Note

The Curious Case of Disparate Impact Under the ADEA: Reversing the Theory's Development into Obsolescence

R. Henry Pfutzenreuter IV∗

The recognition of disparate impact liability in *Griggs v. Duke Power Co.*[1] has been heralded as "[t]he single most important Title VII decision, both for the development of the law and in its impact on the daily lives of American workers."[2] The curious thing about disparate impact since becoming a theory of recovery under the Age Discrimination in Employment Act (ADEA),[3] however, is that its availability to victims of age discrimination has narrowed in scope.[4] Although the Supreme Court's decision in *Meacham v. Knolls Atomic Power Laboratory* recently reaffirmed application of the theory to the ADEA,[5] it also secured its practical obsolescence as a valid means of establishing liability for age discrimination. Faced with troubling

∗ J.D. Candidate 2010, University of Minnesota Law School; B.A. 2007, University of Minnesota. I would like to thank the staff and board of the *Minnesota Law Review*, in particular, Nathan Brennan and Elizabeth Borer, for their ideas and helpful suggestions; Professor Steven Befort for his help in refining the subject of this Note; and finally, my parents, "Fitz" and Andrea, and my brother, Ben, each for their constant love and support. Copyright © 2009 by R. Henry Pfutzenreuter IV.

1. 401 U.S. 424, 431 (1971).

2. H.R. REP. NO. 102-40, pt. 1, at 23 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 561; *see also* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1003–04 (2006) (describing the development of the "behavioral realist" movement, which advocates for an "expansive application of disparate impact theory").

3. 29 U.S.C. § 623(a) (2006); Smith v. City of Jackson, 544 U.S. 228, 232 (2005).

4. *See* Ann Marie Tracey & Norma Skoog, *Is Business Judgment a Catch-22 for ADEA Plaintiffs? The Impact of* Smith v. City of Jackson *on Future ADEA Employment Litigation*, 33 U. DAYTON L. REV. 231, 263 (2008) (concluding that the future does not appear to "offer much latitude to ADEA plaintiffs").

5. 128 S. Ct. 2395, 2404–05 (2008).

economic times[6] and a rapidly aging American workforce,[7] the importance of providing more than mere lip service to these claims is apparent now more than ever. In reaffirming the theory's availability, the Court clarified a central issue for ADEA disparate impact plaintiffs by placing the burden of proof for articulating the reasonable factor other than age (RFOA) defense squarely upon the defendant.[8] Unfortunately for victims of age discrimination, the standard emerging from the Court's earlier recognition of ADEA disparate impact claims in *Smith v. City of Jackson*[9] already made overcoming the defense a nearly impossible task.[10]

The current level of deference afforded to employers makes it likely that any factor other than age will be deemed sufficiently reasonable to preclude liability;[11] therefore, any amount of cost savings will be a valid justification for an employment policy's disparate effect upon older employees.[12] Although it has become clear that the employer's ability to prove the reasonableness of a factor other than age will be the deciding factor in the outcome of an ADEA disparate impact claim,[13] the Court's repeated articulation of a standard under which the issue will

6. *See Job Discrimination Claims Hit Record*, L.A. TIMES, Mar. 12, 2009, at B2 ("With the economy in recession and companies shedding millions of jobs, labor experts suggested that older workers may have suffered a disproportionate hit.").

7. *See* PATRICK PURCELL, CONG. RESEARCH SERV., OLDER WORKERS: EMPLOYMENT AND RETIREMENT TRENDS 2, 5 (2008), http://aging.senate.gov/crs/pension34.pdf (identifying a workforce comprised of aging individuals who often desire to continue working and projecting that the number of those individuals will grow steadily over the next two decades).

8. *See Meacham*, 128 S. Ct. at 2405.

9. 544 U.S. 228, 239–40 (2005) (plurality opinion).

10. Perhaps the best indication of the futility of bringing a disparate impact claim under current standards is that the Court chose to articulate the availability of the theory in a case where the plaintiffs were unable to prevail. *See id.* at 243.

11. *See* Tracey & Skoog, *supra* note 4, at 263 ("[C]ourts are likely to consider favorably, and even dispositively, the rationale and approach of the business judgment rule in disparate impact employment ADEA discrimination cases.").

12. *See* Lee Franck, Note, *The Cost to Older Workers: How the ADEA Has Been Interpreted to Allow Employers to Fire Older Employees Based on Cost Concerns*, 76 S. CAL. L. REV. 1409, 1415–20 (2003) (discussing cases where cost has been upheld as a valid RFOA).

13. *See Meacham*, 128 S. Ct. at 2404–05 (placing the burden to prove the RFOA defense on the employer); Tracey & Skoog, *supra* note 4, at 263 (discussing how an employer's rationale for firing decisions will be a deciding factor for ADEA claims).

almost never reach the trier of fact is problematic, to say the least.[14]

A crippled theory of disparate impact under the ADEA leaves millions of aging American workers susceptible to the perils of economic turbulence and uncertainty. During such times, employers may mistakenly come to believe they have strong incentives to cut costs by terminating employees based on their age.[15] The theory of disparate impact is unique in its ability to provide recovery in the absence of smoking-gun intent,[16] as will often be the case during a discriminatory reduction-in-force wherein an employer can use any number of factors as effective proxies for age.[17] When employers engage in practices that disparately affect older workers and provide unfair windfalls for themselves, reliance on factors other than age are not reasonable. If the Court's rulings in *Smith* and *Meacham* are to have any practical significance, it is necessary to analyze the RFOA defense in a new light.

This Note argues for a departure from the current level of deference afforded to employers. Following from the premise that the viability of a defendant's RFOA lies in an evaluation of its reasonableness, it proposes a familiar balancing standard from tort liability, Judge Hand's B < PL formula,[18] be used to

14. *See City of Jackson*, 544 U.S. at 240–41 (explaining that relief under the ADEA based on disparate impact theory is limited in two significant ways: the RFOA exception and the Court's prior holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655–61 (1982), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), which narrowed the scope of disparate impact claims).

15. *See* DEP'T OF LABOR, REPORT OF THE TASK FORCE ON THE AGING OF THE AMERICAN WORKFORCE 15 (2008), http://www.doleta.gov/reports/FINAL_Taskforce_Report_2-11-08.pdf ("[S]ome employers may *over-estimate* the costs associated with employing older workers while simultaneously *underestimating* the benefits."); Michael Luo, *Longer Periods of Unemployment for Workers 45 and Older*, N.Y. TIMES, Apr. 13, 2009, at A11 (discussing how the economy can force companies that are "reluctant to lose the experience of older workers" to nevertheless fire them due to cost concerns).

16. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977) ("Proof of discriminatory motive . . . is not required under a disparate-impact theory.").

17. *See, e.g.*, Daniel B. Kohrman & Mark Stewart Hayes, *Employers Who Cry 'RIF' and the Courts that Believe Them*, 23 HOFSTRA LAB. & EMP. L.J. 153, 160–63 (2005) (discussing how the bias against older workers because of their salaries, known as "wage bias," serves as a proxy for age bias).

18. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL.").

assess this element of the defense. Application of the formula would ask the trier of fact to make a modified balancing assessment, determining whether the burden that would have been imposed upon an employer forgoing the employment action in question (B), outweighs the magnitude of potential discrimination (L), discounted by its probability (P). Such a standard would compel an objective evaluation of reasonableness and shift focus from misplaced inquiries into intent, mental culpability, and mens rea-like requirements normally associated with criminal liability. Judge Hand's cost-benefit assessment is well within the province of the trier of fact. A court need only permit litigants to produce the evidence that would allow it to perform such a function. Permitting parties to introduce the evidence necessary to evaluate an employer's RFOA defense using the B < PL formula for disparate impact claims under the ADEA would provide a fair and effective means for older workers to secure their rights during these troubling economic times.

Part I of this Note explains the turbulent history of disparate impact claims under the ADEA, foreshadowing the rather curious present-day unavailability of the remedy despite its recognition by the Supreme Court. Part II analyzes the ways in which this unavailability stems from the degree of deference afforded to employers under the RFOA exception, and how this trivial threshold is ill-equipped to address the unique economic concerns of the nation's aging workforce, as well as the nature of age discrimination itself. Finally, Part III proposes that the trier of fact should be permitted to consider the evidence necessary to assess an employer's RFOA under Judge Hand's B < PL formula. It argues that this revised standard would be consistent with the fundamental premise of antidiscrimination law as a form of tort liability, coincide with a modern understanding of age discrimination's operation at an implicit level, and address the urgent economic concerns facing older workers.

I. HISTORY OF DISPARATE IMPACT UNDER THE ADEA

The road to recognition as a theory of recovery under the ADEA was a turbulent one for disparate impact. The initial reluctance of courts to grant disparate impact plaintiffs under the ADEA the same rights as under Title VII,[19] however, is consis-

19. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 618 (1993) (Kennedy, J., concurring) ("[T]here are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.").

tent with the Supreme Court's more recent holdings reinforcing employers' powerful shield from liability—the RFOA defense.[20] Beginning with the legislative history of the ADEA itself, this Part provides the chronological backdrop for analyzing this significant obstacle to the ready availability of disparate impact under the ADEA.

A. THE BEGINNINGS OF EMPLOYMENT DISCRIMINATION: TITLE VII AND THE ADEA

Passage of the ADEA followed shortly after the adoption of Title VII. Both Title VII and the ADEA were passed as a result of the Civil Rights Movement—in 1964[21] and 1967,[22] respectively. Since Title VII failed to address adequately age discrimination, Congress commissioned a report to study its effects.[23] The findings of that study, known as the Wirtz Report,[24] played a central role in the legislative history of the ADEA.[25]

The Wirtz Report reached several important conclusions which would later play a role in the application of disparate impact claims to the ADEA.[26] First, the Report found that explicit dislike of older individuals was not prevalent throughout society.[27] Second, the Report identified that employers' assump-

20. *See* Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2404 (2008) ("[A]though we are now satisfied that the business necessity test should have no place in ADEA disparate-impact cases . . . this conclusion does not stand in the way of our holding that the RFOA exemption is an affirmative defense.").

21. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (2006)).

22. Age Discrimination Employment Act of 1967, Pub. L. No. 90-202, § 4, 81 Stat. 603 (codified as amended at 29 U.S.C. § 623(a) (2006)).

23. *See* Smith v. City of Jackson, 544 U.S. 228, 232 (2005) ("Congress did, however, request the Secretary of Labor to 'make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.'" (quoting Civil Rights Act of 1964 § 715)).

