional lobbyists, [and] a legal staff."<sup>150</sup> The AARP has grown to become the largest private, nonprofit, and nonpartisan membership organization in the world.<sup>151</sup> Today, its annual budget is over \$386 million, \$86 million of which comes from government funding,<sup>152</sup> and its membership includes nearly one of every five voters in the United States.<sup>153</sup>

As its membership grew, the AARP became a serious political presence with an agenda to transform the ADEA. By 1983, the AARP had announced its "global initiatives," which included its opposition to mandatory retirement.<sup>154</sup> In 1984, it began to pursue aggressively its political interests,<sup>155</sup> while advertising itself as "[a] strong, effective voice in Washington, . . . committed to opposing age

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<sup>146</sup> See DeVoss, *supra* note 144, at 8.

<sup>147</sup> This campaign offered AARP members special group rates on products and services, including discounted insurance, travel, hotels, magazines, and prescriptions. See DeVoss, *supra* note 144, at 8; Eric Schurenberg & Lani Luciano, *The Empire Called AARP*, *Money*, Oct. 1988, at 128, 130; see also *Business and Financial Practices of the AARP: Hearings before the Subcomm. on Social Security and Family Policy of the Comm. on Finance, 104th Cong. 90 (1995)* (statement of Paul S. Hewitt) (noting relation between media flood and AARP power). By 1982, the AARP had "started aggressively promoting an expanded range of competitively priced financial services." DeVoss, *supra* note 144, at 8.

<sup>148</sup> See Peterson, *supra* note 143, at 5.

<sup>149</sup> Bryan D. Glass, Comment, *The British Resistance to Age Discrimination Legislation: Is it Time to Follow the U.S. Example?*, 16 *Comp. Lab. L.J.* 491, 532 (1995).

<sup>150</sup> *Id.*

<sup>151</sup> See AARP, *All About the AARP: Its Programs, Its Services* 12 (1987); see also Schurenberg & Luciano, *supra* note 147, at 128 (noting that AARP has 30 million members, which makes it second largest organization in the United States—second only to Roman Catholic Church).

<sup>152</sup> See *Hearing on AARP Gives Preview of Lobby Reform Battle*, *Congress Daily*, June 13, 1995, available in 1995 WL 10435462.

<sup>153</sup> See Schurenberg & Luciano, *supra* note 147, at 128-29.

<sup>154</sup> See Peterson, *supra* note 143, at 5 (noting increasingly bold goals, including containing health care costs and improving work conditions of older employees).

<sup>155</sup> See *id.* at 49 (quoting John Rother, Director of AARP's division of legislation, research, and public policy, on AARP's increased assertiveness in promoting interests of older workers in 1985: "We've been very conservative in the past about not wanting to push too hard . . . but we just can't walk away.").

discrimination in employment, modifying negative attitudes towards older persons and protecting our members' right to work."<sup>156</sup>

The power of "the nation's largest special-interest group"<sup>157</sup> has not gone unnoticed by Congress.<sup>158</sup> Despite increasing budgetary constraints in the 1980s and 1990s, the AARP has been at the forefront of a successful capture of an ever-increasing share of government welfare benefits<sup>159</sup> and has made entitlement programs like Social Security and Medicare political sacred cows.<sup>160</sup> Today's elderly, "who make up about 12.5% of the population, receive 60% of federal social spending."<sup>161</sup> The AARP's growth in power coincides neatly with the changing focus of the ADEA and the expansion of its statutory initiatives.

The first evidence of the AARP's political muscle came with Representative Pepper's 1986 legislative efforts to end mandatory retirement.<sup>162</sup> Although Representative Pepper and others had been trying to eliminate mandatory retirement since 1976, no action was taken until the AARP had accumulated enough power to get the legislation passed.<sup>163</sup>

Already having been a growing force in ADEA litigation through its role as a plaintiff,<sup>164</sup> the AARP was instrumental in Congress's decision to amend the statute. In the legislative history of the 1986

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<sup>156</sup> AARP's Internet Webpage (visited May 25, 1997) <<http://www.aarp.org/advocacy.html>>.

<sup>157</sup> Margot Hornblower, *Gray Power! AARP Emerges as the Nation's Most Powerful Special Interest Lobby*, *Time*, Jan. 4, 1988, at 35, 35.

<sup>158</sup> See *id.* (citing Congress's abandonment of proposal to scale down Social Security cost of living increases in response to pressure from senior citizens' lobby).

<sup>159</sup> See Glass, *supra* note 149, at 532 (crediting AARP with helping elderly draw at least 72% of all federal expenditures); Peirce & Choharis, *supra* note 122, at 1560 (noting lobbying victories of elderly in preventing cuts in basic Social Security benefits and securing 1978 law that repealed mandatory retirement age for most federal workers and extended retirement age from 65 to 70).

<sup>160</sup> See Peterson, *supra* note 143, at 5 (remarking on immense size of AARP and resultant political clout).

<sup>161</sup> Michael D'Antonio, *The New Generation Gap*, *L.A. Times*, Mar. 14, 1993, Magazine, at 16.

<sup>162</sup> See 29 U.S.C. § 631 (1994).

<sup>163</sup> By 1983, the AARP boasted 14 million members and was considered "the great granddaddy of senior power in America." See Tom Morganthau, *Legions of the Old*, *Newsweek*, Jan. 24, 1983, at 23; see also *Debate: Should Mandatory Retirement Be Outlawed?*, *N.Y. Times*, Apr. 14, 1985, § 4, at 24 (showing increasing number of Americans aged 55 and older).

<sup>164</sup> See Peterson, *supra* note 143, at 5 ("AARP carried its opposition to mandatory retirement to the Supreme Court, in separate briefs filed on behalf of public employees and Western Airlines flight engineers."); *Debate: Should Mandatory Retirement be Outlawed?*, *supra* note 163, at 24 (quoting AARP Executive Director Cyril F. Brickfield on mandatory retirement: "[A]ge discrimination cases are the largest category of cases now being handled by the Equal Employment Opportunity Commission.").

amendment, the AARP commanded nearly 200 pages of testimony. Thanks to this advocacy and Congress's rush to pass legislation in an election year, the bill, which in eliminating mandatory retirement fundamentally altered an entire system of career employment, was passed with relatively little discussion.<sup>165</sup> With the end of mandatory retirement in 1986, the AARP could lay claim to the fruits of "a campaign . . . that lasted almost a quarter of a century."<sup>166</sup> However, with the enactment of the OWBPA<sup>167</sup> in 1990, older Americans were given more than anyone could have imagined.<sup>168</sup>

Although the end of mandatory retirement was the most visible of the AARP's efforts, its role in the 1990 amendments to the ADEA may have been more critical yet. Reacting to the Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts*<sup>169</sup> which significantly expanded the scope of ADEA exceptions for early retirement and benefit plans,<sup>170</sup> the AARP pushed Congress to consider a new amendment to the ADEA: The Older Workers Benefit Protection Act. *Betts* was a particular source of concern for the AARP-led lobby because of its refusal to require purely symmetrical treatment of all employees for purposes of all employer benefit programs. The *Betts* plaintiff sought to require an employer undergoing a reduction in force to offer disability benefits to an employee who would already be receiving a fully vested pension.<sup>171</sup> The legislative history reflects that the OWBPA was intended to restore the pre-*Betts* status of the law;<sup>172</sup> however, significant debate took place over what that status was. The AARP acted quickly, and its self-interest became apparent in debates over three major issues: early retirement incentive plans, pension-severance offset programs, and supplemental unemployment benefits.

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<sup>165</sup> See O'Meara, *supra* note 18, at 18-19 (noting that amendments were passed in rush of legislation and that "there are no meaningful committee reports on the controversial provisions").

<sup>166</sup> DeVoss, *supra* note 144, at 8; see also M.B. Christie, AARP Picks New Executive Director, *Wash. Post*, Aug. 17, 1987, at 7 (quoting AARP executive director Cyril F. Brickfield as citing elimination of mandatory retirement as one of AARP's "greatest past achievements"); John Furey, The Elderly: Soft Voice, Big Stick, *San Diego Union Trib.*, May 28, 1986, at A1 (discussing lobbying power and tactics of AARP).

<sup>167</sup> Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended at 29 U.S.C. §§ 623, 626, 630 (1994)).

<sup>168</sup> See *infra* text accompanying notes 179-82.

<sup>169</sup> 492 U.S. 158 (1989).

<sup>170</sup> See *id.* at 177, 181.

<sup>171</sup> See *Betts*, 492 U.S. at 163-64.

<sup>172</sup> See OWBPA Hearings, *supra* note 22, at 3 (statement of Sen. Pryor) ("What we are trying to do is to restore by restatement the rules, regulations and law regarding the [ADEA]'s application to employee benefits.").

