Disparate Impact Analysis and the Age Discrimination in Employment Act

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INTRODUCTION

The Age Discrimination in Employment Act of 19671 (ADEA) was enacted "to promote employment of older persons based on their ability . . . [and] to prohibit arbitrary age discrimination in employment."2 Modeled after title VII of the Civil Rights Act of 1964,3 the ADEA prohibits employers from using age as a factor4 in employment decisions or from classifying employees in ways that would adversely affect employment opportunities because of age.5 The ADEA, however, does exempt such actions if based on business necessity or reasonable factors other than age.6

2. Congress also included among the stated purposes of the Age Discrimination in Employment Act of 1967's (ADEA) "to help employers and workers find ways of meeting problems arising from the impact of age on employment." Id. § 621(b). The protected category originally included workers between 40 and 65 but the upper limit was raised to 70 in 1978. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (codified as amended at 29 U.S.C. § 631(a) (1982)).
4. As is true in title VII cases, there is not total consensus about the degree of causality required in multimotive age discrimination cases. The Sixth Circuit requires that age have "made a difference in determining whether the plaintiff was to be retained or discharged," Laugeson v. Anaconda, 510 F.2d 307 (6th Cir. 1975), while the First Circuit requires that "but for age, the plaintiff would have gotten the job," Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). In refining these standards, other circuits require only that age be "a" determining factor. See Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1111-12 (4th Cir.), cert. denied, 454 U.S. 860 (1981); Kelly v. American Standard, Inc., 640 F.2d 974, 984 (9th Cir. 1981); Bentley v. Stromberg-Carlsson Corp., 638 F.2d 9, 11-12 (2d Cir. 1981); Smithers v. Ballar, 629 F.2d 892, 896-98 (3d. Cir. 1980); Clerverly v. Western Elec. Co., 594 F.2d 638, 641 (8th Cir. 1979).
5. 29 U.S.C. § 623(a) (1982). The ADEA also prohibits labor unions and employment agencies from the same sort of actions in regard to their members or clients. Id. § 623(b),(c).
6. 29 U.S.C. § 623(f)(1) (1982). Like title VII, the ADEA specifically sanctions differentiation based on the protected class in certain situations. The ADEA statutorily excludes settings where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; the differentiation is based on reasonable factors other than age; the age criterion is needed to observe the terms of a bona fide seniority system or employee benefit plan; and the individual is discharged or disciplined for good cause.
Because title VII and the ADEA are nearly identical in wording and purpose, courts often look to title VII cases for guidance in interpreting and applying the ADEA. In *Geller v. Markham*, the Second Circuit applied title VII disparate impact analysis to an ADEA claim, a holding that has been criticized by a number of commentators. The Eighth Circuit's

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Id. § 623(f). In the second and fourth of these exceptions, the differentiation is not based on age. See infra notes 56-62 and accompanying text. The courts also have developed a judicial exemption under disparate impact analysis which may be extended to the ADEA. This is the "business necessity" or "job-relatedness" test developed in title VII cases. See infra notes 25-29, 120-37, and accompanying text.

7. See, e.g., Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) ("the ADEA and title VII share a common purpose, the elimination of discrimination in the workplace"); Lorillard v. Pons, 434 U.S. 575 (1978) ("There are important similarities between [the ADEA and title VII] . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions.").


On the other hand, there is substantial precedent and commentary supporting the use of title VII precedents in ADEA disparate treatment cases. See supra note 7 and infra note 72. Although no journal articles advocate the use of disparate impact analysis in ADEA litigation, several articles note that the parallelism of the ADEA and title VII would make it a logical extension. See Blackburn, *Charting Compliance Under the Age Discrimination in Employment Act*, 57 Chi.-Kent L. Rev. 559, 578-82 (1981) (ADEA and title VII procedures and prohibitions are generally parallel and title VII precedents are applicable to ADEA); Williams, *Proving an Age Discrimination Employment Act Case*, in
recent approval of disparate impact analysis under the ADEA in Leftwich v. Harris-Stowe State College\textsuperscript{10} will accentuate that dispute.

The Supreme Court has not directly addressed the use of disparate impact analysis in ADEA cases.\textsuperscript{11} As a specialist in employment discrimination law recently wrote, "the most significant ADEA issue of the next decade is the application of title VII 'disparate impact' precedents to the ADEA."\textsuperscript{12} That issue, however, is not confined to the question of whether disparate impact theory is appropriate in ADEA litigation. Equally important is the need to develop a standard for statistical analysis under disparate impact theory and a clear understanding of the available defenses.

This Note examines the use of disparate impact analysis in age discrimination cases arising under the ADEA. Part I reviews the development of title VII disparate impact theory and the parties' burdens of proof. Part II discusses the Geller and Leftwich decisions and the rationale for applying disparate impact analysis in ADEA cases. That part concludes that the language of the ADEA, its legislative history, its similarities with title VII, and the policy considerations underpinning the theory support the use of disparate impact analysis in ADEA cases. Finally, Part III analyzes standards for the prima facie disparate impact case and its rebuttal. This Note concludes that to maintain the integrity of disparate impact analysis, statistical theory must be kept distinct from policy decisions about legal requirements. In addition, to follow the congressional mandate to eliminate age discrimination in the work place, courts must narrowly construe the statutory and judicial exemptions.

\textsuperscript{10} 702 F.2d at 686 (8th Cir. 1983).

\textsuperscript{11} Although the Supreme Court denied certiorari in Geller, Justice Rehnquist dissented from that denial, stating: "This Court has never held that proof of discriminatory impact can establish a violation of the ADEA" and also asserting that cost should be considered a "reasonable factor other than age." 451 U.S. at 947-49 (Rehnquist, J., dissenting to denial of cert.). Rehnquist clearly wanted to review Geller in order to overturn it.

\textsuperscript{12} Schneiderman, \textit{supra} note 9, at 184-86 (arguing against an extension of disparate impact).
I. THE DEVELOPMENT OF DISPARATE IMPACT ANALYSIS

In *Griggs v. Duke Power Company*, the United States Supreme Court held that a title VII plaintiff could make a prima facie case of discrimination by showing that a facially neutral employment policy or practice adversely affected a protected group. Prior to *Griggs*, when courts used only disparate treatment analysis, a title VII plaintiff had to prove that the employer intentionally treated the employee differently from others because of the employee’s protected status. By con-

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14. “[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” *Id.* at 431.
15. The basis of disparate treatment analysis is that everyone can and should be treated equally. This approach, however, contains both mechanical and theoretical difficulties. For a discussion of the theoretical problems, see infra note 93. In order to prove discrimination—that similarly situated people are treated differently—a plaintiff has to prove that the employer intended to discriminate against the plaintiff or the plaintiff’s minority group. Since it is illegal to discriminate, and costly if one is caught, in only the most blatant of circumstances will the plaintiff be able to garner the requisite evidence. Even when there is evidence to garner, it is time consuming and costly because of the extensive discovery usually needed to feret out proof of subjective intent. Equally important, discrimination is not always intentional at a conscious level. Under such circumstances it is unfair and counterproductive to require proof of a motive that is unnecessary for the action and the harm.