24. W. WILLARD WIRTZ, DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 21 (1965).

25. *See City of Jackson*, 544 U.S. at 232–33 ("In response to that report Congress directed the Secretary to propose remedial legislation and then acted favorably upon his proposal." (citation omitted)).

26. *See id.* at 234–35 n.5 ("[T]here is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.").

27. Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. RICH. L. REV. 757, 758 (1997) ("The Report found no significant presence of . . . dislike or intolerant feelings about older workers unrelated to their ability to do work.").

tions about older employees could result in "statistical discrimination."[28] Third, the Report concluded that facially neutral practices could have a disproportionate effect on older employees.[29] Finally, the Report found that certain programs designed to aid older employees could actually provide motivation for employers to discriminate against them.[30] Although judges and scholars have disagreed about the extent to which the report advocated legislation to remedy these effects,[31] it is clear that the report identified concern over types of discrimination that took forms other than explicit intolerance.[32]

After considering the study, Congress passed the ADEA.[33] The language of the ADEA mirrors that of Title VII in almost every respect.[34] One significant difference however—the presence of the RFOA exception—would have an important effect on the future availability of disparate impact claims.[35] While Title VII contains a provision exempting adverse employment actions based on bona fide occupational qualifications (BFOQ),[36] the ADEA goes a step further by limiting liability for an employer's actions based on "reasonable factors other than

28. *Id.* at 759 ("The Report[] . . . described what economists have termed 'statistical discrimination,' the rejection of all members of a status group because of certain characteristics . . . .").

29. *Id.* at 761 ("[T]he Report considers a number of ostensibly neutral factors, including health, educational attainment, adaptation to new technology, and aptitude testing, which may impede the employment of older workers.").

30. *Id.* ("[T]he Report considers other 'institutional arrangements' which are 'designed to protect the employment of older workers while they remain in the work force, and to provide support when they leave it or are ill.'" (quoting WIRTZ, *supra* note 24, at 2, 15–17)).

31. *See, e.g.*, *id.* at 762 ("The Report does not recommend that all the practices it lists in the last two categories be condemned by an age discrimination law.").

32. *Id.* ("[T]he Report's discussion of these factors demonstrates a recognition that addressing the aggregate economic and personal impact of the unemployment and underemployment of older workers will require more than the elimination of overt age-based hiring limits.").

33. *See* Smith v. City of Jackson, 544 U.S. 228, 232–33 (2005).

34. *Compare* 42 U.S.C. § 2000e-2(a) (2006), *with* 29 U.S.C. § 623(a) (2006). *See also City of Jackson*, 544 U.S. at 235–36 (plurality opinion) (discussing the textual and structural similarities between Title VII and the ADEA).

35. *See City of Jackson*, 544 U.S. at 240 ("Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII. The first is the [ADEA's] RFOA provision . . . .").

36. 42 U.S.C. § 2000e-2(e)(1) (2006).

age."[37] As discussed below, the present standard for evaluating this exception creates an almost insurmountable obstacle for plaintiffs seeking to recover for disparate impact under the ADEA.

B. DEVELOPMENT OF EMPLOYMENT DISCRIMINATION LIABILITY: *MCDONNELL DOUGLAS* AND *GRIGGS*

Liability under Title VII and the ADEA can be based upon two distinct theories of proof—disparate treatment and disparate impact. The process for determining liability for disparate treatment was originally announced by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[38] The basis for a *McDonnell Douglas* disparate treatment claim lies in proving intentional discrimination.[39] A plaintiff seeking to recover under a theory of disparate treatment must first establish a prima facie case by showing membership in a protected class, qualification for the position, denial of that position, and that the position remained open following that denial.[40] Once the plaintiff establishes a prima facie case, the burden then shifts to the defendant to produce a legitimate nondiscriminatory reason for the adverse employment action.[41] Upon production of such a reason, the burden then shifts back to the plaintiff to prove that the employer's reason was merely a pretext for actual discrimination.[42]

Alternatively, a Title VII or ADEA plaintiff can prove discrimination under a theory of disparate impact. Disparate impact differs from disparate treatment by offering the opportunity for recovery without direct proof of discriminatory intent.[43] Disparate impact claims were first made available to plaintiffs in the Supreme Court case of *Griggs v. Duke Power Co*.[44] *Griggs* was a Title VII case in which an employer had established a policy that required its employees to either pass a test or have

37. 29 U.S.C. § 623(f)(1) (2006).

38. 411 U.S. 792, 802 (1973). The burden-shifting framework for disparate treatment claims was further refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256–59 (1981).

39. *See McDonnell Douglas Corp.*, 411 U.S. at 802.

40. *Id.*

41. *Id.*

42. *Id.* at 804.

43. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

44. 401 U.S. 424, 431 (1971).

a high school diploma.[45] Although this policy was applied equally to all employees, and thus facially neutral, it had the effect of disqualifying a disproportionate number of black employees from the position.[46] The Court held that a plaintiff need not meet the traditional requirements for a showing of disparate treatment under *McDonnell Douglas* so long as the employee could prove that the employer's action had a disparate impact upon employees belonging to a protected class.[47] The Court stated that unless the employer could show that its actions were justified as a "business necessity," it would be liable under Title VII.[48] The reasoning behind its decision was that the purpose of Title VII was to remedy all forms of discrimination, not just explicit intolerance[49]—a justification similarly expressed in the legislative history of the ADEA.[50]

C. INITIAL CHALLENGES TO DISPARATE IMPACT LIABILITY: *WARDS COVE* AND *HAZEN PAPER*

A major hurdle to disparate impact plaintiffs presented itself in 1989 when the Supreme Court chose to significantly narrow the scope of the theory in *Wards Cove Packing Co. v. Atonio*.[51] The plaintiffs in *Wards Cove* alleged that the employer's subjective decision-making practices resulted in a disparate impact on their advancement possibilities.[52] The Court first held that a plaintiff's prima facie case was insufficient unless it identified "application of a specific or particular employment practice that . . . has created the disparate impact under attack."[53] Thus, it was not enough for a plaintiff to identify a statistical disparity; a plaintiff would also have to point to the specific practice she alleged was its cause.[54] The Court further limited disparate impact claims by redefining the "business ne-

45. *Id.* at 427–28.

46. *See id.* at 430.

47. *See id.* at 431.

48. *Id.*

49. *See id.* ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

50. *See, e.g.*, WIRTZ, *supra* note 24, at 22 (explaining that "to eliminate discrimination . . . it will be necessary" to address more than "overt acts").

51. 490 U.S. 642, 655–61 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

52. *Id.* at 648.

53. *Id.* at 657.

54. *Id.*

cessity" standard articulated in *Griggs* to one of mere "business justification."[55] In doing so, the Court held that "there is no requirement that the challenged practice be 'essential' or 'indispensible' to the employer's business."[56] Finally, the Court reconfigured the burdens allocated in *Griggs* by stating that the "ultimate burden . . . remains with the plaintiff at all times."[57] The employer would thus only be required to produce evidence of a "business justification" in order to rebut the plaintiff's prima facie case, rather than persuade the court of the "business necessity" of its practice.[58] These holdings combined to create a significantly more burdensome framework for disparate impact plaintiffs.

Congress responded to the Court's decision in *Wards Cove* by passing the Civil Rights Act of 1991.[59] The Act amended Title VII by restoring the requirements for disparate impact claims to those initially articulated by the Court in *Griggs*.[60] First, the Act codified definitions of "business necessity" and "job relatedness" consistent with the Court's rulings prior to *Wards Cove*.[61] Additionally, the Act replaced burdens of production and persuasion following a plaintiff's showing of a prima facie case upon the employer.[62] The Act also eliminated the requirement that a plaintiff identify a specific employment practice responsible for the disparity.[63] Since the Act did not amend the ADEA, however, uncertainty remained over the availability of disparate impact to victims of age discrimination.[64]

The majority of lower courts initially viewed the holding in *Griggs*, combined with Congressional rejection of *Wards Cove*, as allowing for disparate impact claims to proceed under the ADEA.[65] Given the textual similarities between Title VII and

55. *Id.* at 658.

56. *Id.* at 659.

57. *Id.*

58. *Id.*

59. Pub. L. No. 102-166, § 3, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e (2006)).

60. *See* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1148–49 (1993).

61. *Id.* at 1137–44.

62. *Id.* at 1137.

63. *Id.* at 1144–45.

64. *Id.* at 1104.

65. *See* Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other than Age" Defense and the Disparate Impact Theory*, 55 HASTINGS L.J. 1399, 1410 (2004) ("[T]he

the ADEA, courts applied the same standards to both Acts.[66] As a result, disparate impact law enjoyed a brief period of uniformity.[67] It was not until the Supreme Court's decision in *Hazen Paper Co. v. Biggins*[68]—a case involving an ADEA disparate *treatment* claim—that lower courts began to question the availability of disparate impact under the ADEA.[69] The three-member concurrence in *Hazen Paper* postulated that there were "substantial arguments that it [would be] improper to carry over disparate impact analysis from Title VII to the ADEA."[70] Lower courts proceeded along this path despite the Court's clear statement that it was not ruling on the availability of disparate impact claims under the ADEA.[71] A split among the circuits developed: the Second, Eighth, and Ninth Circuits held that plaintiffs could recover for disparate impact,[72] whereas the First, Third, Sixth, Seventh, and Tenth held that they could not.[73]

D. RECOGNITION OF DISPARATE IMPACT UNDER THE ADEA: *CITY OF JACKSON*

It was not until 2005, in *Smith v. City of Jackson*, that the Supreme Court settled the circuit split and acknowledged that plaintiffs could recover for disparate impact under the ADEA.[74] *City of Jackson* involved a group of police officers who claimed

courts generally applied both the disparate impact and the disparate treatment theory of discrimination to the ADEA before *Hazen Paper*.").

66. *See id.* (attributing this phenomenon to the "similarity between Title VII and the ADEA").

67. *See, e.g.*, Arnold v. U.S. Postal Serv., 863 F.2d 994 (D.C. Cir. 1988); Monroe v. United Air Lines, Inc., 736 F.2d 394 (7th Cir. 1984); Dace v. ACF Indus., 722 F.2d 374 (8th Cir. 1983).

68. 507 U.S. 604, 609 (1993).

69. *See* Johnson, *supra* note 65, at 1415–16 (discussing the effect of *Hazen Paper* on lower courts' application of disparate impact to the ADEA).

70. *Hazen Paper*, 507 U.S. at 618.

71. *Id.* at 610 ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here.").

72. *See* Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000); Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997); Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997).