Early retirement incentive plans (ERIPs) are generally a one-time lump sum payment to induce an older worker to retire voluntarily.<sup>173</sup> ERIPs were industry's response to the 1986 amendments ending mandatory retirement. The idea that older workers could draw steadily increasing wages into the indefinite future was so entirely unrealistic in terms of the potential drain on available resources that employers had to contract around its provisions to maintain some fiscal integrity. As explained above, the life-cycle employment model rests on the assumption of some endpoint to the contract. The elimination of mandatory retirement destroyed that endpoint, leaving employers without a fixed point of closure to their implicit bargain for a long-term, escalating-wage contract.<sup>174</sup> Faced with indefinite contractual liability, employers searched for a means for accelerating the retirement age of the original set of workers approaching the previously accepted retirement age.<sup>175</sup> They quickly realized that early retirement incentives could induce costly older workers to retire before they became an unmanageable liability.<sup>176</sup> To minimize costs and

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<sup>173</sup> See Kerry A. Brennan, Note, Early Retirement Incentives: "Golden Handshake" for Some, Age Discrimination for Others, 54 Brook. L. Rev. 927, 928 n.5 (1988) (reporting results from study concluding that 51% of surveyed employers offered cash payment as part of their ERIPs); Neill A. Borowski, Legislation May Board Shut "Windows" for Early Retirement, Chi. Trib., July 22, 1990, § 7, at 12B (describing ERIP amounting to two times worker's annual salary); Mike Causey, After the Buyouts, Wash. Post, Dec. 5, 1994, at D2 (reporting that one large scale ERIP offered buyouts of up to \$25,000); Bill Sing, Look Before Leaping at Early Retirement Offers, L.A. Times, Jan. 13, 1991, at D4 (finding that ERIPs often eliminate pension reductions for early retirement, grant bonus years toward pensions, or give lump sum payment equal to six months' or one year's worth of pay or two weeks' pay for each year of service).

<sup>174</sup> See Erica Worth, Note, In Defense of Targeted ERIPs: Understanding the Interaction of Life-Cycle Employment and Early Retirement Incentive Plans, 74 Tex. L. Rev. 411, 420 (1995) (describing how end of mandatory retirement led to birth of ERIPs); see also OWBPA Hearings, *supra* note 22, at 321 (statement of Charles A. Corry, Chairman, USX Corp.) ("[T]he continuous stream of legislation and regulation makes it more and more difficult for employers and employees to plan retirement incomes, age of retirement, employee replacements, pension plan funding, pension cost, tax impact . . .").

<sup>175</sup> See Worth, *supra* note 174, at 420 ("Faced with an indefinite obligation to pay excessive wages to older workers, employers searched for a way to escape unbounded liability without violating the ADEA . . ."); see also Robert Lewis, "Downsizing" Taking a Higher Toll, AARP Bull., Nov. 1994, at 14, 14 (reporting view of older worker who noted that "the traditional employer-employee compact that rewarded performance and loyalty with job security no longer exists").

<sup>176</sup> See Edward P. Lazear, Pensions as Severance Pay, in *Financial Aspects of the United States Pension System* 57, 57 (Zvi Bodie & John B. Shoven eds., 1983) (noting that pensions are being used to induce older workers to retire); Charles A. Shanor, Age Discrimination Issues: Reductions in Force, Voluntary Separation Programs, and Severance Benefits Litigation, C669 ALI-ABA Course of Study Materials: Advanced Employment Law and Litigation 369, 385 (1991) (noting that plans offer lump sums and other incentives which augment existing retirement benefits in order to induce early retirement); Charles B. Craver, The Application of the Age Discrimination in Employment Act to Persons Over

maximize the effectiveness of ERIPs, however, employers often targeted the plans to a specific age group among the older workers.<sup>177</sup> Targeted ERIPs, even if costlier than the original life-cycle bargain, at least limited the employer's exposure to those employees who would not otherwise be induced to retire by the passage of time alone.

In 1990, the AARP set out to do away with these techniques for avoiding the most expensive effects of the 1986 amendments ending mandatory retirement. At first, the AARP lobbied heavily against targeted ERIPs as a whole, claiming that providing bonuses or added pension benefits only to workers under a certain age was a clear *per se* violation of the ADEA.<sup>178</sup> The intention was to eliminate the targeted nature of such plans, but the AARP argued its position too well. Thanks to the AARP's moving testimony regarding the inherently detrimental nature of ERIPs, Congress began to consider eliminating the exemption for ERIPs from the ADEA's prohibition on age classifications entirely. This step would have spelled the end for ERIPs given that no employer could afford to offer retirement inducements to its entire workforce. At this point, the AARP did an about-face and began to lobby heavily for the preservation of ERIPs.<sup>179</sup> The AARP argued that ERIPs benefited older workers so long as they

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Seventy, 58 Geo. Wash. L. Rev. 52, 110 (1989) (observing that businesses that "may no longer rely upon mandatory retirement policies to terminate older employees . . . will be forced to resort to voluntary retirement incentives"); Frolik & Barnes, *supra* note 121, at 687 ("Employers who can no longer engage in mandatory retirement arrange pension benefits to encourage voluntary retirement in order to spare themselves the attempt at justifying forced retirement of a particular individual."); Gurus in Government, *Economist*, May 20, 1995, at 21, 22 ("Employment laws mean that sacking public workers is expensive . . . because senior people have to be 'bought out' . . ."); Jeanne Saddler, *Playing Favorites? Older Workers Sue Over Early Retirement Plans*, *Wall St. J.*, Aug. 14, 1987, § 2, at 17 (observing that early retirement incentive plans have "become one of corporate America's most widely used tools for pruning its work force").

<sup>177</sup> See OWBPA Hearings, *supra* note 22, at 207 (statement of Association of Private Pension and Welfare Plans) ("In order to maximize the effectiveness of early retirement window plans, employers often . . . limit the program to an age band of five to fifteen years."); Shanor, *supra* note 176, at 385 (stating that because programs are related to retirement eligibility, in almost all cases they are targeted at employees within protected age group); see also Richard G. Kass, *Early Retirement Incentives and the Age Discrimination in Employment Act*, 4 Hofstra Lab. L.J. 63, 64 (1986) (noting that most ERIPs withdrew or severely reduced benefits after age 55); Saddler, *supra* note 176, at 17 (discussing debate over ERIPs that offer benefits only to younger workers and typically exclude workers over 65 from participating).

<sup>178</sup> See, e.g., Saddler, *supra* note 176, at 17 (noting AARP's opposition to North Tonawanda, N.Y. school system program offering bonuses and added pension benefits to workers under certain age).

<sup>179</sup> See OWBPA Hearings, *supra* note 22, at 173-75 (statement of Horace B. Deets, Executive Director, AARP).

were offered to everyone over a minimum age.<sup>180</sup> By abandoning the claim that all age classifications are inherently suspect, the AARP set out to salvage age classifications that work only to enrich older Americans. Unsurprisingly, the AARP won out. The OWBPA prohibits only "targeted" ERIPs; ERIPs are legal so long as employers include all employees over some minimum age.<sup>181</sup>

The resulting windfall to older workers is more than a simple adjustment and raises real concerns about political legitimacy. Whenever legal rules change, particular groups have the capacity for a one-time gain until affected market actors can adjust to the new legal baseline. Thus, for example, the Social Security Act of 1933 provided immediate benefits to all Americans, despite the fact that workers approaching retirement age at the time of enactment had not paid into the Social Security fund. Similarly, the passage of ERISA in 1974 immediately brought federal guarantees to underfunded pensions. The fact of previous underfunding should have freed up money for those employers to subsidize past higher wages than would otherwise have been available.<sup>182</sup> To some extent, therefore, ERISA provided a one-time windfall to employees whose prior wage demands had been cushioned by underfunded pension plans. In similar fashion, the elimination of mandatory retirement provided some initial, unexpected gains to the first generation of affected employees.

Nonetheless, the actual course of the debates around ERIPs demonstrates a far more self-conscious assertion of wealth-grabbing self-interest. The main ideological loadbearer was a demand for formal equal treatment of all employees, regardless of any economic considerations associated with age. When it came to benefiting older workers, however, delineations based on age and violations of the equal treatment principle proved to be more than just acceptable—they were required.<sup>183</sup>

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<sup>180</sup> See *id.* at 173 (statement of Horace B. Deets, Executive Director, AARP) (recognizing that ERIPs can benefit employers and employees); *id.* at 188-90 (AARP report to Congress) (discussing AARP's stance on ERIPs and impact of Benefit Protection Act on preexisting law).

<sup>181</sup> In order to maintain a sufficient level of inducement for the younger older workers, the incentives were not devalued. Instead, employers suffered the increased cost of buyouts, the cost of which was ultimately borne by the next generation of employees through depressed wage rates. The huge commitment of resources was greater than anything that could have been expected under the original life-cycle contracts.

<sup>182</sup> See Richard A. Ippolito, *Pension Security: Has ERISA Had Any Effect?*, 11 Reg. 15, 19-20 (1987) (arguing that unionized workers' demands for higher wages were met by underfunding pensions).