The development of disparate impact as an alternative theory has relieved some of the inequities resulting from the above difficulties by extending the definition of discrimination. Additionally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), does the same thing for disparate treatment by extending the type of evidence that can be used to infer subjective intent to include statistical indications of different treatment. *McDonnell Douglas* also details the four elements needed to create that inference of intentional discrimination under disparate treatment: the plaintiff must establish that he or she (1) belonged to a racial minority, (2) applied and was qualified for the job, (3) was rejected; and (4) the position remained open and the employer continued to seek applicants with plaintiff’s qualifications. *Id.* at 802.

*McDonnell Douglas* also provides a model for burden and allocation of proof in employment discrimination cases under disparate treatment. Once a plaintiff establishes a prima facie case, it is up to the defendant to articulate a nondiscriminatory reason for the employee’s discharge. If this is done, plaintiff may still prevail by proving the defendant’s reason was merely pretextual. *Id.* at 802-04.

*Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981), reinterpreted this standard to mean that “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Id.* at 253. But in seeking to clarify how this was to be applied, the Court succeeded only in muddying the waters. *See id.* at 253-56.

The significant problems that this confusion creates for disparate treatment
centrating on result rather than motive, disparate impact analysis encompasses a wider view of employment discrimination that requires no showing of scienter.\textsuperscript{16} A policy’s differential effect is judicially seen to fall within the statutory definition of discrimination.\textsuperscript{17}

Although the initial disparate impact cases clearly indicated that statistical disparity rather than intent can establish a prima facie case of discrimination,\textsuperscript{18} none presented a clear standard as to what constitutes “significant disparity” between the employee group and the comparative group.\textsuperscript{19} Nor did

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  \item \textsuperscript{16} Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as “built-in headwinds” for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. \textit{Griggs}, 401 U.S. at 432.
  \item \textsuperscript{17} The Court has consistently interpreted title VII as an intent by Congress to end discrimination both in the form of intentional actions and in the form of differential effect. In so doing, of course, the Court has broadened the definition of discrimination to include not only an act or practice based on discriminatory motive but also a consequence of a neutral act or policy that impacts categorically. It can be inferred that Congress agrees with this interpretation because it has made no attempt to alter title VII to preclude that view even though it has amended the statute since \textit{Griggs} was announced in 1972.
  \item \textsuperscript{18} In \textit{Griggs}, for example, the defendant employer required a high school diploma and a passing score on a general intelligence test if the applicant were to work anywhere besides the low paying, predominantly black manual labor department. There was, however, no relation between the skills supposedly measured by the requirements and the skills needed to satisfactorily perform jobs in the nonlabor departments. Most importantly, the effect of those requirements was to disqualify a substantially larger percentage of blacks than white. Although the Court hypothesized that past educational discrimination against blacks contributed to the differential impact of the employer’s tests, it did not find the reason for the adverse effect central to its holding of discrimination. 401 U.S. at 430-31.
  \item \textsuperscript{19} Dothard v. Rawlinson, 433 U.S. 321 (1977), applied the disparate impact analysis used in \textit{Griggs} and its progeny to sex discrimination. In \textit{Dothard}, the plaintiff charged that physical requirements (minimum of 5’2”, 120 pounds) for a job in the correctional system constituted illegal sex discrimination because over 41% of all women were excluded while less than 1% of all men were excluded. The Court agreed that the facially neutral height and weight requirements did adversely affect women. It then held that because they were unnecessary for the job, they were illegal discrimination. \textit{Id.} at 329-32.
  \item \textsuperscript{19} Without explicitly discussing a statistical standard for determining adverse impact, \textit{Griggs} based its finding of discrimination on the “disqualification of Negroes at substantially higher rate[s] than white applicants.” 401 U.S. at 426. \textit{Dothard} also failed to establish a specific standard,
these cases explain what group should be used as the comparative standard against which to measure the employer's work force. Moreover, because the courts have set these standards on a case-by-case basis, neither plaintiff nor defendant knows what statistical evidence establishes a prima facie case.

Whatever the standard used, once a plaintiff establishes a prima facie case of illegal discrimination the burden of proof shifts to the defendant. The defendant employer may try either to discredit the plaintiff's evidence or show an applicable exception for the employment practice. In the former situation, the defendant may present contrary interpretations of the plaintiff's statistical data or provide additional statistical data casting doubt on the original inference of illegal discrimina-

indicating only that the facts at bar (41% of all women vis-a-vis less than 1% of all men were disqualified by the employment requirement) showed a great enough disparity to prove discrimination. 433 U.S. at 329-31.

20. Both Griggs and Dothard looked to the qualified labor pool (potential applicants) as the appropriate comparative standard, but only Dothard discussed why that benchmark was relevant to its facts. See Griggs, 401 U.S. at 426; Dothard, 433 U.S. at 328-31.

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), continued this discussion but did not provide a definite rule. Teamsters, however, unequivocally stated, "[s]tatistics . . . are probative . . . [because] absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." 431 U.S. at 340 n.20. The Court also noted that, like other evidence, statistical proof is rebuttable and should be viewed in the context of the situation. Sample size and appropriateness of the benchmark are relevant considerations. For example, while the general population was an appropriate comparison point for jobs requiring no or easily learned skills, it would not be probative where a job required specialized training. In those settings, the qualified labor pool would be more relevant. Id. at 339-40 & n.20.

Hazelwood reaffirmed Teamsters and emphasized the need to determine the relevant, qualified labor market: "When special qualifications are required to fill particular jobs, comparison to the general population (rather than to the smaller group of candidates who possess the necessary qualifications) may have little probative value." 433 U.S. at 308 n.13. Hazelwood also concluded that the appropriate geographic scope of the relevant job market would depend on the setting, but factors to be considered included the job skills required, compensation level, the employer's recruitment practices, available public transportation in the community, and so on. Furthermore, statistical analysis covering a period of time was preferable to a one-time snapshot of the situation. See id. at 304-13. In addition, Hazelwood seemed to endorse using a "two or three standard deviation" differential as dispositive of the discrepancy being caused by a factor other than chance (i.e., discrimination). Id. at 309 n.14.