73. *See* Mullin v. Raytheon Co., 164 F.3d 696, 700–01 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995); Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–77 (7th Cir. 1994).

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

to have been disparately impacted by their employer's revised salary plan.[75] The plan instituted salary increases for officers with less than five years of tenure.[76] Unsurprisingly, the plan disproportionately benefited the younger employees in the department.[77] The district court granted summary judgment for the defendants on the basis that disparate impact claims were not available under the ADEA, and the Fifth Circuit affirmed.[78] On review by the Supreme Court, a plurality rejected the Fifth Circuit's holding that a disparate impact claim is unavailable under the ADEA, but nonetheless concluded that the plaintiffs in the present case failed to articulate a cognizable disparate impact claim.[79]

Nevertheless, several lines of reasoning were advanced for allowing disparate impact claims to proceed under the ADEA. Justice Stevens, writing for the plurality, analyzed the legislative history and structure of the Act.[80] Justice Stevens identified not only the similarities behind the purposes of Title VII and the ADEA,[81] but also emphasized that they were almost completely identical in their text and structure.[82] The plurality concluded that its previous decision in *Griggs*—authorizing disparate impact claims to proceed under Title VII—would be "precedent of compelling importance."[83] The plurality, however, noted one important difference between the ADEA and Title VII: a provision eliminating liability for acts based on an RFOA.[84] While the Court concluded that this provision supported the availability of disparate impact under the ADEA, the Court also noted that the textual difference narrows the Act's coverage.[85] Even this statement, taken in light of the standard articulated for evaluating the defense, might be viewed as underambitious.

One of the concurring opinions took issue with the plurality's drawing of parallels between the ADEA and Title VII. Justice O'Connor, writing this concurrence, argued that ADEA

75. *Id.* at 231.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 241–43.
80. *Id.* at 232–33.
81. *Id.* at 232.
82. *Id.* at 233.
83. *Id.* at 233–34.
84. *Id.* at 233.
85. *Id.* at 240.

claims were only cognizable when a plaintiff was able to make a showing of actual discriminatory intent.[86] The ADEA, unlike Title VII and its revisions under the Civil Rights Act of 1991, only permitted claims of disparate treatment. Justice O'Connor reasoned that the RFOA provision was "an independent safe harbor from liability."[87] Justice O'Connor argued that not only did the text and structure of the ADEA warrant her conclusion,[88] but the legislative history of the Act supported it as well.[89] Justice O'Connor articulated a view of the Wirtz Report that indicated conceptual differences between age discrimination and the types of discrimination prohibited under Title VII.[90]

Most of the concerns voiced by O'Connor's concurrence were probably alleviated by the scope of the test articulated by the plurality. The plurality reasoned that since the ADEA did not enjoy the same benefits granted to Title VII in the Civil Rights Act of 1991, disparate impact claims under the ADEA should be governed by the Court's analysis in *Wards Cove*.[91] The Court made it clear that an inquiry into the "job relatedness" or "business necessity" of an employer's practice was irrelevant to the outcome of a disparate impact claim under the ADEA.[92] Instead, the Court identified the RFOA exception as being the employer's means of exemption from liability.[93] So long as an employer's action was based on a reasonable factor other than age, it would not be liable for the action's disparate impact.[94] Furthering its reliance on *Wards Cove*, the Court concluded that unlike Title VII, a prima facie case for disparate impact under the ADEA was incomplete unless it identified a specific employment practice responsible for the alleged statistical disparity.[95] With the standard of "business necessity" clearly ruled out, lower courts were left without guidance as to the proper scrutiny applicable to the defense.[96]

86. *Id.* at 248 (O'Connor, J., concurring).
87. *Id.* at 252.
88. *Id.* at 248–53, 256–58.
89. *Id.* at 253–56.
90. *Id.* at 258–59.
91. *Id.* at 240 (majority opinion).
92. *See id.* at 243.
93. *Id.* at 240.
94. *Id.*
95. *See id.* at 241.
96. *See* Tracey & Skoog, *supra* note 4, at 244 ("[T]he Court did not address any protocol for producing evidence in a case involving an RFOA.").

E. "DEVELOPMENT" OF DISPARATE IMPACT UNDER THE ADEA: *MEACHAM*

Although some celebrated the Court's decision in *City of Jackson* as a victory for older workers, many observers quickly recognized the limitations inherent in the plurality's holding.[97] One key issue was allocation of the burden for proving the RFOA exception.[98] Was it necessary for the employee to prove the unreasonableness of the employer's RFOA, as might be suggested under the *Wards Cove* framework?[99]

Or, consistent with traditional affirmative defenses, was it the employer who had to persuade the court of its RFOA?[100] The Court in *City of Jackson* did not clarify how the RFOA exception fit into the *Wards Cove* framework. What is more, it was not readily apparent that the *Wards Cove* framework was still the correct framework within which to assess these claims.[101] Accordingly, the Court granted certiorari in *Meacham v. Knolls Atomic Power Laboratory* to determine the allocation of the burden of proving the RFOA defense.[102]

In deciding *Meacham*, the Court reaffirmed the availability of disparate impact to ADEA plaintiffs.[103] More importantly the Court adopted the view, consistent with the government's amici briefs and the views of the EEOC, that an employer bears the burden of proving the RFOA as an affirmative defense.[104] The Court rejected the concerns of the defendant's amici, making a point of identifying the significant hurdles that remained for

97. *See, e.g.*, Sandra F. Sperino, *Disparate Impact or Negative Impact?: The Future of Non-Intentional Discrimination Claims Brought by the Elderly*, 13 ELDER L.J. 339, 359 (2005) ("[S]ome journalists and other commentators claimed that the case was a 'boon' for age discrimination claims. Such proclamations are, at best, overstated.").

98. *See* Tracey & Skoog, *supra* note 4, at 261–62 ("A final fly in the ointment for plaintiffs is the question of whether a plaintiff will need to show affirmatively that a business decision is not a RFOA in order to establish a violation of the Act.").

99. *See id.* at 244 ("[W]ill the plaintiff have to prove the activity is not an RFOA in order to state a claim?").

100. *See id.* ("[M]ust the defendant come forward with evidence to show the factor considered was an RFOA . . . ?"); *see also* BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining "affirmative defense").

101. *See* Tracey & Skoog, *supra* 4, at 261 ("[C]ourts may determine that there is simply no need to even address burdens of proof or the shifting of production with respect to RFOAs in a disparate impact case.").

102. 128 S. Ct. 2395, 2400 (2008).

103. *Id.* at 2403.

104. *Id.* at 2404.

disparate impact plaintiffs under the ADEA.[105] Aside from the requirement that a plaintiff articulate a specific employment practice, the Court stated that the "only thing at stake in this case is the gap between production and persuasion."[106] The Court's condolences, however, were perhaps understated. By reiterating "that the business necessity test should have no place in ADEA disparate-impact cases,"[107] but by failing to articulate an alternative test, the mere "gap" identified by the Court is trivial in a significant way—the employer's burden of persuasion will almost always be met by the production of any factor other than age. In practice, this all but precludes the possibility of disparate impact recovery under the ADEA.

II. THE STATUS QUO PROVIDES INADEQUATE PROTECTION FOR OLDER WORKERS

Older workers are vulnerable because of the psychological aspects of age discrimination, as well as an economic situation that fosters a unique threat of exploitation. Part A explains how an employer's reliance on a factor other than age will almost always be deemed sufficiently reasonable to preclude a plaintiff's recovery. Part B discusses developments in psychology regarding implicit bias that emphasize the key role disparate impact can play in remedying age discrimination and highlights the fallacy of using mental culpability as a prerequisite for its identification. Finally, Part C explains how the present economic situation stresses the need for a fair and workable theory of disparate impact under the ADEA, informing the cost-benefit assessment necessary to evaluate an employer's RFOA defense.

A. COURTS ARE LIKELY TO ESTABLISH TOO GREAT A THRESHOLD FOR DISPARATE IMPACT CLAIMS UNDER THE ADEA

Although the precise standard for evaluating an employer's RFOA defense remains unclear, the renewed rejection of "business necessity" standard in *Meacham*,[108] along with the Court's reliance on *Wards Cove* in *City of Jackson*,[109] makes it likely

105. *Id.* at 2406.
106. *Id.*
107. *Id.* at 2404.
108. *Id.*
109. Smith v. City of Jackson, 544 U.S. 228, 240 (2005) ("*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.").

that courts will subject an employer's RFOA defense to a trivial level of scrutiny. The Court's analysis in *Wards Cove* merely required that an employer provide a "business justification" for its conduct in order to avoid liability.[110] Although *Meacham* now properly requires employers to persuade courts of this legitimacy,[111] it is difficult to imagine a scenario where an employer would be unable to meet this burden. The problem stems from a number of areas of judicial confusion.

Courts analyzing the legitimacy of an RFOA are likely to conflate the current standard with a similar degree of deference afforded to corporations under the "business judgment rule."[112] The rule has been used in Title VII employment discrimination contexts in the past.[113] In corporate law, the business judgment rule is a subjective inquiry under which the challenged action must meet a mere test of rationality.[114] It is a principle that establishes judicial reluctance to second-guess the business decisions of corporate officers.[115] Under the ADEA, Courts have similarly engaged in the practice of requiring only that an employer's RFOA be subjectively reasonable and nondiscriminatory.[116] Courts hearing ADEA claims have upheld "business

110. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) ("[A]t the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

111. *Meacham*, 128 S. Ct. at 2402.

112. *See* Tracey & Skoog, *supra* note 4, at 256 ("[I]n light of *Smith*, it is likely that the esteem usually accorded to companies under the business judgment rule will become even more of a factor in the employment discrimination cases.").

113. *See, e.g.*, Deines v. Tex. Dep't of Protective & Regulatory Servs., 164 F.3d 277, 281 (5th Cir. 1999) ("[I]t is not the function of the jury to scrutinize . . . . [w]hether the employer's decision was the correct one, or the fair one, or the best one . . . ."); Blackman v. City of Dallas, No. 3:04-CV-2456-H, 2006 WL 1816390, at *3 (N.D. Tex. July 3, 2006) ("[T]he Court declines to challenge the business judgment of the City in its staffing decisions.").

114. *See generally* R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1337–39 (1993) (identifying three positions on the business judgment rule: (1) the Delaware rule, (2) the ALI rule, and (3) the Model Act rule).

115. *See generally* 1 DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 39–90 (5th ed. 1998) (discussing the elements of the rule).