<sup>183</sup> See OWBPA Hearings, *supra* note 22, at 38-40 (statement of Robert F. Laufman) (describing circumstances of three elderly retirees who would get more money if OWBPA were in place to guarantee benefits); *id.* at 54 (statement of R. Gaull Silberman, Vice

The AARP demonstrated the same form of opportunism on the issue of pension-severance offset programs. Most employers offer workers a variety of benefit plans, including pension, severance, and disability benefit plans. However, most employers also provide for offsets between these plans. For example, in an involuntary reduction in force, those employees who are eligible to receive pension benefits would not receive full severance benefits; the pension benefits received would offset the severance benefits they would otherwise be qualified to receive. Thus, in the *Betts* case, the plaintiff employee was given her pension benefits, but was not eligible for disability benefits. These offsets were customary across industries. When the issue was raised at the 1990 hearings, the AARP contended that older workers deserved both pension and severance benefits.<sup>184</sup>

The AARP argued that, because younger workers who received severance pay would still have 100% of their pension benefits at retirement (assuming they were rehired after a temporary layoff), older workers should also receive both forms of benefits.<sup>185</sup> To deny older workers severance benefits was "age discrimination in its purest form."<sup>186</sup> The AARP reasoned that because severance pay was intended to tide a worker through an extended period of unemployment until suitable employment is located, older workers, who endure long periods of unemployment, are the most in need of severance benefits.<sup>187</sup>

The reality is just the contrary. Severance pay is meant to "provide[ ] funds to those with insufficient service or age to receive immediate pensions."<sup>188</sup> Severance pay is not just an extra bonus; it is an attempt to soften the financial impact of an involuntary termination. When an older employee has a pension, he has "available a stream of income over his remaining life"<sup>189</sup> and does not need the severance

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Chairman, EEOC) (declaring that OWBPA would bring benefits back); see also *Has High Court Imperiled Older Workers' Benefits?*, supra note 137, at 116 (quoting AARP attorney Chris Mackaronis, who maintained that *Betts* must be overturned through legislative action to restore older workers' legal rights).

<sup>184</sup> See OWBPA Hearings, supra note 22, at 171 (statement of Horace B. Deets, Executive Director, AARP) (maintaining that severance and pension benefits are fundamentally different); id. at 222 (Burton D. Fretz, Executive Director, National Senior Citizens Law Center) (noting that denial of benefits hits older workers hardest).

<sup>185</sup> See id. at 171 (statement of Horace B. Deets, Executive Director, AARP).

<sup>186</sup> Id. at 172 (statement of Horace B. Deets, Executive Director, AARP).

<sup>187</sup> See id. at 222 (statement of Burton D. Fretz, Executive Director, National Senior Citizens Law Center) (noting that, at time of hearing, less than half of older workers who lost their jobs became re-employed).

<sup>188</sup> Id. at 315 (statement of ERISA Industry Committee, by James D. Short, Vice President).

<sup>189</sup> Id.

benefits. By prohibiting the use of offset provisions, older employees would be effectively double dipping into the company's benefit reserves.<sup>190</sup> Because those reserves are finite, an extra bonus would translate into smaller benefits for employees who are severed later.<sup>191</sup> Yet, AARP Executive Director Cyril F. Brickfield argued that pension-severance offset programs have "a particularly devastating impact on the older worker who must remain in the work force because his or her pension is inadequate."<sup>192</sup> Although this would provide favored treatment for elderly workers over younger unemployed workers who receive no pension at all while out of work, Brickfield abandoned the AARP's favored arguments for equal treatment when extra benefits for the elderly are at stake.

Employers responded with force at the 1990 hearings, but had no power to stop the processes that had been set in motion nearly a decade before.<sup>193</sup> Representatives from several businesses argued that prohibiting offsets would result in a windfall to older workers and a reduction of benefits for everyone else.<sup>194</sup> The efforts were too little too late; the AARP had the floor and the Congressmen by that time. The legislative history reflects this balance of power; the AARP alone managed to secure 225 pages worth of testimony,<sup>195</sup> while the combined interests of state pension funds, industry, and unions are represented by fewer than 80 pages of testimony.<sup>196</sup> The elimination of targeted ERIPs passed without amendment, and, although the integrated benefits issue was "compromised," employers had clearly lost.

Supplemental unemployment benefits (SUBs) were similarly seized by the AARP. SUBs were the outgrowth of the steel mill closures in the midwest.<sup>197</sup> In an effort to cushion the blow of massive

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<sup>190</sup> See *id.* at 385 (letter of Dick Warden, Legislative Director, United Auto Workers) (asserting that integrated benefit programs are essential to assuring continuation of coverage for lives of workers and their families); see also *id.* at 322 (statement of C.A. Corry, Chairman, USX Corp.) (explaining that OWBPA would result in double benefits for some workers at expense of others).

<sup>191</sup> See Donald R. Stacy, *A Possibility of Avoiding "Double Dipping" into Severance and Pension Payments*, 5 *Lab. Law.* 1, 2-3 (1989) (noting additional point that while pension-eligible individuals tend to be older, this will not be so in every case).

<sup>192</sup> Cyril F. Brickfield, *Pension Policy: Economic and Political Forces*, 1980 *Nat'l J.* 2004, 2007.

<sup>193</sup> See *Legislative History of the Older Workers Benefit Protection Act*, 136 *Cong. Rec. H10020* (daily ed. Oct. 18, 1990) (comments of Rep. Clay).

<sup>194</sup> See *OWBPA Hearings*, *supra* note 22, at 197 (statement of Association of Private Pension and Welfare Plans) (noting also that prohibition of integrated plans would prevent fair allocation of benefits).

<sup>195</sup> See *id.* at 165-390.

<sup>196</sup> See *id.* at 321-403.

<sup>197</sup> See Donald B. Thompson, *Big Steel Doesn't Think Pact is Anemic*, *Industry Wk.*, Mar. 21, 1983, at 19.

factory shutdowns, industry executives and labor unions agreed to additional unemployment benefits.<sup>198</sup> These benefits were designed to be expressly deductible against pension benefits in order to preserve greater benefits for the younger unemployed workers who would suffer from "involuntary retirement" more severely than their pension-eligible counterparts.<sup>199</sup> The plans were approved by the IRS and under ERISA law as "neither arbitrary nor capricious."<sup>200</sup>

Once again, the AARP stepped in at the 1990 hearings. Using the same reasoning applied to severance benefits, the AARP argued that older workers had just as much right to the unemployment benefits as younger workers.<sup>201</sup> Falling back on its most welcome position, the AARP argued that any offset provision would be presumptively invalid as a classification based on age.<sup>202</sup> Once again, industry responded that prohibiting offsets would violate the meaning and purpose of SUBs and would allow older employees to double dip at the expense of younger workers.<sup>203</sup> This time, Congress created an entirely new provision within the ADEA, section 4(l)(1)(B), specifically exempting SUBs from pension offsets and allowing the older employees to claim another group of benefits.<sup>204</sup>

By the time of the 1990 amendments to the ADEA, the transformation of the statute was complete. The ADEA is now primarily a benefits protection regulation for older workers. The original impetus toward facilitating integration into the workplace is all but forgotten. The ADEA now codifies an express double standard: classifications based on age are presumptively discriminatory, unless they benefit older workers. This results in rather open ended obligations to provide older workers lump sum buyouts, dual pension and severance benefits, and supplemental unemployment benefits without giving any consideration to the economic rationale for these programs.

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<sup>198</sup> See Stacy, *supra* note 191, at 3.

<sup>199</sup> See *id.*

<sup>200</sup> *Id.*

<sup>201</sup> See Betts Bills Revised, *Pensions & Investment Age*, Dec. 11, 1989, at 33, 33 (noting labor unions' concerns that bills could threaten legality of early retirement plans and integrated benefits programs).

<sup>202</sup> See Nicole Weisenbee, *States News Service*, Mar. 28, 1990 (noting AARP's position).

<sup>203</sup> See OWBPA Hearings, *supra* note 22, at 385 (statement of Dick Warden, Legislative Director, United Auto Workers).

<sup>204</sup> See John H. Langbein & Bruce A. Wolk, *Pension & Employee Benefit Law* 376 (2d ed. 1995).

## III

## DECOUPLING NONDISCRIMINATION FROM WEALTH GRABS

A. *Identifying the ADEA's Mischief*1. *Mandatory Retirement*

We confess to a strong temptation to argue for the straightforward reintroduction of mandatory retirement. At its most fundamental, crediting the argument that mandatory retirement is a form of discrimination of any meaningful sort is problematic. Because mandatory retirement is imposed by society on all members of society, at least potentially, it entails neither the stigmatization nor victimization associated with the imposition of constraints on discrete and insular groups. By way of example, labeling as just a society that declares that women or black citizens cannot hold certain jobs because of their membership in those particular subclasses is difficult. In such a case, the more powerful group or groups in society have imposed a legal disability on a finite subset of the population.<sup>205</sup> On the other hand, imagining a society claiming the mantle of justness that declares that the working lives of its members shall run from twenty to sixty-five and then offers postemployment security in the form of generous health and retirement programs is perfectly plausible.<sup>206</sup> Coherently applying the label of discrimination to an obligation borne equally by all working members of the society is impossible.