21. "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Griggs, 401 U.S. at 432. See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Williams, supra note 9, at 161-63.

22. For a description of the exceptions, see supra note 6.
This approach goes only to the quality of the plaintiff's evidence. When the plaintiff's evidence of disparate impact is uncontroversible, the defendant may nonetheless avoid a finding of illegal discrimination if the employment practice is covered by an exemption. In *Griggs*, the Supreme Court developed the exemption of "job-relatedness" or "business necessity." The Court defined this exemption more precisely in *Albemarle Paper Company v. Moody*: a prima facie case of illegal discrimination can be rebutted by proving the practice in question is job related in that it directly measures a skill needed for the job. Even if the defendant satisfies this burden, however, the plaintiff could still prevail by showing an alternative practice that the employer could use to achieve the desired end without the illegal differential impact.

23. For example, the employer could show that little or no hiring or promotion occurred since the legislation was passed and the current disparate impact was thus a result of preAct practice that circumstances have not allowed the employer to remedy. Depending on the data presented by the plaintiff, the employer could also argue that the plaintiff's statistical standard or comparative benchmark were inappropriate. See W. Connolly & J. Peterson, *Use of Statistics in Equal Employment Opportunity Litigation* §§ 3.01-3.06 (1983); McMorrow, *The Prima Facie EEO Case and Its Rebuttal* 30 Lab. L.J. 20, 24 (1979).

24. For example, in *Dothard*, the defendant employer challenged the plaintiff's use of national averages for the weight and height of women as an improper comparison and argued that disparate impact could be shown only if the percentage of women hired was disproportionate to those actually applying. The Court refused to accept the defendant's view for two reasons. First, it noted that using the actual applicant pool would disregard the fact that the publicized height and weight requirements may have prevented many otherwise qualified applicants from applying. Second, since the defendant did not show otherwise, it was reasonable to assume the physical characteristics of Alabamians mirrored the national population. 433 U.S. at 329-31.

25. An employment test or requirement which has an adverse effect on a protected group will be excused only when that procedure directly and reasonably measures the ability of the candidate to do the job. No matter how useful or accurate a predictor the test is, it cannot be used if it adversely affects a protected classification when there is any other alternative. See *Griggs*, 401 U.S. at 431-36 ("The touchstone is business necessity."), *Dothard*, 433 U.S. at 331-32; see generally Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 Ga. L. Rev. 376 (1981) (narrowly construed and strictly enforced business necessity test will enhance effectiveness of title VII).

*Griggs* found that an employment practice was prohibited if it had an adverse effect on black applicants and was not shown to be related to job performance. 401 U.S. at 431. Similarly, *Dothard* held that height and weight requirements could not be used as a proxy measure for strength if strength was the real job requirement. In the latter case, strength must be measured directly. 433 U.S. at 331-32.

27. Id. at 425-36.
28. Id. at 425; *Dothard*, 433 U.S. at 329.
II. APPLYING DISPARATE IMPACT ANALYSIS TO THE ADEA

A. THE CASES: GELLER v. MARKHAM AND LEFTWICH v. HARRIS-STOWE STATE COLLEGE

To date, two federal circuit courts have held that a plaintiff can use disparate impact theory in age discrimination cases arising under the ADEA.29 Together, the analyses in Geller v. Markham30 and Leftwich v. Harris-Stowe State College31 provide a model for determining the elements of a prima facie age discrimination case and evaluating the defenses under disparate impact analysis.

In Geller, the employer school board followed its policy of

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29. The Second and Eighth Circuits explicitly held that disparate impact analysis applied in ADEA litigation. Three other circuits have alluded to the use of disparate impact analysis in ADEA litigation but have gone no further. A somewhat confused opinion by the Ninth Circuit in Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981), may be seen to imply the use of disparate impact analysis. However, a close reading of the case indicates that in deciding the appropriateness of punitive damages, which can only be awarded under the ADEA for “willful violations”, the court was searching for a definition of “willful violation.” In discussing the plaintiff’s burden of establishing a prima facie case, Kelly noted that it could be established via the McDonnell Douglas standard without showing a state of mind. 640 F.2d at 980. However, McDonnell Douglas is a disparate treatment case. In citing the McDonnell Douglas standard, Kelly seems to say that an inference of intentional discrimination can be drawn without inferring bad motive. The court then cited Geller in a footnote as showing statistical evidence alone can establish discriminatory impact. Id. at 980 n.9. Because the court did not really examine disparate impact analysis or its use in any case other than Geller and because its emphasis was on “willful violation” and the appropriate remedy, this case should not be relied on to show the Ninth Circuit holds disparate impact analysis applies in ADEA litigation.

The Eleventh Circuit, in Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982), used disparate impact analysis in reviewing an appeal urging error in jury instructions but did not decide if disparate impact analysis is appropriately applied in ADEA cases. Allison noted that even if disparate impact analysis applied, the jury apparently believed that the defendant’s statistical expert effectively rebutted the plaintiff’s showing under either disparate treatment analysis or disparate impact analysis. Although the lower court’s instructions to the jury did not distinguish the two theories, they were generally correct and no harmful error was committed. Allison specifically reserved judgment on the issue of using disparate impact analysis in ADEA litigation. Id. at 1323.

The Third Circuit, in Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983), also used the analysis without deciding whether it applied to ADEA cases. In Massarsky, the Third Circuit held that even if disparate impact analysis were used, the plaintiff could not establish a prima facie case because his evidence was only that General Motor’s policy was detrimental to him. He provided no statistics showing that the policy had an adverse impact on the group of employees between 40 and 70. Id. at 119-20.