116. *See, e.g.*, Allen v. Highlands Hosp. Corp., 545 F.3d 387, 405 (6th Cir. 2008) (agreeing with the lower court that the defendant's conduct "might not be the wisest method of running a hospital, but it is a reasonable factor other than age in response to HHC's bulging employee costs").

judgment" jury instructions.[117] Case law regarding employers' legitimate nondiscriminatory justifications is replete with references to protecting the sanctity of business judgments.[118] Courts that preside over claims of age discrimination often cite the maxim that they do not function as a "super-personnel department that reexamines the entity's business decisions."[119]

The deference afforded under the business judgment rule, however, is greater than the deference that should be afforded under the RFOA defense. In many cases, the business judgment rule is discussed with regard to a "presumption" in favor of the employer.[120] The business judgment rule forecloses corporate liability so long as directors and officers have operated in "good faith."[121] The doctrine essentially precludes a court from evaluating the "'fairness' or 'reasonableness' or 'rationality'" of a business's decisions.[122] Courts have also noted that the business judgment rule allows employers to terminate employees for any nondiscriminatory reason, even if the reason seems "objectively unwise."[123] The scope of the business judg-

117. *See, e.g.*, Jones v. Nat'l Am. Univ., Civ. 06-5075, 2009 WL 2005306, at *7 (D.S.D. July 8, 2009) (finding jury instructions in an ADEA case sufficient where "[t]he jury received instructions on the elements that Jones had to prove and on the business judgment rule").

118. *See, e.g.*, Walker v. AT&T Techs., 995 F.2d 846, 848 (8th Cir. 1993) ("[A]n employer has the right to assign work to an employee, to change an employee's duties, to refuse to assign a particular job to an employee or even to discharge for good reason, bad reason, or no reason at all absent intentional age discrimination . . . .").

119. Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 973 (8th Cir. 1994). *Compare id.* (discussing the quoted material with regard to employment discrimination), *with* Brehm v. Eisner, 746 A.2d 244, 266 (Del. 2000) ("To rule otherwise would invite courts to become *super-directors* . . . ." (emphasis added)).

120. *See* Balotti & Hanks, *supra* note 114, at 1348 ("The 'presumption' of the business judgment rule, however, may require a larger amount of proof to satisfy the preponderance-of-the-evidence standard . . . .").

121. Cole v. Nat'l Cash Credit Ass'n, 156 A. 183, 188 (Del. Ch. 1931) ("There is a presumption that the judgment of the governing body of a corporation, whether at the time it consists of directors or majority stockholders, is formed in good faith and inspired by a bona fides of purpose.").

122. *In re* RJR Nabisco, Inc. S'holders Litig., No. 10389, 1989 WL 7036, at *14 n.13 (Del. Ch. Jan. 31, 1989) ("To recognize in courts a residual power to review the substance of business decisions for 'fairness' or 'reasonableness' or 'rationality' where those decisions are made by truly disinterested directors in good faith and with appropriate care is to make of courts super-directors.").

123. Webber v. Int'l Paper Co., 417 F.3d 229, 238 (1st Cir. 2005) ("[P]ursuant to the 'business judgment' rule an employer is free to terminate an employee for any nondiscriminatory reason, even if its business judgment seems objectively unwise.").

ment rule is also inconsistent, granting judges wide latitude in deciding when to apply it.[124] These characteristics are ill-suited to address the concerns presented by age discrimination, particularly a standard demanding an objective assessment of reasonableness, and one lacking the presumed existence of a reasonably informed actor.[125] If the degree of deference afforded to an employer's RFOA is the same as that afforded under the business judgment rule, then it would appear that the only restraint upon an employer's conduct is its creativity in inventing an alternative nondiscriminatory justification for its behavior.

Courts have also mistaken case law upholding employers' legitimate nondiscriminatory reasons at the second stage of the *McDonnell Douglas* test as persuasive in determining the business legitimacy of an RFOA. In a typical disparate treatment claim, an employee first provides a prima facie case of discrimination.[126] In order to rebut this presumption, an employer responds by articulating a legitimate nondiscriminatory reason for its conduct.[127] It is a rare case where an employer will fail this step of the *McDonnell Douglas* burden-shifting arrangement.[128] Consequently, some courts proceed directly to analyzing the third step of the *McDonnell Douglas* framework.[129] In the past, Courts evaluating an employer's RFOA defense have

124. *See* MODEL BUS. CORP. ACT § 8.30 cmt. (stating that the contours of the business judgment rule are for the courts to decide); Gerard C. Martin, *Duties of Care Under the Revised Uniform Partnership Act*, 65 U. CHI. L. REV. 1307, 1327 (1998) ("The boundaries of the business judgment rule, a doctrine intended to minimize judicial discretion to second-guess managerial decisions, had itself become subject to varying interpretations by judges."); *cf.* Smith v. Van Gorkom, 488 A.2d 858, 888–90 (Del. 1985) (refusing to apply the business judgment rule when directors are not reasonably informed), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

125. *See* Jack M. Beermann, *Administrative-Law-Like Obligations on Privat[ized] Entities*, 49 UCLA L. REV. 1717, 1725 (2002) ("'Due care' under the business judgment rule is not the 'reasonable person' standard of negligence commonly used in tort litigation; rather it requires that corporate decisionmakers be 'reasonably informed' before making a decision.").

126. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

127. *Id.*

128. *See, e.g.*, Shaner v. Synthes (USA), 204 F.3d 494, 501 (3d Cir. 2000) ("Our experience is that most cases turn on the third stage, i.e., can the plaintiff establish pretext."); *see also* Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 573 (2001) ("Proving that an employer's LNRs [legitimate nondiscriminatory reasons] are untrue is not easy.").

129. *See, e.g.*, Veliz v. City of Minneapolis, Civ. No. 07-2376, 2008 WL 2622966, at *5 (D. Minn. July 2, 2008) ("[The court] will jump directly to the ultimate question of discrimination [and retaliation] *vel non*." (internal quotation marks omitted)).

applied these standards interchangeably.[130] For some period of time, the RFOA defense was thought to encapsulate the second stage of the *McDonnell Douglas* test.[131]

The burden required to prove the business legitimacy of an RFOA, however, should be greater than the burden required to rebut an employee's prima facie case of discrimination. First, under the *McDonnell Douglas* test, the employer must only meet a burden of production—the burden of persuasion remaining at all times with the plaintiff.[132] The framework requires only that an employer articulate a nondiscriminatory justification for its conduct, without considering its credibility.[133] The *Meacham* Court, however, places the burden of persuasion for establishing the legitimacy of an RFOA upon the employer, requiring not only identification of a factor other than age, but also a yet-to-be-articulated degree of convincing reasonableness.[134] Additionally, under the *McDonnell Douglas* framework, an employee has the opportunity at the third stage to refute the employer's legitimate nondiscriminatory reason by proving pretext.[135] In evaluating the RFOA defense, the Court has not articulated how an employee might be given a similar opportunity to refute the business legitimacy of an employer's reliance on a factor other than age.

There is simply a paucity of case law discussing the precise standard by which a court should evaluate an employer's RFOA

130. *See, e.g.*, Bender v. Hecht's Dep't Stores, 455 F.3d 612, 624 (6th Cir. 2006) ("According to Hecht's, it implemented the workforce reduction with the goal of reducing expenses and retaining the strongest employees. . . . These certainly qualify as legitimate, nondiscriminatory reasons for the company's actions."); Reese v. Potter, No. Civ. A. 03-1987, 2005 WL 3274052, at *5 (D.D.C. Sept. 28, 2005) ("Because the ADEA does not prohibit adverse employment action based on reasonable factors other than age or for good cause, the USPS has met its initial burden of providing a legitimate nondiscriminatory reason for denying Ms. Reese the promotion." (internal quotation marks and citations omitted)).

131. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979) ("In [the RFOA defense], to be sure, Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence. But as *McDonnell Douglas* is merely a sensible, orderly way to evaluate the evidence in light of common experience, it affords ample scope for the operation of this provision." (internal quotation marks and citations omitted)).

132. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

133. *See id.* at 257.

134. Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2405 (2008).

135. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

defense.[136] Courts, therefore, currently possess excessive discretion in determining what types of factors other than age will be sufficiently reasonable.[137] It should come as no surprise that a variety of factors that might meet the test of business legitimacy are also functional proxies for what would otherwise be age discrimination.[138] An employee's proximity to retirement,[139] salary level,[140] and the number of years employed[141] are almost always directly related to an individual's age and have been upheld as RFOAs. Subjective evaluations of an employee's physical capability, willingness to change, and ability to interact with others might also illicit bias on behalf of evaluators.[142] Current case law, however, does not indicate how closely related to age a factor can be while still functioning as a valid RFOA.[143]

B. THE CURRENT STANDARD INADEQUATELY ADDRESSES THE NATURE OF AGE DISCRIMINATION

The excessive deference likely to be afforded under a standard of business legitimacy is further complicated by the nature of age discrimination itself. Employers are not only unlikely to admit to relying on age as a factor in their employment

136. *See* Tracey & Skoog, *supra* note 4, at 258 ("The Supreme Court has yet to articulate the context in which it will evaluate RFOAs and the business rationale supporting them.").

137. *See id.* at 258–63 (discussing the various potential interpretations courts may adopt in evaluating employers' RFOA defenses).

138. *Meacham*, 128 S. Ct. at 2403 ("Reasonableness is . . . not necessarily correlated with [age] in any particular way: a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite.").

139. *See, e.g.*, N.Y. 10-13 Ass'n, Inc. v. City of New York, No. 98 Civ. 1425, 2000 WL 1376101, at *10 (S.D.N.Y. Sept. 22, 2000) (finding that connecting benefits provided to retirement status based on years of service was a valid RFOA).

140. *See, e.g.*, Allen v. Highlands Hosp. Corp., 545 F.3d 387, 404–05 (6th Cir. 2008) (finding that termination of employees based on salary was a valid RFOA).

141. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 242–43 (2005) (finding that giving larger salary increases to lower echelon employees was a valid RFOA).

142. Medina v. Ramsey Steel Co., 238 F.3d 674, 681 (5th Cir. 2001) ("While subjective criteria . . . may serve legitimate functions, they also provide opportunities for unlawful discrimination because the criteria itself may be pretext for age discrimination." (internal quotation marks omitted)).

143. *See Meacham*, 128 S. Ct. at 2403.

decisions,[144] they may not even be aware of its effect.[145] The theory of disparate impact, however, proceeds by substituting a showing of statistical disparity for an inquiry into intent.[146] To this extent, disparate impact is distinct from disparate treatment in establishing liability for discrimination caused by policies and procedures, as opposed to particular individuals.[147] Several developments in social psychology support these conclusions, and courts should allow them to serve an evidentiary role for determining liability for discrimination under the ADEA.