Moreover, a strong contractual argument can be made that employees subject to mandatory retirement after a career-term relationship with an employer are simply getting their return on a prearranged bargain. Older employees may argue that in their younger incarnation they had not anticipated the harms that would befall them as they approach the end of their work lives. Such an argument would ring true in terms of the general inability of people to correctly discount the impact of remote future events in planning a present course of

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<sup>205</sup> This of course refers to the classic *Carolene Products* argument defining membership in a "discrete and insular group." *Carolene Prods. Co. v. United States*, 304 U.S. 144, 153 n.4 (1938). Walter Kamiat helped us with the formulation of this argument.

<sup>206</sup> On one view, that is already the basic state of affairs in the United States: A retired American today is probably the freest human being ever to walk the earth. Assuming that basic needs are met by a pension, Social Security, Medicare and investment income, the retiree lives in a perpetual paradise of leisure and recreation. If the retiree stays healthy, this special status can be enjoyed for 15 to 20 years. There is time to fish all day and golf every afternoon. Kingsley Davis, *Our Idle Retirees Drag Down the Economy*, N.Y. Times, Oct. 18, 1987, at A31; see also Adam Gopnick, *The Chill*, New Yorker, Mar. 17, 1977, at 64 (chronicling French political agitation for mandatory retirement age of 55).

action.<sup>207</sup> Nonetheless, this argument sweeps too broadly. Just as the seventy-year-old of tomorrow must live with the tattoos fancied by the twenty-year-old of today, so too does the law recognize that the contractual obligations of the young adult may bind the same person in a more wizened state.

The best argument against enforcement of mandatory retirement is that the societal baseline has changed so dramatically since the current generation of near-retirees entered the workforce that continued enforcement of across the board terminations required by mandatory retirement would be unfair.<sup>208</sup> Americans not only live considerably longer than in past generations, but they do so with greater health and vitality.<sup>209</sup> Americans may also be more attached to the workplace, particularly with the advent of two-career families and the increased integration of the workforce, than at the time when the current generation of potential retirees first began working. While we find these arguments incomplete, we accept their logic for now—particularly since the effort to roll back the end of mandatory retirement appears politically futile.

What will the end of mandatory retirement mean? Most likely its demise will force a confrontation with the unreliability of the common defense of ADEA reforms, which claims that, “as an overall matter, the performance of older workers [is] at least as good as that of younger workers.”<sup>210</sup> This argument suffers from a terrible selection bias: Those workers who are still in the workforce past normal retirement age are not a random sample of their age cohorts.<sup>211</sup> Given the

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<sup>207</sup> See generally *Choice Over Time* (George Loewenstein & Jon Elster eds., 1995) (presenting empirical and experimental literature on skewed perceptions of risk and reward over time).

<sup>208</sup> Strikingly, this argument did not emerge in the legislative debates over the 1986 amendments to the ADEA. Instead, the simpler invocation of antidiscrimination carried the day.

<sup>209</sup> See Hurd, *supra* note 100, at 567 tbl.1, 568 tbl.2. These data, derived from the *Current Population Reports* of the U.S. Bureau of the Census, show, for example, that between 1900 and 1990, the percentage of Americans aged 55 and above increased from 9% to 20%. In addition, the life expectancy of those aged 65 increased from 11.3 to 14.9 years for men and from 12.0 to 19.2 years for women. Perhaps more striking is the phenomenon aptly described by Judge Posner: “Forty years ago, most 60-year-olds and all 70-year-olds were thought, by themselves and others, ‘old.’ Today a great many people retain a reasonable simulacrum of ‘youth’ (more precisely of middle age) until their late seventies.” Posner, *supra* note 49, at 49. Posner then adds: “Of course, the shift has costs. One is the cost in medical care of keeping young. Another is the added burden of elder care on young and middle-aged adults, for along with a shift from old to not-old has come a shift from dead to old.” *Id.*

<sup>210</sup> *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983) (listing conclusions of Secretary of Labor, confirmed through “extensive factfinding,” which led to creation of ADEA).

<sup>211</sup> This argument is supported by Posner, *supra* note 49, at 63 (claiming that those who live to old age “are apt to be healthier than average, of course, but also more intelligent,

trends toward earlier retirement, the toils exacted in manual labor, and the overall desire of management to remove older employees, those senior employees still in the workforce are those who for some reason have withstood the pressures toward exit. In addition, such employees are most likely clustered in areas of the workforce in which monitoring costs make precise estimations of productivity difficult. By contrast, earlier employee attrition is the norm in occupations with greater physical demands or more routinized measures of performance. One does not see seventy-five-year-old assembly line workers any more readily than one sees forty-five-year-old running backs in the National Football League. As expressed by Professor Epstein in the inimitable University of Chicago style, "production ceases at death or incapacitation, and it may well fall before that."<sup>212</sup>

The confrontation with the end of mandatory retirement will not take place across the employment spectrum. A steady move toward earlier retirement has accompanied the increased longevity of Americans. Between 1957 and 1987, for example, the percentage of men aged fifty-five to fifty-nine in the workforce fell from 91.4% to 79.7%; the comparable percentages for men aged sixty to sixty-four fell from 82.9% to 54.9%.<sup>213</sup> The same trend is found among women, although the data are somewhat more complicated to analyze because of the heavy influx of women into the labor force during this period.<sup>214</sup> The reasons for earlier retirement are varied. In occupations requiring heavy physical toil, laborers tend to wear out. In other occupations, the military being the extreme example, retirement packages induce very early departures from the workforce—oftentimes with the expectation of a second, more limited, career.<sup>215</sup>

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better educated, and more affluent, since health, income, education, and intelligence are all positively correlated").

<sup>212</sup> Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 449 (1992).

<sup>213</sup> See Hurd, *supra* note 100, at 572 tbl.7.

<sup>214</sup> Instead of measuring total percentage of women in the workforce, it is necessary to measure the rate at which women who are in the workforce are retiring. This measure is statistically termed the "retirement hazard rate," which simply denotes the likelihood with which women in the workforce will retire during defined periods of time. See *id.* at 571. For women aged 55 to 64, the hazard rate increased from .207 to .364 from 1957 to 1987. See *id.* at 572 (noting that by 1987 "the hazards of men and women were about the same").

<sup>215</sup> A clear example of the early retirement phenomenon is government employees. Federal employees can retire fully vested in very generous pensions after age 55 and 30 years of service; most state and local governments also tend to provide more generous benefits than private systems. See James H. Schulz, *The Economics of Aging* 247-48, 250 (5th ed. 1992). One study found that in fiscal 1978, 59% of male civil service employees who retired were 60 or younger. See *id.* at 236. These figures are completely out of line with the private sector. See Herman B. Leonard, *The Federal Civil Service Retirement System: An Analysis of Its Financial Condition and Current Reform Proposals*, in Pen-

One area where the end of mandatory retirement will have a marked effect is among managerial and professional employees. This group alone has resisted the trend toward earlier retirement.<sup>216</sup> Judgments of performance in this area are based on the worker's experience and the work product tends to be highly valued. As a result, careers "peak" relatively late. Perhaps because the perquisites of power and influence come late, and perhaps because the wage profiles may be steeper, the end of mandatory retirement provides a sudden opportunity for this group to perpetuate itself in office. As may be suspected, this phenomenon is compounded in fields in which productivity is hardest to measure—university professors, for example.<sup>217</sup>

As we have already demonstrated, the ADEA's casual introduction of the antidiscrimination norm into the career-wage relationship has significantly damaged the life-cycle arrangement. Despite the antidiscrimination gloss, the elimination of mandatory retirement is a benefit overwhelmingly to employees drawn from the most privileged sectors of the workforce. These employees have already received the greatest benefits from the life-cycle arrangement: a steady upward swing of wages, a relaxed form of productivity review during their working careers, and a strong likelihood of generous pension protections. In short, they have realized all their contractual claims. The ADEA's abolition of mandatory retirement now provides them with a chance for a second dip at the benefits of employment.

Perhaps the most troublesome aspect of the invocation of antidiscrimination rhetoric in this context is the obfuscation of the clear redistributive consequences of the end of mandatory retirement. If employees at the tail end of their productivity are to be kept in the workforce, and if they are to remain there at salary levels in excess of productivity, they impose costs to be borne by others.

Besides the loss of labor predictability and the introduction of double dipping, the most obvious cost of the end of mandatory retire-

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sions, Labor, and Individual Choice 399, 413 (David A. Wise ed., 1985) (noting that only 7% of private sector employees retire before reaching 60).

<sup>216</sup> The divergent trends can be derived from the tables in the Appendix. These tables examine workforce participation trends by age and educational level. While more precise data is hard to obtain, these tables clearly show an accelerated decline in workforce participation over time for the four education levels that are surveyed. Evidently, while all groups (of males) have had an earlier rate of withdrawal from the labor force, that trend is far less pronounced for the more educated sectors of the workforce.