31. 702 F.2d 686 (8th Cir. 1983).
hiring teachers below the sixth step of the salary scale and replaced a newly hired but experienced fifty-five year old teacher with an inexperienced twenty-five year old.\textsuperscript{32} Geller, the fifty-five year old, argued that because each step represented a year of teaching experience and the goal of the policy was to save money, the "Sixth Step Policy" made hiring teachers with more than four years experience financially undesirable. She also offered statistical evidence demonstrating a high correlation between age and experience: 92.6\% of all teachers over forty had five or more years of experience while only about 60\% of those under forty had five years or more. Citing several title VII disparate impact cases,\textsuperscript{33} the Second Circuit held that the plaintiff could establish a prima facie case of age discrimination by showing that the "Sixth Step Policy" had an adverse impact on teachers over forty. The court then considered the statistical evidence and found the correlation sufficient to hold the "Sixth Step Policy" discriminatory as a matter of law.\textsuperscript{34}

A similar age-experience-salary linked plan arose in \textit{Leftwich}. After the Missouri legislature transferred Harris-Stowe College to the state college system, the Board of Regents agreed to reduce the faculty by seventeen. The Regents classified the remaining positions as "tenured" and "nontenured" and allowed those who held tenured slots before the reorganization to apply only for those tenured slots remaining.\textsuperscript{35} Three biology teachers at the city college applied for positions at the state college, but because of the reduction in faculty, the state college had only one tenured and one nontenured biology positions. Watlington, a sixty-two year old black male who had been tenured at the city college, obtained the tenured slot at the state college. Werner, a thirty year old white male who had not been tenured at the city college, got the nontenured slot at the state college. The college terminated Leftwich, a white,

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\item \textsuperscript{32} On September 3, 1976, plaintiff Geller was hired by the West Hartford school system to fill an unexpected opening; she began teaching on September 7. Two weeks later, she was terminated and replaced by a 25 year old teacher who had not applied for the job until September 10. 635 F.2d at 1030.
\item \textsuperscript{33} 635 F.2d at 1032 (citing \textit{Griggs}, \textit{Teamsters}, and \textit{Hazelwood}).
\item \textsuperscript{34} \textit{Id.} at 1032-33.
\item \textsuperscript{35} In 1979, Harris-Stowe College was transferred from control of the St. Louis Board of Education to a newly created Board of Regents under the state college system. While the physical facilities, accreditation, curriculum and student body remained virtually the same, the Regents reduced the number of faculty positions from 51 to 34 in order to save money. A specified number of tenured and nontenured faculty from the city college would be chosen to fill designated "tenure" and "nontenure" positions in the state college. \textit{Leftwich}, 702 F.2d at 689.
\end{itemize}
forty-seven-year-old tenured professor who scored higher than either Watlington or Werner on the evaluation test used to make the selection decision. The Eighth Circuit noted that Geller and Griggs provided appropriate precedent for establishing a prima facie case and held that, based on the statistical data showing a "significant correlation" between age and tenure status and age and salary, Leftwich had faced illegal discrimination.

In both Geller and Leftwich, the defendants first denied that their policies resulted in discrimination. They argued that although the policies might have a theoretical discriminatory impact on those over forty, the real impact was not discriminatory because, in Geller, the policy did not affect the percentage of teachers over forty and, in Leftwich, the average age of the faculty at the college remained "virtually the same." Both courts dismissed this approach, although for different reasons.

Alternatively, both defendants argued that even if the policies did have a discriminatory impact on the protected age group, budget constraints made reducing costs a business ne-
cessity and thus justified the policies. The Geller court, citing Department of Labor interpretative guidelines\(^{41}\) and federal court decisions,\(^{42}\) summarily rejected cost as a business excuse for age discrimination in employment because the ADEA was passed to prevent such discrimination.\(^{43}\) The Leftwich court, while reaching the same conclusion, pursued a more extensive analysis that resulted in a standard for shifting the burden of persuasion as well as one for determining business necessity. Looking to Albemarle Paper Company v. Moody\(^{44}\) for guidance, the court noted that “[o]nce the plaintiff established his prima facie case, the burden of persuasion shifted to the defendants to prove that their selection plan was justified by business necessity.”\(^{45}\) The Eighth Circuit pointed to congressional intent, Department of Labor and Equal Employment Opportunity Commission (EEOC) interpretative guidelines,\(^{46}\) and federal court decisions to support its holding that the need to save

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\(^{41}\) The guidelines stated:
To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

29 C.F.R. § 860.103(h) (1979), quoted in Geller, 635 F.2d at 1034.

\(^{42}\) 635 F.2d at 1034.

\(^{43}\) Id. For a discussion of legislative intent in passing the ADEA, see infra notes 58-65 and accompanying text.

The court went on to discuss Geller's disparate treatment claim as well. Geller marks a midpoint on the road of disparate impact analysis extension. Previously, courts had not readily applied disparate impact in ADEA cases; when both disparate impact and disparate treatment claims were available, courts pursued the latter. Here, Geller pursued both. Leftwich completes the road because the Eighth Circuit applied only the disparate impact theory even though Leftwich also had disparate treatment, title VII, and due process claims. See supra note 37.

\(^{44}\) 422 U.S. 405 (1975).

\(^{45}\) 702 F.2d at 691. Geller had talked in more general terms without noting who had the burden of persuasion or proof. 635 F.2d at 1032.

\(^{46}\) The Wage and Hour Division of the Department of Labor was originally assigned the job of enforcing the ADEA. Its ADEA duties were shifted to the EEOC, effective January 1, 1979, as a result of President Carter's reorganization plan of 1978. 43 Fed. Reg. 1987 (1978). One commentator has suggested that Congress placed the ADEA under the Labor Department to begin with only because it was concerned that the EEOC caseload was too great to effectively handle the potential ADEA litigation and because the secretary of labor had the requisite resources to implement the sections requiring continuing studies and information for public education about age. See Comment, Class Actions Under the Age Discrimination in Employment Act: The Question is "Why Not?", 23 Emory L.J. 831, 838 (1974). At any rate, the shift of ADEA enforcement to the EEOC adds weight to the belief that both Congress and the Executive view the ADEA and title VII as equivalent.
costs cannot justify an adverse impact.\textsuperscript{47} In \textit{Leftwich}, Harris-Stowe College also argued that the selection plan was a business necessity because it promoted "innovation and quality among the faculty by giving the college flexibility to hire non-tenured faculty."\textsuperscript{46} The court rejected this argument on two grounds. First, the evidence showed that the college had not suggested this purpose at the time of the plan's inception and application. Second, even if the college had adopted the plan for this purpose, the defendants failed to carry their burden of showing that the plan was necessary to achieve their goal. They showed neither a "manifest relationship to the employment in question" nor "a compelling need . . . to maintain that practice."\textsuperscript{49} The court acknowledged that promoting innovation and quality among the faculty is a permissible goal,\textsuperscript{50} but concluded that the manner of achieving it was neither necessary nor effective. By assuming that only younger, nontenured faculty could create an exciting, quality atmosphere, the college adhered to the "stereotypical thinking about older workers that the ADEA was designed to eliminate."\textsuperscript{51} Furthermore, the college retained Watlington and Werner yet terminated Leftwich, who was clearly the most innovative, competent, and qualified of the three.\textsuperscript{52}

### B. RATIONALE FOR APPLICATION OF DISPARATE IMPACT ANALYSIS TO ADEA CASES

Although the Second and Eighth Circuits noted the prece-
dential value of title VII litigation in interpreting the ADEA, neither discussed the basis for applying disparate impact analysis to ADEA cases. The courts' silence on this aspect reflects not an unsound footing for their position, but rather substantial support for it. Indeed, the language of the statute, its legislative history, the courts' use of title VII precedent in interpreting and applying the ADEA, and the policy considerations underlying the Act support using disparate impact analysis for age discrimination cases brought under the ADEA.