Studies show that individuals are surprisingly adept at offering nondiscriminatory justifications for their discriminatory behavior.[148] One such study charged individuals with selecting between two candidates—one female and one male—for the job of a construction manager.[149] In one trial, the male candidate had more experience, but less education; in a separate trial, the male candidate had more education, but less experience.[150] Irrespective of the criteria employed, most individuals chose the male candidate over the female candidate, and justified their decision using whichever criterion was superior for their chosen candidate.[151] Although the study observed these results with

144. *See* Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987) (Posner, J.) ("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it . . . .").

145. *See* Krieger & Fiske, *supra* note 2, at 1036–37 ("[W]hen faced with making a choice between members of different social groups, people whose preferences are implicitly shaped by group membership spontaneously search for independent decision criteria consistent with their preference, and use those criteria to justify their choices to themselves and others.").

146. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

147. *See* Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1179–82 (2007) (offering a critique of a unitary theory of employment discrimination liability and explaining the distinction between disparate impact and disparate treatment).

148. *See, e.g.*, Samuel R. Sommers & Michael I. Norton, *Race-Based Judgment, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 263 (2007) ("[P]eople can offer compelling explanations for their behavior even when unaware of the factors—such as race—that are actually influential.").

149. Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 820 (2004).

150. *Id.*

151. *See id.* ("[M]ale participants who select men for management positions justify that selection by inflating the importance of whichever qualification favors a male candidate.").

respect to gender, from a psychological perspective, age, along with race, are considered equally salient characteristics and thus similar results could be expected.[152] Researchers posit that social pressure and awareness of laws against discrimination compel individuals to justify their decisions using legitimate criterion, irrespective of the role of illegitimate factors in their decision.[153] Researchers also note that this phenomenon occurs both consciously and unconsciously.[154] Thus, for disparate impact claims under the present standard of business legitimacy, an employer will almost always be able to produce a sufficient RFOA.

To the extent that many of these processes occur without the conscious awareness of the test subject, disparate impact is an important remedy for victims of age discrimination. Studies consistently show that people harbor negative attitudes towards aging and elderly people.[155] These stereotypes suggest that older people are "cognitively slower, sexless, unable or unwilling to change, less intelligent, weaker, physically slower, stubborn, negative, conservative and dependant."[156] Acceptance of these attitudes is often institutionalized, taking the form of company policies and operating procedures, making their presence less conspicuous.[157] Studies also show that these attitudes operate at an implicit level. Data collected from respondents on

152. *See* Marilynn B. Brewer, *A Dual Process Model of Impression Formation*, *in* 1 ADVANCES IN SOCIAL COGNITION 6–9 (Thomas K. Srull & Robert S. Wyer, Jr. eds., 1988).

153. *See* Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 39–44 (2006) ("Unfortunately for litigants seeking to prove bias in these decisions, people are quite good at masking their biased behavior by couching it in more acceptable terms, both to avoid the appearance of impropriety and as part of a more general effort to view themselves and their choices positively.").

154. *See* Norton et al., *supra* note 149, at 828 ("It is quite clear that the phenomenon can be entirely conscious and strategic . . . . It is also possible that the employer may truly wish to avoid using social category information . . . yet unknowingly allow these stereotypes to influence his review of resumes.").

155. *See* Mary E. Kite & Lisa Smith Wagner, *Attitudes Toward Older Adults*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 129, 129–61 (Todd D. Nelson ed., 2002).

156. Todd D. Nelson, *The Young Science of Prejudice Against Older Adults: Established Answers and Open Questions About Ageism*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 45, 45–46 (Eugene Borgida & Susan T. Fiske eds., 2008).

157. *Cf. id.* at 49 (noting the institutionalization of ageism and describing its subtle manifestations).

the Implicit Association Test (IAT), showed that irrespective of age, a majority of individuals hold "negative implicit attitudes towards older people."[158] A number of other studies support the conclusion that these negative attitudes operate without conscious awareness to influence people's actual behavior.[159] Unfortunately for victims of age discrimination, the lack of explicit evidence will most often preclude the possibility of a successful claim for disparate treatment under the ADEA.[160] The remedy of disparate impact, however, proceeds without explicit evidence of discrimination on behalf of the decision maker.[161] For this reason, broad application of disparate impact theory is advocated by many social scientists involved in IAT research—it is important that their findings be available for consideration by the trier of fact.[162]

The implicit stereotypes these studies measure are made salient when individuals are generally queried about their attitudes toward "older people."[163] However, when individuals are asked about one older person in particular, the response is less likely to reflect a negative stereotype.[164] Age discrimination in particular is thus less likely to operate in a way that produces the type of evidence necessary to bring a disparate treatment claim. Since employers are less likely to harbor negative stereotypes about a specific employee, the direct evidence required for a disparate treatment claim will often be unavailable, creating a particular problem given the restrictive interpretations the Supreme Court has adopted for mixed-motive instructions and the general use of circumstantial evidence in ADEA disparate

158. *See id.* at 50.

159. *See id.* at 50–51.

160. The Court recently held that the ADEA does not authorize mixed-motive disparate treatment claims. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2352 (2009). Accordingly, a disparate treatment claim can only succeed where the plaintiff is able to prove "that age was the 'but-for' cause of the challenged employer decision." *Id.* at 2351. As a result, disparate treatment claims under the ADEA will fail when the employer's decision was motivated by both impermissible and permissible factors. A plaintiff lacking direct evidence, of course, would face extreme difficulty proving that age was the sole consideration in the employer's decision.

161. *See* Seicshnaydre, *supra* note 147, at 1181 ("The focus . . . is on the neutral policy or procedure, its effects, and its justifications, not on the decision maker, his or her decisions, and the decision-making process.").

162. *See* Krieger & Fiske, *supra* note 2, at 1004.

163. *See* Walter H. Crockett & Mary Lee Hummert, *Perceptions of Aging and the Elderly*, *in* 7 ANNUAL REVIEW OF GERONTOLOGY AND GERIATRICS 217, 220 (K. Warner Schaie & Carl Eisdorfer eds., 1987).

164. *See id.* at 218.

treatment claims.[165] As a large percentage of negative stereotypes about older people will be the result of macro generalizations about the class, it should come as no surprise that age discrimination will often occur in situations like large-scale involuntary reductions-in-force,[166] where the remedy best suited to address such claims is disparate impact.

C. THE ECONOMIC CRISIS MAKES ALLEVIATING AGE DISCRIMINATION PARTICULARLY IMPORTANT

The current economic climate places older employees in a uniquely precarious situation. Economic hardship often falls disproportionately upon these individuals.[167] From an employment perspective, older workers often appear to be the most expensive employees, carrying with them large costs in salary, healthcare, accommodations, and pensions.[168] The number of individuals subject to this risk is growing faster than ever—a baby boomer turns sixty every seven seconds.[169] Since the retirement savings of most of these Americans have suffered major setbacks, many of these older workers must now entertain the prospect of working well beyond their projected age of retirement.[170] It should come as no surprise then, that during periods of economic downturn claims of age discrimination rise sharply.[171] The economic concerns giving rise to extreme cost-

165. Since mixed-motive instructions are not authorized for disparate treatment claims under the ADEA, *see Gross*, 129 S. Ct. at 2352, it will be difficult, if not impossible, for plaintiffs to rely solely on circumstantial evidence to prove that age was the "but-for" cause of the employer's decision.

166. *See* Sperino, *supra* note 97, at 371 ("Of the 176 total cases, 74 (approximately 42%) of the cases involved employees challenging termination and rehiring decisions relating to reductions-in-force.").

167. MARIA HEIDKAMP & CARL E. VAN HORN, SLOAN CTR. ON AGING & WORK AT BOSTON COLL., ISSUE BRIEF 16: OLDER AND OUT OF WORK: TRENDS IN OLDER WORKER DISPLACEMENT 2 (2008), http://agingandwork.bc.edu/documents/IB16_OlderOutofWork.pdf (discussing the effects of the recent economic crisis on older workers).

168. *See* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 254–58 (1990) ("[S]ince higher compensation costs are often a function of accumulated seniority, the cost comparison predictably, even if unintentionally, operates against older workers.").

169. DEP'T OF LABOR, *supra* note 15, at 8.

170. SLOAN CTR. ON AGING & WORK AT BOSTON COLL., FACT SHEET 25: TIMING OF RETIREMENT AND THE CURRENT ECONOMIC CRISIS 1 (2009), http://agingandwork.bc.edu/documents/FS25_TimingofRetirement_2009-08-18.pdf (discussing the increasing number of older workers postponing retirement).

171. *See, e.g.*, Kathy Chen, *Age-Discrimination Complaints Rose 8.7% in 2001 Amid Overall Increase in Claims*, WALL ST. J., Feb. 25, 2002, at B13

cutting measures at the expense of older employees support the wider availability of disparate impact under the ADEA, and a solution that allows the trier of fact to make a cost-benefit assessment based on the evidence before it.

During periods of economic downturn, involuntary reductions-in-force based on age discrimination take unfair and ultimately inefficient advantage of the implicit long-term contracts created between employees and their employers.[172] Lazear's model of labor relations suggests that employees enter into implicit arrangements with their employers for wages below their productivity at the onset of their career, with the expectation that they will be compensated above their productivity later in their career.[173] The model is beneficial to employers because it reduces risks associated with hiring new employees and encourages worker effort.[174] The model is also beneficial to employees because it results in promotions and higher earnings later in their careers.[175] An employer who terminates its employee before the present value of the employee's total productivity and earned wages reach equilibrium, however, obtains an unfair windfall given the total life cycle of the employee.[176] Economic decline creates a dangerous incentive for this type of behavior through involuntary reductions-in-force based on proxies for age.[177] The theory of disparate impact is best-suited to address these claims.[178] The Court's present approach to evaluating employers' RFOA, however, is unlikely to classify such

("[T]he number of age-bias claims against private-sector employers jumped 8.7% to 17,405 in the 2001 fiscal year that ended Sept. 30 . . . .").

172. *See generally* Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 J. POL. ECON. 1261–81 (1979) (describing the inefficient practice of forcing older workers into retirement rather than decreasing their wages proportionate to relative productivity).

173. *See* David Neumark, *The Age Discrimination in Employment Act and the Challenge of Population Aging*, 31 RESEARCH ON AGING 41, 57 (2009).