<sup>217</sup> The ADEA's prohibition on mandatory retirement in the university setting went into effect on December 31, 1993. Good data on the impact on universities are therefore difficult to obtain. One study at the University of Chicago predicted that up to 30% of the instructional budget was likely to be redirected as a result of the ADEA into either increased salary for expensive senior faculty that would have retired or costly buyouts of contracts. See Epstein, *supra* note 212, at 468-70.

ment is the redirection of firm income to older workers. Clearly, no firm can continue the pattern of promising an upward slope of wages indefinitely. In order to accommodate the expanded and unanticipated liability to older workers, the next generation's wage rates must be depressed. In addition, the conceptual foundations of a career-wage relation must be recast. We would expect firms to be less inclined to grant formal permanence to employees in a manner similar to a greater reluctance to grant tenure in the universities.<sup>218</sup>

An example from the University of Texas School of Law may help illustrate this issue. The Law School has been extremely fortunate to have loyal alumni who have endowed faculty chairs. While there are a significant number of these, the number is still finite. The Law School's official practice had been to award the chairs on a one-year basis, but in fact, chairs are granted on a career basis to its most successful mid- and senior-level professors. Once awarded, a chair remained in the hands of its recipient until retirement (or until the awarding of another chair deemed more desirable). With the end of mandatory retirement came the end of predictability in the turnover of chairs and the rewarding of newer faculty members. As a result, the Law School adopted a policy of awarding all prospective chairs for a finite period of time: ten years with a full review prior to an award for an additional five years. Thus current chairholders are entitled to hold their positions well beyond the original age of mandatory retirement, while new chairholders will have fixed terms of only ten to fifteen years.

## 2. *Pension Benefits*

The problems caused by the end of mandatory retirement are compounded by the ongoing shift from defined-benefit to defined-contribution pension plans. While the range of retirement programs is vast, and the governing regulatory regime is of mind-numbing complexity, a thumbnail sketch may help focus our discussion.<sup>219</sup> Under

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<sup>218</sup> There is evidence of increasing pressure on the institution of tenure at universities across the country, although the links to the end of mandatory retirement are speculative at present. See Dr. William H. Cunningham, *Tenure Revisited; Careful Peer Reviews No Threat to Freedom*, *Austin Am.—Statesman*, Sept. 2, 1996, at A11 (reporting statement of University of Texas Chancellor on need to allay public concerns over faculty productivity); Mary Ann Roser, *Tenure at UT is Under Review*, *Austin Am.—Statesman*, Aug. 31, 1996, at A1 (reporting efforts by University of Texas to reevaluate tenure protections in light of legislative initiatives toward greater professor accountability).

<sup>219</sup> For a systematic comparison of defined-benefit and defined-contribution pension plans, see Zvi Bodie et al., *Defined Benefit Versus Defined Contribution Pension Plans: What are the Real Trade-offs?*, in *Pensions in the U.S. Economy* 139, 139-62 (Zvi Bodie et al. eds., 1988).

defined-benefit plans, a vested employee is entitled to a fixed pension that is typically calculated on the basis of length of service or a formula based on average earnings at the end of the employee's career. The benefits are based on actuarial assumptions about the workforce, and the employer is responsible for ensuring the integrity of the pension fund's assets. In defined-contribution plans, by contrast, the employer is responsible only for paying a contractually-based amount into a retirement fund for each employee. The contribution is made each year, oftentimes each quarter or each paycheck, and exhausts the employer's obligations. The employee, either individually or through a group representative, is responsible for the management of the assets accumulated in a retirement account.

Defined-benefit plans hold out only mild incentives toward late retirement. To the extent that these incentives are present, they derive from the fact that defined-benefit plans are usually not indexed for inflation<sup>220</sup> and instead typically substitute a formula based on the last year or years of an employee's career. Because of the career-wage slope, additional years of working will have the predictable effect of increasing the wage from which pension benefits are calculated. However, this effect is significantly limited by the fact that employees seeking to increase the size of their retirement benefits must still work an additional year rather than receive benefits.<sup>221</sup> Thus, the discounted future benefit rate must be offset against the year-by-year tradeoff of working instead of retiring on a pension. In addition, employers are still able to limit ongoing pension escalations by capping the number of years of service that can be included in benefit calculations.<sup>222</sup> In this fashion, the concept of the Normal Retirement Age (NRA) that is a foundation of ERISA can be protected from ADEA attack.<sup>223</sup>

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<sup>220</sup> See Posner, *supra* note 49, at 300 (comparing such plans to defined-compensation plans, which, not being paid until retirement, can be invested to be protected from inflation).

<sup>221</sup> Additionally, employers may cap benefit levels based on the salary achieved after a set number of years of service. See 29 U.S.C. § 623(i)(2) (1994).

<sup>222</sup> Under the relevant provision of ERISA, "A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation . . . on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan." 29 U.S.C. § 1054(b)(1)(H)(ii) (1994) (also codified at 26 U.S.C. § 411(b)(1)(H)(ii) (1994)). Since capping defined benefits by a fixed number of years of service or by a fixed amount and did not employ an age classification, it avoided the strictures of the ADEA. For a general discussion of ERISA benefits, see Langbein & Wolk, *supra* note 204, at 384-85.

<sup>223</sup> ERISA defines NRA as whatever is provided by the plan, or the later of age 65 or the fifth anniversary of the participant's participation in the plan as the default. See 29 U.S.C. § 1002(24) (1994). However, the NRA may not exceed 65. See *id.*

Whereas defined-benefit plans were once the norm, employers have shifted toward defined-contribution plans. Such plans now constitute the majority of pension plans in the United States,<sup>224</sup> although defined-benefit plans still hold more total assets.<sup>225</sup> Most critically, defined-contribution plans alter the incentives that substantially affect retirement decisions.<sup>226</sup> The effect is clearest in examining the concept of the NRA, which pension law defines as "the earliest age at which eligible participants are permitted to retire with full benefits."<sup>227</sup> Traditionally, if a participant wanted to retire before the NRA, he or she would receive reduced benefits.<sup>228</sup> Conversely, if a participant wanted to retire past the NRA, he or she would neither receive any additional benefits nor suffer a decrease in the rate of benefit accrual. The EEOC approved of this approach. Thanks to AARP involvement, however, the Omnibus Budget Reconciliation Act of 1986 amended ERISA to forbid any "cessation or reduction of benefit accrual 'because of attainment of any age.'"<sup>229</sup> While employers could avoid the consequences of this amendment in the defined-bene-

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<sup>224</sup> This move was spurred by the requirement of greater levels of minimum employer funding of defined-benefit plans following the enactment of ERISA and the Pension Protection Act of 1987. ERISA created the Pension Benefit Guarantee Corporation (PBGC), which serves as a public guarantor of underfunded defined-benefit pension plans. By 1993, the PBGC had incurred \$5 billion in liabilities, a figure that the federal government budget for fiscal year 1995 projected would increase to between \$45 billion and \$70 billion. The PBGC has responded by tightening the funding rules and increasing insurance fees for defined-benefit plans which, in turn, has encouraged the transition to defined-contribution plans. See Randall P. Mariger, *Public Policy Toward Pensions: Why Defined Contribution Pensions Dominate Government-Insured Defined Benefit Pensions*, 95-3 Finance and Economics Discussion Series 1-3 (1995). Another factor in the push toward defined-contribution as opposed to defined-benefit plans was the ERISA requirement that pensions vest after 10 years, which was subsequently reduced to five years by the 1986 Tax Reform Act. See Laurence J. Kotlikoff & David A. Wise, *The Wage Carrot and the Pension Stick: Retirement Benefits and Labor Force Participation* 9 (1989). This requirement eliminated much of the Ponzi-scheme quality of defined-benefit plans that assumed high rates of attrition before vesting after 25 years, for example.

<sup>225</sup> See B. Douglas Bernheim & John B. Shoven, *Pension Funding and Saving*, in *Pensions in the U.S. Economy*, supra note 219, at 88 (finding that in 1978, although 71.9% of pension plans were defined-contribution, 72.3% of all assets in pension plans were in defined-benefit plans); Kotlikoff & Wise, supra note 224, at 9; *Pension and Welfare Benefits Admin.*, Abstract of 1990 Form 5500 Annual Reports, Private Pension Plan Bull., Summer 1993.

<sup>226</sup> See Kotlikoff & Wise, supra note 224, at 97 (analyzing data from defined-benefit plans to show how employee retirement decisions are affected by incentive structure of pension plans).

<sup>227</sup> Langbein & Wolk, supra note 204, at 376.

<sup>228</sup> See id. at 379-80 (describing actuarial reductions that result from early retirement).

<sup>229</sup> Id. at 384-85 (quoting and citing amendments to ERISA contained in Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9202(a), 100 Stat. 1874 (codified as amended at 29 U.S.C. § 1054(b)(1)(H) (1994))).

fits context by using non-age-based caps on benefit accrual, no such mechanism is available in the case of defined contributions.

This amendment significantly alters the comparative retirement incentives for defined-contribution as opposed to defined-benefit plans. Not only may benefit accrual be capped in a defined-benefit plan, but because defined benefits run the life of the pensioner (or the pensioner's surviving spouse), bequest considerations are not included in the pension plan.<sup>230</sup> The prospective retiree faces a classic "use it or lose it" tradeoff if retirement is postponed.