1. Statutory Language.

The ADEA, in identical wording to title VII, provides that


The four exceptions to the word-for-word repetition of title VII in the ADEA show that although Congress viewed age discrimination as part of the discrimination that title VII was designed to prohibit, there were certain aspects of employment discrimination based on age that it viewed as distinguishable. Where Congress believed there was a difference, therefore, it specified and provided for them.

First, although title VII prohibited discrimination based on the protected category in apprenticeship or training programs, the ADEA made no such prohibition. See 42 U.S.C. § 2000e-2(d) (1976). Thus, although Congress viewed retraining or additional training for older workers as an important tool in dealing with unemployment, it did not intend to provide such training through the current educational structure. A number of both practical and policy factors can explain this distinction: most such programs are educationally oriented to youth; in an area of great demand and few resources those with no training or experience should have preference over those with some other kind of training or experience; or retraining programs can be more efficiently organized if separated from training programs that also teach basic education skills already possessed by retrainees.

Secondly, whereas title VII provided exemptions only for educational institutions, seniority or merit systems, and “bona fide occupational qualifications reasonably necessary to the normal operations of the business,” the ADEA added to the latter “or where differentiation is based on reasonable factors other than age.” Compare 42 U.S.C. § 2000e-2(e),(h) (1976) with 29 U.S.C. § 623(f) (1982). This additional exception, rather than negating the use of disparate impact theory, shows that Congress actually intended the ADEA to cover facially neutral policies that impacted adversely on older workers but exempt such policies when they were “reasonable” and “necessary for the normal operations of business.”


Finally, the ADEA also includes a prohibition on reducing the wage of any
"[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."54 The phrase "adversely affect" implies that an employment practice can constitute illegal discrimination even if not intended or directed specifically at age. Thus the phrase not only prohibits intentional age discrimination but also forbids any policy having a more harmful effect on older people than on their co-workers.55

While "adversely affect" is the only phrase in title VII that literally supports the concept of disparate impact, the ADEA has additional statutory language to support this interpretation. Section 623 of the ADEA states that discrimination will not be considered illegal "where differentiation is based on reasonable factors other than age" or when an individual is discharged or disciplined for good cause.56 The inclusion of these exemptions suggests that Congress thought an ADEA without exemptions would prohibit all facially neutral policies with adverse effects on older workers. Congress consequently carved out exemptions to limit the statute's reach to unreasonable and unnecessary policies. For example, if a steel mill requires that workers be able to lift sixty pounds over the course of an eight-hour day in 100 degree heat, that policy might disqualify a larger percentage of sixty year old workers than twenty-five year old workers.

employee in order to comply with the Act. See 29 U.S.C. § 623(a)(3) (1982). This fourth exception shows the congressional concern with the economic effects of age discrimination and supports the position taken by the EEOC, the Department of Labor, and the courts, that cost cannot be considered a RFOA. 54. 29 U.S.C. § 623 (1989) (emphasis added). Title VII has the same language except that "race, color, sex or national origin" stand in the place of "age." 42 U.S.C. § 2000e-2(a)(2) (1976).

55. As Chief Justice Burger, writing for a unanimous Court, said in Griggs, "The Act [title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). He also noted that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Id. at 432. Curiously, Blumrosen, who strongly supported the used of disparate impact analysis in title VII racial discrimination cases, made only passing reference to this language in title VII. While noting that this language was the statutory "anchor" for disparate impact, he merely added that "[i]t . . . presents a technically new point of departure for purposes of statutory interpretation. It suggests that a court's focus of attention should be more on the consequences of actions than on the actor's state of mind." Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 74 (1972).

Nonetheless, the nature of that business requires the worker to lift sixty pounds in that setting, so any disparate impact would be excused. An accounting firm could not adopt this policy, however, since nothing about an accountant’s job requires such physical endurance.57

In addition, the EEOC, the agency responsible for enforcing the ADEA and title VII,58 issued interpretative guidelines59 that define how the EEOC will examine claims for the statutory exemption of “reasonable factor other than age” (RFOA) under both disparate treatment and disparate impact theories.60 The EEOC would not have mentioned disparate impact analysis unless it viewed such analysis as appropriate for ADEA claims. Furthermore, both the EEOC and the Wage and Hour Division guidelines note that cost is not a RFOA:61 an employer cannot refuse to hire older workers because they cost more than younger workers. Thus these guidelines also support the use of disparate impact analysis in ADEA litigation because they outlaw cost, a facially neutral policy that adversely affects older workers.

Both the prohibitory language and the statutory exemptions support the use of disparate impact theory under the ADEA. Any other interpretation would allow employers to

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57. Senator Yarborough made clear that this interpretation was the congressional intent. When asked for an example of an RFOA, Yarborough explained that speed or weight lifting ability might be an RFOA in certain settings. See 113 Cong. Rec. 31,254 (1967). The subcommittee on labor, which met to examine oral and written statements about the proposed bill, also noted that safety sometimes necessitated certain physical qualifications of applicants and the bill would not force the hiring of someone without such needed physical qualifications simply because he or she was within the protected age group. 113 Cong. Rec. 31,253 (1967). A summary of the subcommittee’s findings is reprinted in 113 Cong. Rec. 31,250-253 (1967).


60. Id. § 1625.7.

61. The EEOC provides: “A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans [exempted by the Act].” Id. § 1625.7(f). The Wage and Hour Division guidelines stated:

It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized . . . . To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

Id. § 860.103.
evade the statute by developing employment policies based on a non-age criterion (such as experience or cost) that correlates highly with age.\textsuperscript{62}

2. Legislative History and Congressional Intent.

Earlier congressional attempts to outlaw age discrimination and the legislative history of the ADEA also support the use of disparate impact theory in order to fulfill the congressional intent. Senator Jacob Javits\textsuperscript{63} wanted to amend the Civil Rights Act of 1964 to include age among the protected categories but feared that his amendment, which had no assurance of success, might jeopardize the chance of the bill’s passage.\textsuperscript{64} As a compromise, Congress ordered the secretary of labor to study the employment situation for older Americans and report to Congress with relevant empirical data.\textsuperscript{65} When the study revealed the gloomy employment picture facing older Americans, Congress passed the ADEA in hopes of improving the situation by prohibiting age discrimination in employment decisions.