174. *See id.*

175. *See id.*

176. *See id.*

177. *See* Kohrman & Hayes, *supra* note 17, at 160–61 ("A second explanation as to why older workers experience such high job displacement rates draws on the insights of microeconomic theory and posits that older workers are particularly vulnerable in RIF [reduction-in-force] settings, not because of age bias, but because of 'wage bias.'").

178. *See* Kaminshine, *supra* note 168, at 318–20 ("[T]he risk is that in a large-scale layoff, where abilities within the targeted pool may vary, a cost conscious employer may sacrifice the accuracy of individual performance reviews and rely on age-related salary comparisons as a more crude but less costly selection device.").

conduct as creating liability.[179] The cost, unfortunately, is borne by more than just the individual employee.

Reductions-in-force based on age discrimination present a threat not only to the financial well-being of older workers, but the health of the economy as a whole. Age discrimination inefficiently removes valuable employees from the workforce.[180] For some time scholars have noted concerns over the "graying" of the American workforce and the vacuum of worker experience expected to follow suit.[181] While reliance upon non-performance-based factors is inconsistent with market efficiency, it is nevertheless clear that the market sometimes fails to eliminate such inefficient discriminatory behavior.[182] Even if short-term incentives exist to engage in statistical discrimination based on age,[183] such discrimination is contrary to the types of long-term implicit contracts formed under Lazear's model of labor relations[184] and is the precise type of discrimination criticized in the Wirtz Report.[185] In any event, although enforcement of the ADEA places restraints upon the business decisions of employers, it is not necessarily the case that such

179. *See* Meacham v. Knolls Atomic Power Lab., 128. S. Ct. 2395, 2404–05 (2008).

180. *See* WIRTZ, *supra* note 24, at 18 (describing the harms of unemployment in the older workforce on the national economy).

181. *See* DEP'T OF LABOR, *supra* note 15, at 5 ("[T]he aging of the population has many implications for the U.S. labor market, including possible labor and skill shortages. Employers will be challenged to find and train replacements as some of their most experienced workers retire."); BEVERLY GOLDBERG, AGE WORKS: WHAT CORPORATE AMERICA MUST DO TO SURVIVE THE GRAYING OF THE WORKFORCE 21–24 (2000) (noting the trend toward a "graying" workforce and the potential shortage of workers with modern skills); Luo, *supra* note 15 (describing companies' reluctance to fire older workers and lose their substantial experience).

182. *See* John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1423–31 (1986) ("Some firms will soon realize that they will be unable to compete and therefore will exit more rapidly, whereas others will try to ward off the inevitable and succumb more slowly to the ineluctable market forces."); Kaminshine, *supra* note 168, at 239 ("[D]iscrimination, at least in the short term, is not always economically irrational. According to economists, an employer might find forbidden criteria attractive, even if only crudely predictive of productivity needs, because they are relatively convenient and cheap to administer.").

183. *See* RICHARD A. POSNER, AGING AND OLD AGE 322–25 (1995) (describing the incentives of statistical discrimination based upon age to "weed out" inefficient workers).

184. *See* Neumark, *supra* note 173, at 57 (explaining Lazear's labor-relations model).

185. *See* WIRTZ, *supra* note 24, at 18–19.

restraints will hinder economic potential.[186] A revised standard allowing for a cost-benefit assessment of reasonableness seems likely to alleviate such concerns.

III. A NEW STANDARD FOR EVALUATING THE RFOA DEFENSE

In the four years since *City of Jackson*, there has yet to be a successful disparate impact claim under the ADEA. Courts have routinely dismissed claims at the summary judgment stage and earlier, for either failing to articulate a specific employment practice,[187] or for an inability to overcome an employer's RFOA defense.[188] The practical impossibility for plaintiffs to succeed upon these claims, despite the Court's recognition of the disparate impact theory's availability under the ADEA, should raise concerns about the appropriate standards by which these claims are judged. With *Meacham*'s resolution of a central issue regarding the allocation of burdens, full attention can be devoted towards defining a standard for evaluating the RFOA defense.

The Supreme Court's jurisprudence, however, provides stark guidance for assessing the "reasonableness" element of the defense.[189] While the Court's decision in *Meacham* makes it clear that application of the "business necessity" standard "'[did] not survive' *City of Jackson*," it offers no insight as to when an employer's RFOA might be insufficient to preclude liability.[190] Lower courts are left with no alternative other than to analyze an employer's RFOA with levels of scrutiny analog-

186. *See* Donohue, *supra* note 182, at 1431 ("[A]ntidiscrimination legislation may be thought of as a tool to perfect the market response to employer discrimination.").

187. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (finding that plaintiff's mere identification of disparity in pay plan was not a sufficiently specific employment practice).

188. *See, e.g.*, Allen v. Highlands Hosp. Corp., 545 F.3d 387, 405 (6th Cir. 2008).

189. *See* Mack A. Player, Wards Cove Packing *or Not* Wards Cove Packing*? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 839 (1997) (identifying the RFOA defense as "virtually unlitigated under the ADEA").

190. Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2401 n.9 (2008); *see also* Sarah Benjes, Comment, Smith v. City of Jackson*: A Pretext of Victory for Employees*, 83 DENV. U. L. REV. 231, 249 (2005) ("[T]he Court did not propose any limitations to this RFOA test, nor did it offer any factors to judge reasonableness or any examples of what would constitute an unreasonable non-age factor.").

ous to the type of business legitimacy standard articulated in *Wards Cove*.[191] In such scenarios, courts have afforded employers under the RFOA defense the degree of deference used under the business judgment rule,[192] and accepted as persuasive employers' survival of the second stage of the *McDonnell Douglas* framework.[193] Both situations render the theory of disparate impact practically unavailable for plaintiffs under the ADEA, but this could not have been the intention of the Supreme Court in recognizing the availability of disparate impact for victims of age discrimination.

A. MOTIVE IN ANTIDISCRIMINATION LAW: REFOCUSING ON THE FUNDAMENTALS

The consequence of using mere business legitimacy to evaluate an employer's RFOA is that only one type of conduct will establish liability under the ADEA: explicit reliance upon age as a discriminating factor. Under a business legitimacy standard, courts tend to find practically any proxy for age to be a valid RFOA, thus shielding an employer from liability.[194] The nature of age discrimination operates in a way that makes the availability of this evidence highly unlikely; when it is, a plaintiff is able to bring a claim for disparate treatment instead.[195] Individuals satisfied with this outcome are comfortable with the underlying assumption that smoking-gun evidence of intent to discriminate is an essential aspect of a successful employ-

191. *See* Tracey & Skoog, *supra* note 4, at 263 (concluding that courts are likely to use low thresholds when evaluating an employer's RFOA).

192. *See, e.g.*, Walker v. City of Cabot, No. 4:08-CV-00139, 2008 WL 4816617, at *4 (E.D. Ark. Nov. 4, 2008) ("Although Walker appears to contend that his termination was not financially necessary as of June 2007, even assuming that this is true, it was reasonable to terminate Walker to eliminate redundant positions and reduce expenses.").

193. *See, e.g.*, Aliotta v. Bair, 576 F. Supp. 2d 113, 128 (D.D.C. 2008) ("[T]he plaintiffs' evidence does not rebut the defendant's proffered legitimate, nondiscriminatory reason for the 2005 downsizing.").

194. *See, e.g.*, Schlitz v. Burlington N. R.R., 115 F.3d 1407, 1411–12 (8th Cir. 1997) ("[T]he factors used by Andres in making his hiring decisions, such as salary and grade level . . . are correlative with age, but are not prohibited considerations.").

195. *See* Tracey & Skoog, *supra* note 4, at 260 ("In a disparate impact case, the specter of intentional discrimination does not raise its head, and the plaintiff has no obligation to prove it. Certainly had a plaintiff been able to do so, he or she would or should have also filed a claim under a disparate treatment theory.").

ment age discrimination claim.[196] In order to formulate an effective standard by which to judge the RFOA defense, this assumption must be discredited.

A basic, although important, distinction to keep in mind is the fundamental difference between criminal and tort liability. Antidiscrimination law is best served by emphasizing its obvious association with the latter.[197] The essence of criminal liability lies in a determination of a defendant's mens rea; a characteristic making it generally incompatible with the use of economic analysis to seek policy-based outcomes.[198] For example, criminal law makes the appropriate moral distinction between one who causes the death of another intentionally, and one who causes it negligently.[199] With the exception of certain *malum prohibitum* crimes,[200] a defendant will be subject to punishment only after finding a requisite level of mental culpability.[201] Investigation into motive and intent is justified when the philosophies underlying criminal law—deterrence, rehabilitation, incapacitation, and retribution—are taken into consideration.[202] Yet, scholars have experienced difficulties justifying the element of mens rea in economic terms that explain, and thus help control, human behavior.[203]

196. *See* Seicshnaydre, *supra* note 147, at 1145 ("Litigants, courts, and theorists have all contributed to the enmeshment of the disparate impact and disparate treatment theories, and each of these stakeholders has remained stuck on state of mind evidence in a way that has helped erode the disparate impact theory.").

197. *See* Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. 259, 265–66 (2008) (arguing that tort liability does not require an inquiry into normative questions of fault, and that future developments in antidiscrimination law should instead focus upon policy objectives).

198. *See* Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CAL. L. REV. 895, 918 (2000) ("If it is indeed correct that the criminal category is demarcated by the notion of mens rea, then the distinctive nature of criminal, as opposed to civil, liability cannot be accounted for in economic terms.").

199. *See* Black, *supra* note 197, at 267 ("This is not to suggest that people who accidentally kill and those who intentionally kill are morally indistinguishable from one another; a difference certainly exists and criminal law takes that difference into account.").

200. *Malum prohibitum* is defined as "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." BLACK'S LAW DICTIONARY 1045 (9th ed. 2009).

201. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW § 5.2 (4th ed. 2003) (discussing the mens rea requirement in criminal law).

202. *See generally id.* § 1.5 (discussing criminal theories of punishment).

203. *See* Finkelstein, *supra* note 198, at 918 ("[E]conomic analysis fails to offer an adequate descriptive account of the criminal . . . because the exemp-

In comparison, tort liability requires no equivalent assessment of mental culpability.[204] Although some torts are actionable only upon a showing of intent or recklessness, this examination of fault is, at most, a secondary consideration.[205] The primary inquiry of tort law surrounds the prevention of undesirable policy outcomes.[206] For example, determination of a defendant's motive or intent is irrelevant to a plaintiff's claim for loss of consortium.[207] Likewise, application of Judge Hand's familiar B < PL formula does not concern itself with a fault-based inquiry.[208] The Hand formula is an objective cost-benefit assessment, establishing negligence when the cost of exercising care (B) is less than the magnitude of injury (L) discounted by its probability (P).[209] To this extent, most tort law proceeds by identifying a desirable policy outcome and then formulating the legal standards necessary to achieve it.[210] Standards in anti-discrimination law should follow this fundamental premise.