Prior studies have shown that retirement benefits that cannot be cashed out have an important effect on an employee's decision to retire.<sup>231</sup> For example, early research showed that Social Security was a more significant factor than the amount of saved assets in triggering retirement decisions.<sup>232</sup> The rationale was that, because Social Security avails to the benefit of the potential recipient alone and will not pass through the estate,<sup>233</sup> the employee would view foregone Social Security retirement benefits essentially as a wasting asset. Additional observations that older employees tailored their hours of work to fall under the maximum allowable to receive Social Security retirement benefits confirmed the conclusion.<sup>234</sup> Subsequent studies further revealed that defined-benefit pension plans, when available to a prospective retiree, are likely to outstrip the value of Social Security and are instead the best determinant of retirement decisions.<sup>235</sup>

Combining the observations about employee responses to incentive structures under Social Security and defined-benefit plans yields a troubling conclusion about defined-contribution plans: Defined-contribution plans as now structured under the ADEA and ERISA amendments clearly create incentives toward late retirement. There is no "use it or lose it" wasting asset element to defined-contribution

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<sup>230</sup> See *id.* at 382 (arguing that defined-benefit plans encourage earlier retirement than defined-contribution plans).

<sup>231</sup> See generally Alan L. Gustman & Thomas L. Steinmeier, *An Analysis of Pension Benefit Formulas, Pension Wealth, and Incentives from Pensions*, in 10 *Research in Labor Economics* 53, 53-106 (Ronald Ehrenberg ed., 1989); Richard Ippolito, *Toward Explaining Earlier Retirement After 1970*, 43 *Indus. & Lab. Rel. Rev.* 556 (1990).

<sup>232</sup> See James Schulz, *Economics of Aging* 77 (1988).

<sup>233</sup> See Michael J. Boskin, *Social Security and Retirement Decisions*, 15 *Econ. Inquiry* 1, 13 (1977) (noting reasons why effect of Social Security benefits are more important than effect of income from other assets on probability of retirement).

<sup>234</sup> See Gary Burtless & Robert A. Moffitt, *The Joint Choice of Retirement Age and Postretirement Hours of Work*, 3 *J. Lab. Econ.* 209, 230 (1985) (arguing that impact of Social Security on retirement probabilities and hours of work grows rapidly once individual reaches late 50s); Hurd, *supra* note 100, at 592 ("Apparently, many who work part-time after retirement choose hours close to the exempt amount in the earnings test.").

<sup>235</sup> See Kotlikoff & Wise, *supra* note 224, at 97 (analyzing data from defined-benefit plans to reach this conclusion).

pension plans. Each year that an employee delays retirement not only postpones that employee's drawing down of his or her retirement fund, but increases the amount of the fund by the additional employer contributions. That increased level can either be used to subsidize a more lavish or simply more secure retirement, or to pass on to prospective heirs. To the extent that a particular job allows an older employee to coast, that employee can simply choose to defer the time to tap retirement savings. In practice, defined-contribution plans look more like tax deferred saved assets than actual retirement plans.<sup>236</sup>

### 3. *Employee Review and Salary*

By condemning mandatory retirement, the ADEA, paradoxically, may undermine the life-cycle model of employment. While reinforcement of employee expectations or "hands-tying" is arguably the best normative defense of the ADEA,<sup>237</sup> the extension of the ADEA to preclude employers from acting at the conclusion of the life-cycle contract may be the most lasting impact of the statute. We have already explored, in the first part of this section, what we consider to be the unjustified redistributive consequences caused by the ADEA's assault on mandatory retirement. Particularly in light of the demonstrated propensity of American workers to seek earlier retirement, the notion that a central (not to mention the prime) manifestation of the legal disability of the aged is mandatory retirement is worth rethinking.

We now turn to the paradox of this feature of the ADEA. All too often legal reforms are hampered by the lack of a systematic understanding of the means by which altered legal rules have effects that spill over beyond the precise focus of regulation. Thus, we propose that the likely effect of the ADEA, once internalized in employer con-

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<sup>236</sup> This feature of defined-contribution plans has not escaped notice. Complicated tax regulations require that some withdrawals begin at age 70½. Furthermore, accelerated taxes on excess withdrawals limit the ability of individuals to draw down defined-contribution pensions in a short period. In addition, estate taxes on the unused portion of a retirement fund are levied prior to the collection of outstanding income tax liability. The effect for the unfortunate or unsophisticated is that the combination of estate taxes and deferred-tax liability can wipe out virtually the entire reserved savings at death. This is in turn offset by a congressional penchant for creating windows for withdrawals in which individuals may draw down their retirement assets without being subject to the accelerated taxes on excessive withdrawals. See generally Peter Passell, *Economic Scene: Be Thrifty and Invest Well, and Then Wait for the Huge Tax Bill*, N.Y. Times, Nov. 21, 1996, at D2 (discussing implications of 1996 law suspending 15% tax on "excess distributions" from retirement savings).

<sup>237</sup> See Jolls, *supra* note 48, at 1844 (arguing that "ADEA is likely to be a better means of achieving desirable hands-tying than other legal doctrines potentially suited to that function").

duct, will be to undermine further the income progression and relatively relaxed form of senior employee review that characterized the proper functioning of the life-cycle arrangement. Rather than cement the loose joints of a life-cycle contractual scheme, this aspect of the ADEA threatens to undo the entire structure.

Mandatory retirement may turn out to be a misnomer. There is ample anecdotal evidence of individuals past the formal retirement age for their fields who continued to be employed. In the field most readily at hand—legal academia—schools such as Hastings and New York Law School regularly buttressed the ranks of their teaching faculty with professors who had reached emeritus status at their home institutions. Mandatory retirement served primarily as a prearranged point at which an employer could sever a longstanding contractual relationship with a particular employee without in any sense “proving” that the employee was no longer capable. At its most basic, the mandatory retirement age spared most employees the distress and possible embarrassment of a late-stage review and the real possibility of being deemed unfit after a lifetime of service.<sup>238</sup> As expressed by Professor Epstein in assessing the academic context:

There has to be some way to end the lifetime contract in order to preserve the vitality and productivity of the institution. Mandatory retirement is the only possible system that allows that to be done. The *automatic* termination rule avoids the endless evaluations of personnel and scholarship, the invidious and delicate comparisons between colleagues and friends that drove universities to take refuge in tenure in the first place.

. . . With age, the risk of rapid decline, even for the ablest of academics, is too serious to ignore. The hiring of skilled older academics on short-term contracts would allow them to teach and research as long as they were able without putting them into the governance structure of the institution.<sup>239</sup>

Furthermore, there was a serious cost consideration for employers. Mandatory retirement spared the employer the time and expense necessary to establish to the satisfaction of fellow employees that a senior

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<sup>238</sup> Constant productivity review will result in a loss of dignity for older workers who would have been removed without stigma under the traditional mandatory retirement policies. See 1977 House Hearings, *supra* note 103, at 84 (statement of Harold P. Coxon, Jr., Director of Labor Law, U.S. Chamber of Commerce) (arguing that prohibiting mandatory retirement age forces employers to terminate for cause in place of mandating stigma-free retirement for all employees at a certain age).

For-cause terminations necessarily entail an ugly exit for the older worker when the basis for that termination is the presumed exhaustion of one's individual abilities. But see *id.* at 8 (statement of Rep. Claude Pepper) (arguing that workers are not stigmatized by competency-based retirement).

<sup>239</sup> Epstein, *supra* note 212, at 462-63.

employee was no longer up to snuff. So long as the end of employment was uniform, there was no threat that termination would be seen as unjust, vindictive, or arbitrary in any one case.

What do we expect employers to do in anticipation of having to continue to employ senior employees who choose not to retire but whose skills have declined appreciably? In order to be able to move out senior employees no longer able to function effectively and at the same time avoid an ADEA challenge, employers must document the diminution in ability to the satisfaction of potential court review. Performance reviews of senior employees themselves, however, would appear to violate the ADEA's requirement of symmetrical treatment of all employees, regardless of age. The likely result is an expansion of employee monitoring and performance evaluations across the age spectrum. This expansion, in turn, will create costs, presumed efficiency losses in those worksites where formal monitoring is expensive,<sup>240</sup> and loss of freedom in institutions (such as universities) in which a significant measure of employee autonomy is considered indispensable to the mission of the enterprise.<sup>241</sup>

Greater investment in performance reviews, in turn, will place grave pressure on life-cycle wage arrangements. One of the key reasons for additional employee evaluations will be to terminate the pattern of steady wage increases that would otherwise continue even as productivity ebbs. To the extent that marginal employee productivity can indeed be measured, there is every reason to believe that long-term, more highly compensated employees will be increasingly vulnerable. These employees, who currently have expectations of wages above marginal output, will appear to be an unaffordable luxury in highly competitive markets.<sup>242</sup>

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<sup>240</sup> See Schwab, *supra* note 33, at 23-24 & nn.52-59 (summarizing economic literature on costs of employee monitoring and suggesting substitutes for direct employee review).