\textsuperscript{62} Two categories (or variables) can be so closely related that each acts as a proxy for the other so that knowing the value of one enables you to predict the value of the other. In statistical terminology, this relationship is called a correlation; the higher the correlation, the greater the predictability. Thus, if age and experience are highly correlated, an employer could avoid hiring older people without directly using age as a factor by simply requiring that applicants have little or no experience. For example, academic rank and age are highly correlated in most postsecondary educational institutions. Because of the years needed for academic training and professional credentialing, even the youngest of tenured professors tend to be over 40. Thus an employer who offered one-year sabbaticals to its employees but required that the teacher be nontenured would effectively exclude almost everyone over the age of 40. While the employer may have a legitimate and compelling business reason for favoring nontenured instructors, it should at least be required to come forth with that reason since its policy has the effect of simultaneously favoring younger employees over those in the protected age group.

\textsuperscript{63} Javits, Senator from New York, is a long time supporter of legislation to end age discrimination. He played a major role in the passage of age discrimination legislation in New York and has been introducing similar bills at the national level since 1951 when he was a member of the House of Representatives. See 113 CONG. REC. 31,254 (1967).

\textsuperscript{64} One of the strategies of die-hard congressional segregationists in 1964 was to load up the bill with so many protected categories that it would accumulate additional special interest opponents and be voted down. In addition, some members of Congress simply did not understand or believe in the magnitude of the age-discrimination problem in 1964. The combination of lack of statistical data to prove the existence of age discrimination and concern about the whole Civil Rights Act killed the chance of winning support for an age discrimination prohibition in 1964. See id.

\textsuperscript{65} The Civil Rights Act directed the secretary of labor to study the problem of age discrimination. The secretary’s report, which was issued in July 1965, found that statutory prohibition would be necessary to deal with the problem. 113 CONG. REC. 31,250 (1967).
Discussions in Congress when the ADEA was introduced, as well as the language of the statute, show that Congress clearly intended to extend title VII protection against discrimination to cover age.\textsuperscript{66} Senators Yarborough\textsuperscript{67} and Javits, two of the ADEA’s most determined supporters, viewed ageism in terms of general societal discrimination but placed the ADEA squarely on the rock of employment discrimination.\textsuperscript{68} While Yarborough personally might have wished for a broader prohibition, he emphasized that the ADEA applied only in employment, that it did not require the hiring of an older person who was not otherwise qualified to perform the job, that it did not compel the preference of an older worker over a younger one, and that it did not extend the normal worklife of Americans. Rather, it would “give every American . . . the right to be equally considered for employment and promotion.”\textsuperscript{69} Since

\begin{itemize}
\item \textsuperscript{66} The congressional focus on the employment ramifications of age discrimination does not lessen the parallel of age to the protected categories of the 1964 Civil Rights Act. Instead, the singling out of employment merely means that the ADEA’s analog is title VII, which prohibits employment discrimination for the protected categories, rather than the entire Civil Rights Act.
\item \textsuperscript{67} Yarborough, a Senator from Texas and one of the ADEA’s original sponsors, helped shepherd the bill through the Senate. See 113 Cong. Rec. 31,248-57 (1967).
\item \textsuperscript{68} Id.
\item \textsuperscript{69} 113 Cong. Rec. 31,251-54 (1967). Discussion about the ADEA in the House of Representatives also emphasized the need to protect older workers in the labor market in the same way that other minorities had been protected under title VII. Representative Burke of Massachusetts, one of the bill’s sponsors in the House, reflected the confused belief of some that although there was no prejudice against older Americans, they faced employment discrimination because of their age and must be protected by Congress. Speaking in favor of the bill, he said:

\begin{quote}
Age discrimination is not the same as insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in unemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job-seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance . . . . In the last several years we have done much to bar employment discrimination on race, religion, color and sex—we must do it for age too.
\end{quote}

Id. While Burke apparently did not view age discrimination in the same societal light as Javits or Yarborough, he clearly believed the ADEA would do for what title VII was doing for race, religion, color, and sex.

Burke’s comment that age discrimination is not insidious discrimination is apparently based on the secretary of labor’s 1965 report to Congress about the status of older workers. See id. Some commentators have used Burke’s comment and the secretary’s assumption that there was no prejudice against older Americans to conclude not only that there is no prejudice but also that this lack of prejudice makes age discrimination different from other forms of discrimination. See, e.g., Stanford Note, supra note 9, at 853. Age discrimination, they contend, merely is based on “misconceptions about the abilities of older workers.” Id. The conclusion that there is no age prejudice is inaccurate. See
the disparate impact analysis in Griggs refers to the concept of
equal opportunity in title VII,70 Senator Yarborough's emphasis
on equal opportunity for older workers implies that the Griggs
analysis should also apply to the ADEA.

When asked whether the ADEA would conflict with the
Civil Rights Act of 1964 and its attempt to end discrimination
based on race or color, the sponsors indicated that the two Acts
were not conflicting, but complementary—the ADEA did not
cover race or religion and the Civil Rights Act did not cover
age.71 These congressional discussions clearly indicate that
Congress intended the ADEA to rid the workplace of all forms
of age discrimination just as title VII had attacked employment
discrimination based on race, ethnicity, religion, or gender.

3. Similarities of the ADEA and Title VII.

The complementary relationship of the ADEA and title VII
is also revealed by the extent to which courts, using disparate
treatment analysis, have looked to title VII precedents in inter-
preting and applying the ADEA.72 Some critics of Leftwich and
Geller grudgingly accept the use of title VII precedent in
ADEA cases under disparate treatment analysis, but argue that

infra text accompanying notes 88-112. Furthermore, with the exception of
Burke's two sentence reference to the report, members of Congress neither re-
ferred to the secretary's report nor based their discussion on the secretary's as-
sumptions. Instead they stressed the clear economic disadvantages of older
workers vis-a-vis their compatriots and searched for ways to solve that prob-
lem. Schneiderman's conclusions that Congress did not intend the ADEA to be
equivalent to an older American's title VII is based on his reading of the secre-
tary of labor's report rather than the congressional record or the statutes. See
Schneiderman, supra note 9, at 204-09. Similarly, in asserting that age discrimi-
nation deserved "less protection" than race discrimination, he looked to cases
litigating constitutional standards rather than statutory ones. See id. at 206-08;
see infra note 86.