Articulating antidiscrimination law as a species of tort law is not a novel assertion.[211] Nor does this fact alone exclude it from attaching elements of fault to certain causes of action—many torts contain such requirements.[212] The comparison,

tion of that category from cost-benefit analysis is based on the fact that the harm is inflicted with awareness and control.").

204. *See* Black, *supra* note 197, at 267 ("Tort law does not delude itself, as does antidiscrimination law, with the notion that it is punishing 'wrongdoers' or morally unacceptable 'faulty' conduct.").

205. *See id.* at 268 ("[A] tort-based approach demands an identification of the actual results of the intent standard, or any other standard, and whether those results further our goals.").

206. *See id.* ("[T]ort principles demonstrate that, without attention to the goals or intended results of equal protection and antidiscrimination, nothing justifies the intent standard or renders it more appropriate than other standards.").

207. *See id.* at 267 (discussing why a tort system need not consider fault if "its only purpose is to compensate family members for their loss of support").

208. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (concluding that determining duty is a function of three variables).

209. *Id.*

210. *See* Black, *supra* note 197, at 293 ("As society changed, so did its needs, dangers, cultural customs, and goals. Tort law simply followed these changes, attempting to create standards that reflected the varying concepts of social value and utility.").

211. *See generally* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 970–71 (1993) (offering an alternative to the popular notion that moral condemnation is key to imposing liability for discrimination).

212. *See* Black, *supra* note 197, at 278 ("The justification for a higher mens rea in these cases is not based on a concept of fault, but rather is primarily a

however, is simply intended to show that there is nothing about a framework for antidiscrimination law that inherently mandates a showing of motive or intent.[213] Furthermore, the broader principle of tort law, involving a focus upon policy-driven outcomes as opposed to moral condemnation, is helpful when considering an alternative standard for evaluating the RFOA defense.

B. EVALUATING REASONABLENESS: A FAMILIAR INQUIRY

If the fundamental premise of tort law is achieving desirable policy outcomes, then statutorily speaking, the RFOA defense is an excellent candidate to be interpreted in such a manner. Courts commonly approach "reasonableness" with a balancing assessment.[214] Accordingly, evaluating an employer's RFOA should be conducted within the rubric of the familiar Hand formula: $B < PL$.[215] If the goal of the ADEA is to reduce the harm caused by age discrimination, the costs of that harm can be represented by the gravity of the adverse employment action (L) discounted by the likelihood that age played a role as an illegitimate criterion (P). Employers have thus relied upon an unreasonable factor when the total cost of injury (P x L) is greater than the cost that would have been imposed upon an employer forgoing the decision relying upon that factor (B).

Take, for example, an employer who decides to eliminate thirty employees during an internal reorganization by evaluating employee performance across a range of subjective factors. As a result of this reduction-in-force, twenty-five of the thirty employees terminated are over the age of forty and thus within the class protected under the ADEA. If these twenty-five employees filed a claim under the ADEA for disparate impact, the employer's reliance on a factor other than age would be a successful defense if the employer could persuade the trier of fact that the magnitude of the injury (P), multiplied by the probability of discrimination (L), was less than the cost that the employer would have borne if it had not engaged in the restructuring (B).

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factor of cost-utility balancing, which must account for the inherent social utility and value of the challenged activity.").

213. *See id.* at 279 ("The breadth and variance within the above spectrum of torts demonstrates that no inherent, consistent, or agreed upon form of fault exists to necessarily justify forcing one individual to compensate another.").

214. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (balancing interests to determine "reasonableness" of searches and seizures).

215. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

If the employer in this example persuaded the trier of fact that by terminating the twenty-five plaintiffs and reassigning their job duties elsewhere it obtained a cost-savings of $500,000 per year, this amount would represent (B). Providing such evidence should be within an employer's capability—employers are already on notice concerning the importance of documenting and evaluating costs associated with relying upon different factors before engaging in internal restructuring as a method of cutting costs.[216] In assessing the employer's theoretical burden, the trier of fact should consider the nature of the costs urged by the employer and reject inclusion of supracompetitive profits derived from market failure.[217] The only profit margins that should be cognizable within the formula are those that allow the employer to cover its own costs and not those that allow the employer to raise prices above its costs in exploitation of a non-competitive market.[218]

Calculating the likelihood that a given factor will be influenced by age discrimination (P) is also within the capability of the trier of fact.[219] Both employees and employers are capable of introducing expert testimony providing the trier of fact with tools to assess the likelihood of age discrimination. For example, the employer in this example might provide evidence that precautionary measures taken during its internal restructuring reduced the likelihood of age being used as an illegitimate criterion.[220] The plaintiff might respond with evidence showing

216. *See* O'Kelly E. McWilliams III & Nimesh M. Patel, *Diversity Management in an Economic Downturn: Diversity & Risk Mitigation in Corporate Restructuring*, BUS. L. TODAY, Jan.–Feb. 2009, at 59, 60 ("The need for identifying and documenting the business needs driving the restructuring efforts and the factors to be used in making the decisions, as well as the reasonableness of the factors, was recently emphasized by the U.S. Supreme Court in [*Meacham*].").

217. *See* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 CAL. L. REV. 669, 718 (2007) ("Distinguishing pro-competitive increments to profits (those that let firms cover their costs) from anti-competitive increments to profits (those that let firms raise the price above their costs) challenges this unconditional deference to the normative reasonableness of profitability.").

218. *See id.* at 690 ("An employer who merely matches the market salaries of low-wage employees may merely be reflecting these employees' relative lack of market power.").

219. *See, e.g.*, Adams v. Ameritech Servs., Inc., 231 F.3d 414, 428 (7th Cir. 2000) (permitting statistical expert testimony to proceed in an ADEA disparate impact claim).

220. *See* McWilliams & Patel, *supra* note 216, at 60 ("[M]anagement should highlight the objective reasons for grouping employees subject to restructuring

that the evaluator's subjective determinations about an employee's physical capabilities, motivation, and willingness to adapt to new technologies had a high probability of being influenced by implicit age-related assumptions.[221] Inevitably, the trier of fact will face a difficult assessment concerning the likelihood of age having played a role in the decision-making process—one that might not be easily quantifiable.[222] Such an assessment, however, is not unusual or excessively burdensome. Since the beginning of negligence as a standard for liability, courts have been asked to determine the probability of injury in formulating the duty of care.[223] Courts engage in similar balancing inquiries in other types of employment cases.[224] They face an even more challenging task when asked to make such assessments about the low-probability high-cost catastrophic injuries involved toxic tort cases.[225]

For the purpose of this simplified example, say that the trier of fact determines a 75% probability exists for the presence of age bias as an illegitimate criterion. This probability (P) would be multiplied by the magnitude of the injury (L), as determined by the total cost to the class of disparate impact plaintiffs if discrimination were to found to have occurred. As-

efforts, such as by business unit, responsibilities/job duties, geographic location, etc.").

221. *See* Medina v. Ramsey Steel Co., 238 F.3d 674, 680 (5th Cir. 2001) ("While subjective criteria . . . 'may serve legitimate functions, they also provide opportunities for unlawful discrimination' because the criteria itself may be pretext for age discrimination." (quoting Lindsey v. Prive Corp., 987 F.2d 324, 327 (5th Cir. 1993))); Mistretta v. Sandia Corp., 15 Fair Empl. Prac. Cas. (BNA) 1690, 1711 (D.N.M. Oct. 20, 1977), *aff'd*, 639 F.2d 588 (10th Cir. 1980) ("Management's concern about the increasing age of its staff, reduced hiring, new technical developments, and emphasis on recruiting and advancing young Ph'd's [sic] might not violate ADEA in themselves, but these policies and attitudes could easily be reflected in subjective performance ratings.").

222. *See* McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987) (admitting that Hand's formula is a conceptual tool that tends to defy reliable quantification).

223. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 182 (5th ed. 1998) ("[T]he method [Hand's formula] capsulizes has been used to determine negligence ever since negligence was first adopted as the standard to govern accident cases.").

224. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967) ("In some situations, 'legitimate and substantial business justifications' for refusing to reinstate employees who engaged in an economic strike, have been recognized.").

225. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 256–72 (1987) (analyzing negligence in the context of catastrophic injuries).

sessing this variable shifts the focus away from the present approach, which considers the reasonability of the employer's burden in a vacuum, to one that includes the cost borne by the plaintiff as well. Evaluating the magnitude of injury should also not be problematic. The gravity of discriminatory adverse employment actions should inevitably be considered by the trier of fact when determining the award of damages. Similarly, the possibility of loss and the expected cost of preventing the loss are also part of the common practice for formulating the duty of care in negligence cases.[226] Assessments of the injuries borne by individuals and society as a result of age discrimination were made as early as the Wirtz Report.[227] The magnitude of injury might be based upon front pay, back pay, payment of wages owed, and injunctive relief, as well as injuries caused by emotional distress, and pain and suffering. Here, assume that the total amount of front and back pay owed to the class was calculated at $1,000,000. In this example, the employer's defense would fail since the $500,000 cost savings (B) would be less than the $750,000 total injury as determined by the $1,000,000 cost to the plaintiffs (L) discounted by the 75% probability of discrimination (P).

Despite the difficulties that often exist in manipulating courtroom evidence into an algebraic formula, and the unlikelihood of a real world situation as easily quantifiable as the above example, evaluating these variables is a workable standard within the context of the RFOA defense.[228] Even Judge Hand recognized that the variables in his equation would not always be subject to simple quantitative assessment.[229] Moreover, judges and juries are required to engage in this type of cost-benefit analysis on a regular basis. Thus, using the formu-

226. *See* POSNER, *supra* note 223, at 182.

227. *See* WIRTZ, *supra* note 24, at 18–19 (discussing economic injury incurred by individuals terminated as a result of age discrimination).

228. This is especially true because Judge Hand's formula has been applied in other areas of legal analysis. *See, e.g.*, United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (applying the Hand formula to a constitutional determination of free speech); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986) (suggesting that a court should apply the Hand formula to determine when to regulate speech).