<sup>241</sup> On the end of mandatory retirement necessitating "for cause" terminations, see 1977 House Hearings, *supra* note 103, at 81 (statement of Harold P. Coxon, Jr., Director of Labor Law, U.S. Chamber of Commerce) (noting that "if people could not be retired at a certain date, employers would be forced to look for 'cause' as a basis for retirement or discharge in order to avoid bias charges"). Those determinations force employers to engage in increased monitoring of all employees. See Michael Schrage, *Why a Multimedia Big Brother Looms over the Future of Work*, *Wash. Post*, July 29, 1994, at B3 (discussing increased surveillance of all levels of employees in workplace).

One consequence of increasing the number of "for cause" terminations is a likely increase in the number of ADEA suits. See 1977 House Hearings, *supra* note 103, at 102 (statement of Daniel E. Knowles, Director of Personnel, Grumman Aerospace Corp.) (arguing that without objective criteria, industry will be subjected to swell in charges of discrimination).

<sup>242</sup> It is important to recall that the life-cycle arrangement serves to defer compensation from the most productive middle years to later stages of an employee's career when output would not independently justify an increased wage pattern. For those employees whose

The combination of the end of mandatory retirement and the ADEA's insistence on equal treatment of all senior employees, therefore, is likely to increase the wage pressure on all senior employees, not just those approaching normal retirement age.

### *B. Restoring Order*

We have set out to show that what loosely passes for age discrimination in employment is a complex set of institutional arrangements, recognized even from the beginning of the ADEA as demonstrably different than the animus-based discrimination aimed prototypically at black Americans.<sup>243</sup> Perhaps more fundamentally, we have questioned the normative assumptions behind claims of age-based discrimination. Unlike restrictions that target isolated and vulnerable members of the society, limitations attending to age are those that, even if today placed on others, are ones that we shall later endure ourselves.<sup>244</sup> With the emergence of powerful political actors asserting expansive claims on behalf of older workers, however, all sense of limits seems to have dropped out of the ADEA picture.

Although these differences were acknowledged in the 1967 hearings, by 1990, the concern for the vulnerability of older workers at the end of the life-cycle had been replaced by an inflexibly reactive approach which made any age classification presumptively invalid. Neither the cases nor the legislative history of the OWBPA, however, explain why age classifications should trigger this kind of scrutiny. America's most expansive antidiscrimination law has emerged in the context of a group that has neither suffered historical discrimination nor lacked political power. On the contrary, American elderly have

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output versus salary was not measured carefully during their most profitable years, the sudden introduction of greater scrutiny threatens to destabilize the implicit contractual understanding of a career-term relationship.

<sup>243</sup> See OWBPA Hearings, *supra* note 22, at 231 (statement of Mark S. Dichter on behalf of the Association of Private Pension and Welfare Plans, U.S. Chamber of Commerce, National Association of Manufacturers, and ERISA Industry Committee) ("In considering age discrimination legislation back in the 1960s, Congress understood that age discrimination is by its nature different from discrimination on the basis of race and sex."); *id.* at 231-32 (citing *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, at 2 (1965), reprinted in EEOC, *Legislative History of Age Discrimination in Employment Act of 1967*, at 20 (1981) (explaining that employers' reluctance to hire older workers was primarily due to "institutional arrangements—such as pension, seniority, insurance, and promotion-from-within policies"))).

<sup>244</sup> See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (*per curiam*) ("Instead, [old age] marks a stage that each of us will reach if we live out our normal span."); *Frolik & Barnes*, *supra* note 121, at 711 (describing programs that favor elderly, such as Social Security, as efforts to "ameliorate" old age since "we do not want to be old" ourselves).

done amazingly well at capturing significant benefits through the political process.<sup>245</sup> Whatever the arguments that might be mustered on behalf of the elimination of mandatory retirement, we are simply at a loss to construct an argument for redirecting such significant social resources towards the most privileged of senior employees who readily assume the role of ADEA plaintiff.

We now turn to a series of modest proposals that will not, of themselves, cure the mischief caused by the ADEA. Rather these suggestions are intended as a springboard toward remedying some of the more bizarre incentives created under current law. We have deliberately tried to keep these proposals narrow in order to conform them where possible to existing law. As will be evident, however, many of these require a revisiting of recent ADEA reforms.

*1. Eliminate employer contributions to defined-contribution plans for employees working past the normal age of retirement*

This proposal seeks to conform the operation of defined-contribution and defined-benefit plans. Under current law, employers with defined-benefit programs may already cap the maximum retirement draw of employees by pegging the maximum retirement rate to the salary reached after a fixed number of years. The result is that the employer's obligation to the funding of the pension plan does not increase for any employee beyond the plan's Normal Retirement Age (NRA)—which by law can be no later than age sixty-five. No policy justification exists for continuing employer contributions to defined-contribution plans past the NRA given that the employer's obligations may equally be thought to have been discharged fully at that point. Further, this proposal could be combined with a corresponding elimination of tax deferral for employee contributions to a retirement fund after the NRA.<sup>246</sup>

The elimination of additional payments to defined-contribution plans will remove one incentive, secondary though it may be, for retirement age employees to stay on in the workforce. If a worker chooses to work past the NRA, then, at the very most, he or she should receive 100% of the benefits that have vested by the time he or she reaches age sixty-five, but no more. Such a phase-out will not harm the individual who wants to continue working, but will effec-

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<sup>245</sup> See Peterson, *supra* note 122, at 70 (“[E]lderly Americans now have the highest level of per capita household wealth of any age group . . . .”); *id.* at 74 (“Today’s seniors, represented by powerful lobbies and voting in disproportionate numbers compared with the young, are already a potent political force”); *id.* (“[P]er capita federal spending on the elderly towers eleven to one over federal spending on children.”).

<sup>246</sup> This second step was suggested by Doug Laycock.

tively remove any incentive for an older worker to "hold out" for more of the pie.

2. *Offset employee wages by some proportion of the amount drawn down from defined-contribution plans*

Although defined-benefit plans are statutorily required to set an NRA no later than age sixty-five, defined-contribution plans have no direct equivalent. The closest parallel is the requirement that annuity-based retirement plans begin to pay out no later than age 70½.<sup>247</sup> For those employees still in the workforce at age 70½, some reduction in the employee benefit from the employer contribution equivalent to what happens in defined-benefit plans should be available. This reduction could be accomplished by offsetting salary by the percentage of the yearly annuity that represents the employer's share of the retirement contributions. For example, if an employee had a retirement plan in which the employer contributed half the retirement amount (matched by pretax payroll withholdings), and if the annuity payments beginning at age 70½ were \$2000 per month, the employer should be entitled to reduce monthly salary by \$1000. At a conceptual level, it is possible to think of the defined-contribution plan being "overfunded" for the employee who works beyond the point where annuity payments begin, in much the same fashion as a defined-benefit plan would be actuarially overfunded if an employee chose to work beyond the age of retirement eligibility.<sup>248</sup>

3. *Repeal the prohibition of targeted ERIPs or allow a set-off of ERIPs by pension eligibility*

Under current law, employers are allowed to implement only untargeted ERIPs, which are offered to all employees over a certain age. The problem with such plans is that they result in a one-time transfer of wealth to older employees at the expense of younger ones.<sup>249</sup> In

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<sup>247</sup> See Max J. Schwartz, Distributions from Qualified Retirement Plans—The Basic Rules, in *Understanding ERISA* 337, 349 (Joseph R. Simone ed., 1995).

<sup>248</sup> This proposal would have no impact on employees whose defined-contribution plans call for a lump sum payment upon retirement. Whether this proposal would induce employees to switch over to riskier equity investments rather than annuity programs is a subject fit for debate. This proposal might also make the employer, in effect, an insurer for employees who pursue more aggressive and riskier investment strategies by not penalizing them if their investments do not pan out. While this effect is possible, it is not clear that the investment decisions of employees throughout their careers are subject to a rational calculus of subsidizing risky investments by being able to work into their seventies at the employer's expense.

<sup>249</sup> See Worth, *supra* note 174, at 426-29 (providing detailed explanation of how untargeted ERIPs create intergenerational transfer of wealth).

the past, funds invested in targeted ERIPs could be rationalized as the amount of money the employer still owed the employee under the original life-cycle contract. With untargeted ERIPs, however, the employer must appropriate funds to those employees sixty-five and over who were owed nothing under the life-cycle contract. Because those employees were supposed to have retired at sixty-five under the original life-cycle contract, they receive a pure windfall when they accept an ERIP past the age of sixty-five and a more modest one depending on how close they are to retirement age. Ultimately, the money used to induce those workers over sixty-five to retire comes at the expense of decreased wages for the next generation.<sup>250</sup>

This windfall could easily be eliminated by mandating that any accepted ERIP would offset dollar for dollar any vested pension benefits in a defined-benefit plan or any annuities that *may* be collected from a defined-contribution plan.<sup>251</sup> Such a policy will effectively nullify any incentive for those workers over sixty-five; however, it will preserve the value of ERIPs for those younger older workers, who deserve some additional payment under the original life-cycle contract. This integrated approach will eliminate the double dipping and the incentives for wealth capture by the oldest workers. Instead of having employers entice older workers to retire by offering overly expensive buyouts or by engaging in costly monitoring programs, older workers will remain free to choose their own retirement date. Without any extraordinary incentives to work past sixty-five, only those workers who truly want to work for working's sake will stay on. More important, groups like the AARP will have no incentive to fight for even larger ERIPs and pension contributions. The incentive for capture would effectively be eliminated. Furthermore, to the extent that older workers need protection against opportunistic firings, they will continue to have it. The elimination of mandatory retirement will be undisturbed, and older workers will continue to have the choice to work past sixty-five.<sup>252</sup>

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<sup>250</sup> See Issacharoff, *supra* note 37, at 1248-49 (arguing that Epstein's analysis of mandatory retirement supports author's theory that applying ADEA to mandatory retirement rules results in wealth transfer to senior generation of employees).