71. 113 CONG. REC. 31,255 (1967).
72. In interpreting and applying the ADEA under disparate treatment
analysis, some courts simply assumed the link and applied the precedent with-
out commentary. Others, however, stated explicitly that they considered title
VII and the ADEA "equivalent in language or goal." Oscar Mayer & Co. v. Ev-
ans, 441 U.S. 750, 756 (1979) ("[T]he ADEA and title VII share a common pur-
pose."); Lorillard v. Pons, 434 U.S. 575, 584 (1978) ("[T]he prohibitions of the
ADEA were derived in haec verba from title VII.").

This has led to a string of ADEA cases relying on title VII precedent. For
example, courts have held that the McDonnell Douglas elements of a prima fa-
cie case for race discrimination under disparate treatment should be applied,
with some modifications, to age discrimination because title VII cases are valid
precedent for the ADEA. See, e.g., McCorstin v. U.S. Steel Corp., 621 F.2d 749,
752-54 (5th Cir. 1980); Loeb v. Testron, Inc., 600 F.2d 1003, 1010 (1st Cir. 1979);
Fletcher, 452 F. Supp. 17, 23 (N.D. Ala. 1978). But see Mastie v. Great Lakes
such use of precedent should not be extended to include disparate impact analysis because age
discrimination is different from title VII discriminations. But the similarities between
the ADEA and title VII are too striking to draw artificial lines in interpreting the Acts. The nearly identical language of the two statutes as well as the comments made by members of Congress imply that Congress passed the ADEA in order to
provide the same employment protection to older Americans that title VII gave to members of nondominant racial, ethnic, religious, and gender groups. As a matter of common sense, similar language and objectives require similar application.

4. Policy Considerations.

Although the statutory arguments seem compelling, some commentators have argued that the type of discrimination suffered, rather than the legislation prohibiting that discrimination, justifies the use of disparate impact analysis in cases under title VII. According to the advocates of this position, the disparate impact theory applies under title VII because the individuals in its protected categories have suffered historical discrimination, invidious social stereotyping, or prejudicial assumptions about immutable characteristics. Therefore, disparate impact analysis is not available under the ADEA because older Americans have not faced those problems.

Steel Corp., 424 F. Supp. 1299, 1307-08 (E.D. Mich. 1976); Liddle, supra note 9, at 538.

Similarly, title VII cases have served as precedent for the evaluation of burden and allocation of proof under the ADEA, see Anderson v. Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982); Laugeson v. The Anaconda Co., 510 F.2d 307, 313 (9th Cir. 1975); Moore v. Sears, Roebuck & Co., 464 F. Supp. at 363; Loeb, 600 F.2d at 1011-12, and for the determination of time limits and filing requirements, see Baruah v. Young, 536 F. Supp. 356, 360-61 (D. Md. 1982); EEOC v. Kimberly-Clark Corp., 531 F. Supp. 58 (N.D. Ga. 1981). Also, while the disagreement in multimotive title VII cases over the required degree of causality shows up in ADEA litigation as well, all the ADEA cases acknowledge the title VII roots of the test therein applied. See Loeb, 600 F.2d at 1010-11; Bentley v. Stromberg-Carlson Corp., 638 F.2d 9, 11-12 (2d Cir. 1981); Smithers v. Bailear, 629 F.2d 692, 896-98 (3d Cir. 1980); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1111-12 (4th Cir. 1981), cert. denied, 50 U.S.L.W. 3248 (1981); Laugeson, 510 F.2d at 313; Cleverly v. Western Elec. Co., 594 F.2d 638, 641 (8th Cir. 1979).

To assert, as some commentators do, that age discrimination is too different from title VII discrimination to allow the use of title VII precedents in ADEA cases is unrealistic in view of this solid wall of precedent. See supra note 9.

73. See supra note 9.
74. See supra notes 53-54 and accompanying text.
75. See supra notes 66-71 and accompanying text.
76. See supra note 53.
77. See McKenny, Enforcement of Age Discrimination in Employment Leg-
This argument for limiting the use of disparate impact analysis to certain types of discrimination seems to be based on a misunderstanding of the development of the theory, the mistaken application of constitutional standards to statutorily prohibited discrimination, and the assumption that different policy considerations underlie the goal of ending different kinds of discrimination. A close examination of the early disparate impact cases shows that the Supreme Court's theory was neither tied to nor based on past discrimination. In Griggs, for example, the Court emphasized that title VII, on its face, prohibited employment actions that adversely affected minority members. The reasons for the adverse effect were not deemed crucial because "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." In other words, the differential impact, not the reasons for it, constituted the harm in the employment practice and the violation of title VII. Although it discussed possible reasons for the differential impact, the Griggs Court never stated or implied that other minority groups had to prove similar causes in order to use disparate impact analysis.

The Court's use of disparate impact analysis in International Brotherhood of Teamsters v. United States81 and Dothard v. Rawlinson82 supports this view. In Teamsters, the Court found that the company's hiring policy had an illegal discriminatory effect on employees who were black or had Spanish surnames.83 In reaching this result, the Court said nothing about the decades of discrimination suffered by these racial and ethnic minorities or the immutability of skin color or parentage. It

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78. Schneiderman argues that disparate impact analysis should not apply to ADEA cases because "older workers do not constitute a clearly defined group with immutable characteristics which has been subject to a history of deliberate discrimination." Schneiderman, supra note 9, at 206. Although he notes that constitutional standards are different from those of a remedial statute like the ADEA, he uses only constitutional cases to support his view that the nature of age discrimination precludes a disparate impact analysis. See id. at 204-14; see also McKenry, supra note 77, at 1167-68; Stanford Note, supra note 9, at 848-54.


80. "What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract." Id. at 436.