229. *See* Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940) (Hand, J.) ("All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically."), *rev'd on other grounds*, 312 U.S. 492 (1941).

la to evaluate an employer's RFOA seems unlikely to pose any new problems.[230]

Most of the information necessary to assess the variables of the B < PL formula can be provided by the litigants through the introduction of expert testimony. This is particularly true for determining the likelihood that age played a role as an illegitimate criterion, (P). A number of critics, however, disapprove of expert testimony premised upon empirical research claiming to have established the effects of implicit bias in workplace settings.[231] Indeed, courts are reluctant to admit the type of expert testimony that sheds light on these inquiries.[232] This reluctance is not specific to claims of age discrimination.[233] The behavioral-realist movement has responded to the refusal of courts to admit the testimony of peer-reviewed social scientists for the purpose of determining the existence and impact of implicit bias in employment settings, and they offer compelling arguments in support of their position.[234] There are, however, documented instances where such evidence has been admitted in conjunction with evidence of statistical disparity to establish liability under disparate impact,[235] and it is only a matter of

230. Courts have engaged in balancing similar to the Hand formula in areas as diverse as administrative law and the First Amendment. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (weighing the private interest, the risk of an erroneous deprivation of the interest, and the government's interest); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (using the Hand formula to determine whether to regulate the speech at issue).

231. *See, e.g.*, David M. O'Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 JUDICATURE 8, 11 (1980) (arguing that judges "should abandon the practice of justifying their decisions on the basis of empirical propositions").

232. *See, e.g.*, Kotla v. Regents of the Univ. of Cal., 8 Cal. Rptr. 3d 898, 903 (Cal. Ct. App. 2004) (rejecting expert testimony from a social psychologist in an employment discrimination case on the grounds that "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." (quoting People v. McAlpin, 812 P.2d 563, 568–69 (Cal. 1991))).

233. *See* O'Brien, *supra* note 231, at 11 (criticizing the use of empirical research in general).

234. *See generally* Krieger & Fiske, *supra* note 2, at 1006 ("Behavioral realism, understood as a prescriptive theory of judicial decision making, addresses this problem by proposing that, before judges use lay or 'common sense' psychological theories in their legal analysis, they should take reasonable steps to ensure that those theories are valid.").

235. *See, e.g.*, Dunn v. Hercules, Inc., No. 93-4175, 1995 WL 66828, at *4 (E.D. Pa. Feb. 15, 1995) (allowing a plaintiff, on a *Daubert* motion in an age discrimination claim, to use statistical expert analysis to prove that the employer's subjective employment practice had a disparate impact).

time before such use becomes more prevalent.[236] Although courts have been behind the curve in accepting it,[237] there appears to be little reason for failing to do so.[238] If judges are unwilling to admit relevant expert testimony under current evidentiary standards, one solution might be for Congress to respond by amending the Federal Rules of Evidence to make the use of such evidence in disparate impact claims more accessible to litigants.[239] With these reluctances cast aside, a range of probative information becomes cognizable within Judge Hand's B < PL formula, transforming it into a viable tool for evaluating the RFOA defense.

Some might criticize the Hand formula and the process of quantifying its variables as too complicated for the trier of fact. Some might even argue that since any degree of precise quantification is impossible, the Hand formula merely defines an admittedly arbitrary assessment. These objections not only understate the competence of the trier of fact, but they also overstate the complexity of the application of Hand's formula in practice. Even if evidence is not easily quantifiable, or perhaps even arbitrary, the primary benefit of Hand's formula lies in its role as an instructive normative standard.[240] Judge Hand's formula provides the trier of fact with a framework for evaluating the employer's RFOA defense from an objective standpoint, instructing it to balance the parties' interests rather than unquestioningly accept an employer's subjective justification for its discriminatory practice. In the simplest of terms, the revised standard replaces mere deference with a more equitable balancing approach.

236. *See* Krieger & Fiske, *supra* note 2, at 1062 (discussing the inevitability of a day when a court of last resort will be forced to address the consequences of implicit stereotypes and the related research).

237. *See id.* at 1025–26 (discussing the "lag time" between psychological and jurisprudential theories and identifying several examples).

238. *See id.* at 1022–24 (finding there is no reason for courts not to allow scientific psychological studies when the alternative is for judges to rely on their personal intuitions regarding human behavior).

239. There is historical precedent for such legislative initiatives. Congress responded to the Supreme Court's ruling in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 102 (1991), which held that expert-witness fees could not be recovered by litigants, by giving courts discretion to "include expert fees as part of the attorney's fee." 42 U.S.C. § 1988(c) (2006). The Civil Rights Act of 1991 also amended Title VII to include expert fees. Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (codified as amended at 42 U.S.C. § 2000e (2006)).

240. *See* McCarty v. Pheasant Run, 826 F.2d 1554, 1557 (7th Cir. 1987) ("[Hand's] formula has greater analytic than operational significance.").

As a result, reliance on age-related factors driven by exploitive cost-savings would no longer be subject to trivial scrutiny. Considering the degree of injury to the employee prevents employers from unfairly profiting off the inferior bargaining position of many older workers.[241] The approach would also encourage employers to recognize the sort of long-term implicit contracts suggested by Lazear's model of labor relations.[242] Since the degree of undercompensation incurred by an employee early in the employee's career is factored into the employee's future salary,[243] that value is represented in the cost of injury to the employee (L) by the amount of front pay she would have received had she not been terminated. After being discounted by the probability that age was used as an illegitimate criterion (P), the cost of violating these implied agreements would be transferred to the employer if the burden (B) in forgoing the adverse employment action would have been less than that which was imposed upon the employee.

Applying Judge Hand's formula for determining the validity of an employer's reliance on an RFOA would offer a number of advantages to both litigants and the court. It achieves optimal efficiency by avoiding excessive interference with the activities of business while also avoiding excessive deference to employers.[244] Unlike the business necessity standard used in Title VII cases, the B < PL formula would not require an employer to engage in alternative business practices whenever a

241. *See* Kaminshine, *supra* note 168, at 281 ("The 'significantly serve' requirement also would preclude an employer from justifying a seniority-salary criterion solely on grounds of convenience and cheapness of administration.").

242. *See id.* at 268–70 (noting the value that comes from an older worker's experience and maturity).

243. *See id.* at 269–70 ("[W]orkers generally are paid less than the value of their marginal product during the early periods of employment; this disparity is said to disappear over time as the worker receives more pay, seniority, benefits, and privileges.").

244. Some might argue that employers who take excessive precautions in avoiding discriminatory impacts will be bogged down by inefficiency, presupposing that a truly efficient model might even impose sanctions upon employers who provided a super optimal level of care. *See* Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 795 (1990) ("Tort law penalizes victims who choose too little safety by reducing or barring recovery, but it fails to punish those who choose too much although their behavior is just as inefficient."). This is untrue, however, because employers implementing policies with potentially discriminatory impact have no incentive to adopt excessive precautions. Doing so would only impose extra costs and offer no savings.

disparate impact arises.[245] Instead it offers flexibility in decision making so long as the practice arising from the RFOA does not rise above the external costs associated with the consequence of relying upon that factor.[246] Accordingly, the framework would generate incentives to think creatively about ways to strike an appropriate balance between minimizing discrimination and maximizing profitability. This flexibility is tempered by a fair degree of predictability for employers. With a common sense formula offering guidance as to when reliance on a given factor will be permissible, employers will be better able to avoid the likelihood of a lawsuit in the first place.[247] Being both legally coherent and familiar, the Hand formula would tend towards predictability for courts as well.[248]

CONCLUSION

The history of disparate impact under the ADEA has been a turbulent one. Curiously, however, as application of the theory to age discrimination has developed over time, its availability to victims has simultaneously narrowed in scope. In search for a standard to evaluate an employer's reliance on a factor other than age, a familiar approach appears to have been overlooked. Judge Hand's B < PL formula is one that is recognizable to courts and well within the capability of the trier of fact.

Adoption of such a standard would not necessitate a revisitation of the Supreme Court's holdings in *Smith* or *Meacham*.[249] Rather, a cost-benefit evaluation is an appropriate and

245. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C.A. § 2000e-2 (2006)) (stating that the alternative practices "demonstration referred to by subparagraph (A)(ii) [§ 2000e-2(k)(1)] shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'").

246. See Black, *supra* note 197, at 318 ("A modified [disparate impact] standard permits defendants to continue their course of action so long as they can establish an acceptable explanation for it.").

247. There is abundant evidence that employers are already cognizant of the need to exercise care in dealing with disparate impacts. *See generally* McWilliams & Patel, *supra* note 216, at 59–61 (offering guidance for employers engaged in reductions-in-force).

248. *See* POSNER, *supra* note 223, at 182.

249. The Court stated in *Meacham* that "a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite." Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2403–04 (2008). The Court added that it is "now satisfied that the business necessity test should have no place in ADEA disparate-impact cases." *Id.* Yet neither statement precludes application of Judge Hand's B < PL formula

logical interpretation of the "reasonableness" of an employer's proffered factor other than age.[250] The standard would be one that balances the needs of employers' to make necessary cost-reductions with the threat of economic exploitation faced by older workers. Our developing understanding of age discrimination and the present economic situation demand a fair and workable standard that gives meaning to the Court's decisions in *Smith* and *Meacham* and makes disparate impact claims truly available to victims of age discrimination.

to the RFOA defense. Under Hand's formula, a reasonable factor may still lean more heavily on older workers, so long as the costs do not outweigh the benefits. Hand's formula is also categorically distinct from the business-necessity test, because reliance on age need not meet any particular degree of job-relatedness or financial necessity—the benefits must simply outweigh the costs.

250. The Court adopted another restrictive interpretation of the ADEA in its most recent decision on the subject. *See* Gross v. FBL Fin. Serv., Inc., 129 S. Ct. 2343, 2352 (2009) (holding that the burden does not shift to an employer in an ADEA claim to demonstrate that the action would have been taken regardless of age, "even when plaintiff has produced some evidence that age was a motivating factor in the decision"). The case, however, addressed only the disparate treatment theory of recovery, and not disparate impact. In *Meacham*, the Court explicitly stated it was only interpreting the RFOA defense and not the statutory "because of" language addressed in *Gross*. *Meacham*, 128 S. Ct. at 2403 ("Reasonableness is a justification categorically distinct from the factual condition 'because of age' and not necessarily correlated with it in any particular way."). As pointed out by the dissent in *Gross*, the reasoning underlying the two rulings is also inconsistent. *Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting) ("If the *Wards Cove* disparate-impact framework that Congress flatly repudiated in the Title VII context continues to apply to ADEA claims, the mixed-motives framework that Congress substantially endorsed surely applies."). There is no reason to believe that the Court's restrictive interpretation of mixed-motive claims under the ADEA has any bearing on standards used for evaluating the RFOA defense.