<sup>251</sup> This suggestion is broader than the salary set-off in the prior proposal. This ERIP reduction would be triggered by the total amount of annuity benefit available to the employee, even if the employee were under age 70½ and had not yet begun to draw down on his pension.

<sup>252</sup> This proposal is not as radical as it seems. Congress has already agreed to phase in a higher age for Social Security benefit eligibility, evidencing an intent to phase out the windfalls being captured by the oldest workers. See Peterson, *supra* note 122, at 76.

4. *Do not apply disparate impact analysis to the consequences on senior employees of regular employer review of all employees*

Applying disparate impact analysis is the painful, and we fear inevitable, byproduct of the end of mandatory retirement. Employers will now be in the unenviable position of having to document declining productivity of older employees in order to avoid potential ADEA liability if senior employees have to be fired. This concern is of course a matter for each individual firm to address on its own terms. One important legal policy issue, however, is that the institution of employee review processes should not be allowed to serve as a proxy for proof of discriminatory intent, even if the most significantly affected group is the class protected under the ADEA. Regular employee reviews will be a natural consequence of the ADEA's recent expansions and should not be misinterpreted as a basis for disparate impact evidence of discrimination.

5. *Do not apply disparate impact analysis to "negative salary increases" of senior employees*

This suggestion follows directly from the fourth proposal. Because there is no reason to anticipate an ever-escalating level of employee productivity, and much reason to suspect the contrary, there is no reason for a constant upward slope of an employee's wage curve across his entire career. As we have set forth, that upward slope is best explained by career-length arrangements, which include a predetermined stopping point. With the end of mandatory retirement, employers should be expected to protect themselves against end-of-career exposures by documenting employee productivity and adjusting salaries downward for those employees with the greatest gulf between actual pay and present output. In some worksites, such monitoring undoubtedly will be highly inefficient. But where it is undertaken, the likely upshot will be a reduction in senior employee wages. Again, the law has a role to play here. Despite the lack of clearly established disparate impact liability under ADEA case law, there are constant pressures on this front from "pattern and practice" claims that seek to prove discriminatory motive based on broad statistical inferences.<sup>253</sup> No presumption of discrimination should be cre-

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<sup>253</sup> See, e.g., *Markham v. Geller*, 451 U.S. 945, 948 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("This Court has never held that proof of discriminatory impact can establish a violation of the ADEA . . ."); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1077 (7th Cir. 1994) (holding that decisions "which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited" by ADEA); *Hiatt v. Union Pac. R.R.*, 859 F. Supp. 1416, 1433-36 (D. Wyo. 1994) (finding disparate

ated by diminishing salaries of older employees. Instead, both the EEOC and the courts should anticipate this pattern as the employment norm and accord it no weight in an age discrimination case.

### CONCLUSION

The battles over the ADEA are part of a broader confrontation with the elusive concept of intergenerational equity. An issue of claims to societal resources is present whenever there is a tradeoff to be had between investments for tomorrow and consumption for today. The sources of such tradeoffs range from environmental preservation to the competing demands for medical care for the elderly to additional educational resources for the young.<sup>254</sup>

As a general matter, broad questions of societal equities fit uncomfortably within standard legal discourse. The law can offer few concrete answers with regard to how much a society should invest in defense, housing, or medical care for the elderly. Legal commentators may opine on the changes from generations past that invested in such massive public works as the construction of the interstate highway system, the electrification of rural America, or the reconstruction of war ravaged Europe. Further, we may express concern or even dismay over the retreat from a commitment to broader conceptions of the public good in the political calculus of the day. Our expertise in these areas, however, is no broader than our capacity to marshal information and argue in the public sphere.

By contrast, legal commentators have much to offer when the debate shifts from abstract questions of broad societal duties to concrete applications of policy through statutes and judicial opinions. Here legal analysis holds sway in understanding the application of, and the incentives created by, new laws. The ADEA emerged from the 1986 and 1990 amendments as the most potent of antidiscrimination laws. Through relentless effort by special interest lobbyists, the antidis-

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impact liability not available under ADEA). A line of cases, however, accepts, more or less without analysis, the availability of disparate impact analysis under the ADEA. See, e.g., *EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1992); *Wooden v. Board of Educ.*, 931 F.2d 376, 379 (6th Cir. 1991); *MacPherson v. University of Montevallo*, 922 F.2d 766, 770-71 (11th Cir. 1991). For a thoughtful discussion of the relation between disparate impact liability and the ADEA, see Evan H. Pontz, Note, What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act, 74 N.C. L. Rev. 267, 288-320 (1995) (arguing absence of statutory basis for establishing disparate impact theory under ADEA).

<sup>254</sup> See Matthew Miller, Agitpol, *New Republic*, July 8, 1996, at 16-17 (quoting then-presidential candidate Richard Lamm as arguing, "[m]y aging body can prevent your kids from going to college. . . . We as a society spend more money turning 80 year olds into 90 year olds than we do 6 year olds into educated 16 year olds").

crimination model was captured for the benefit of a group that is not socially reviled, not penurious, neither discrete nor insular, not cut off from the mainstream of society, and not marked by the unmistakable badge of social opprobrium. The ADEA amendments forced a self-conscious wealth transfer not to society's victims or even its unfortunates, but to some of its most advantaged and secure. We cannot escape the conclusion that the use of antidiscrimination law and rhetoric to accomplish this aim is simply deplorable.

## APPENDIX

*Table 1: Percentage of Men in Population Aged 45–49 in Workforce by Education Level*

Year	Non-High School Graduates	High School Graduates	Some College	College Graduate or Greater
1970	85.9	91.8	88.9	93.2
1980	80.2	89.9	89.6	94.9
1990	73.1	90.6	90.6	92.1
1994	62.6	88.2	88.2	92.1

*Table 2: Percentage of Men in Population Aged 50–54 in Workforce by Education Level*

Year	Non-High School Graduates	High School Graduates	Some College	College Graduate or Greater
1970	83.3	90.6	92.3	90.9
1980	74.5	86.6	89.9	93.1
1990	69.1	84.4	87.0	90.7
1994	65.8	81.6	85.0	90.3

*Table 3: Percentage of Men in Population Aged 55–59 in Workforce by Education Level*

Year	Non-High School Graduates	High School Graduates	Some College	College Graduate or Greater
1970	79.8	85.6	87.8	86.9
1980	69.7	79.9	84.2	89.5
1990	64.4	74.1	80.7	84.0
1994	56.0	73.1	75.6	82.3

*Table 4: Percentage of Men in Population Aged 60–64 in Workforce by Education Level*

Year	Non-High School Graduates	High School Graduates	Some College	College Graduate or Greater
1970	66.3	77.8	81.0	84.7
1980	50.4	59.5	63.4	69.4
1990	44.4	54.5	54.7	61.5
1994	39.5	46.6	50.2	60.4

*Table 5: Percentage of Men in Population Aged 65–69 in Workforce by Education Level*

Year	Non-High School Graduates	High School Graduates	Some College	College Graduate or Greater
1970	31.2	37.8	40.3	48.8
1980	19.1	24.3	32.0	36.8
1990	17.2	19.6	22.0	36.3
1994	14.1	20.8	23.8	33.4

These disparities can be observed in women in the workforce as well, although the trends are complicated by the influx of women into the workforce.

*Table 6: Percentage of Women in Population Aged 55–59 in Workforce by Education Level*

Year	Non-High School Graduates	High School Graduates	Some College	College Graduate or Greater
1970	36.1	45.9	49.5	56.8
1980	29.5	43.7	48.3	54.8
1990	30.9	47.2	50.9	61.6
1994	32.3	48.3	55.1	61.8

*Table 7: Percentage of Women in Population Aged 65–69 in Workforce  
by Education Level*

Year	Non-High School Graduates	High School Graduates	Some College	College Graduate or Greater
1970	11.1	16.9	19.9	21.8
1980	8.8	11.6	15.3	16.6
1990	9.0	12.2	14.0	18.3
1994	6.2	12.2	16.0	22.0

*Sources:* All data are from the March, Annual Demographic Supplements, Current Population Survey, Bureau of Labor Statistics. These data were drawn from the Census data tapes by Professor Finis Welch of Texas A&M University. We are deeply grateful to Professor Welch for his help.