83. The union's seniority system, which had the effect of perpetuating the company's past discrimination, was immune to prosecution because it was a bona fide seniority system covered by the title VII exemption. 431 U.S. at 348-56.
simply focused on the employment practice’s adverse effect on a protected group.\footnote{4} Extending the use of disparate impact analysis to sex discrimination, the \textit{Dothard} Court declared minimum height and weight requirements illegal because of their disparate impact on female applicants, not because past sex discrimination made women weigh less and have smaller statures than men. Indeed, the Supreme Court never discussed “past” discrimination but simply concentrated on the adverse effects of the employment policy on members of a protected group.\footnote{5}

The commentators’ insistence on distinguishing among types of discrimination also confuses the statutory analysis used in ADEA cases with the constitutional analysis applied when the fourteenth amendment is invoked. Under equal protection analysis, membership in a “suspect” category determines whether a court applies a strict scrutiny, rational basis, or middle-tier test.\footnote{6} In title VII and ADEA litigation, however, the statute defines the protected group and courts do not vary their standard of review.\footnote{7} Congress may have examined the

\footnote{4. \textit{Id.} at 335-39. As a former EEOC Commissioner stated, “the rationale of \textit{Griggs} reaches situations in which there has never been a history of overt discriminations.” Blumrosen, \textit{supra} note 55, at 90-91. Even the Stanford Note conceded that adverse impact on minority status could arise as a result of current cultural deprivation as well as past discrimination. \textit{See} Stanford Note, \textit{supra} note 9, at 851-52.\r

\footnote{5. 431 U.S. at 328-32.\r
\footnote{6. Under equal protection analysis, the type of test applied (strict scrutiny or rational basis) depends on the existence of a suspect category or a fundamental interest. If neither is present, courts will apply the rational basis test under which few laws are struck down. If either is present, however, courts will use the strict scrutiny test under which few laws survive. The Supreme Court also may be developing a middle-tier test for categories not quite suspect but nonetheless needing a closer examination than that of the rational basis test. Because of these levels of scrutiny, the type of constitutional discrimination complained of is crucial; it will determine which test is applied and hence whether the conduct will be prohibited. In determining whether a category is suspect, the courts look to factors such as whether the group has been politically powerless or historically subject to discrimination, whether the factor on which discrimination is based is immutable, irrelevant, or inaccurately stereotyped. \textit{See generally} Gunther, \textit{Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for New Equal Protection}, 86 \textit{Harv. L. Rev.} 1 (1972).\r

In applying these criteria, the Court has declared that age is not a suspect category and it will be reviewed under the rational basis test. \textit{See} Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976). For an excellent summary of equal protection theory and its effect on the problem of age discrimination, see Eglin, \textit{Of Age and the Constitution}, 57 \textit{Chic.-Kent L. Rev.} 859, 872-914 (1981).\r

\footnote{7. Blumrosen discusses this point in regard to title VII. He noted that \textit{Griggs} was decided by a Court already shifting to a more restrictive view of the constitutional rights of minorities. It remained willing, however, to be less restrictive in regard to statutory rights. \textit{See} Blumrosen, \textit{supra} note 55, at 63.}}
nature or pattern or history of discrimination, but it did so in order to determine whether a particular group needed protection. The congressional decision to protect race, national origin, religion, gender, and age in identical language suggests that Congress did not intend to create different levels of statutory protection.

Furthermore, neither the legislative history nor the facts of age discrimination support the commentators' claim that Congress passed the ADEA—rather than simply amending title VII to include age—because age discrimination is not as persistent, debilitating, or real as ethnic, race, or gender discrimination. Admittedly, the general consensus that blacks and women were, and in some situations still are, subject to widespread discrimination in the form of racism and sexism\(^8\) was not matched by a similar understanding of ageism.\(^9\) Much discussion about earlier attempts to outlaw age discrimination revolved not around how best to solve the problem but whether it existed.\(^9\) Moreover, Congress, in passing the ADEA in 1967, specifically found that age discrimination did exist in employment but made no mention of ageism in American society.\(^9\)

That Congress focused on age discrimination in the workplace instead of ageism throughout society does not imply, however, that Congress viewed ageism as different or less offensive than the types of discrimination prohibited by title VII. Even within the Civil Rights Act of 1964, Congress did not protect sex and religion in the same ways it protected race and national origin.\(^9\) Thus the emphasis on employment discrimination may

\(8\) This consensus was (and is) much less clear with regard to women. While most would agree in 1970 that women were treated differently, not everyone viewed that different treatment as discrimination. For example, the seventh edition of Webster's Dictionary (1971) defined racism but not sexism and its definition of stereotype included race as an example but not gender. See Webster's Seventh New Collegiate Dictionary (1971). Furthermore, the Civil Rights Act itself and the debate generated by it were probably important in developing a broader awareness that the different treatment of blacks, women, and others was discriminatory. Before the Act's passage in 1964, many viewed such different treatment as merely a justifiable result of physical differences.

\(9\) Some of the comments about ageism in the 1960s and 1970s are reminiscent of those about racism in the 1940s and 1950s.

\(9\) See 113 Cong. Rec. 31,254 (1967).


\(9\) The Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in all sections of the Act, but prohibits religious discrimination only in the public accommodations, public facilities, public education, and equal employment opportunities sections, and discrimination based on sex only in the public education and equal employment opportunities sections. 42 U.S.C. §§ 2000a-f (1976).
reflect congressional concern about the economic effects of discrimination rather than a belief that older Americans are not a minority group\textsuperscript{93} subject to persistent, debilitating, and real discrimination.

Although the legislative history of the ADEA provides no guidance about age discrimination outside the realm of employment, many sociologists and gerontologists view older Americans as a distinct minority\textsuperscript{94} noting that, like blacks and

\begin{itemize}
  \item A commonly accepted definition of “minority group” is “a group of people who, because of their physical or cultural characteristics, are singled out from others in the society in which they live for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination.” F. Davis, Minority-Dominant Relations 4 (1978) (quoting Wirth, The Problem of Minority Groups, in The Science of Man in the World Crisis 347 (R. Linton ed. 1945)). According to this view, minority status is not a matter of inferior numbers but a relative lack of power in society. Any group that is not allowed full access to the political, social, or economic rewards of society because its members share a physical or cultural characteristic not valued by those who hold power is a minority. See id. at 3-17.
  \item The concept of a minority group as a perception of the distribution of benefits is an important way to view inequality because it focuses on the treatment of the group members and alerts the observer to the fact that the treatment is due to some distinguishing factor such as skin color, parentage, or gender, over which the individual has no control. Differential treatment in this sense can be viewed as a societal problem in general rather than the individual’s having done something, or not done something, to merit such treatment. See J. Levin & W. Levin, Ageism: Prejudice and Discrimination Against the Elderly 65-66 (1980) (summary of the current literature on minority group status).
  \item The minority group approach is radically different from that of victim-blaming, which explains inequality, deprivation, and prejudice by the lack of opportunities available to the minority because of their minority status. This circular reasoning allows the dominant group to be sympathetic to the problems arising from inequality without being compelled to do anything about them. Levine clearly summarized this approach as “[b]laming the victim for the problem he or she suffers is merely a matter of identifying those characteristics which distinguish the individual from the rest of the population and proposing how the problem may result from this.” Id. at 37. A thorough examination of this issue can be found in W. Ryan, Blaming the Victim (1971). Ryan demonstrates how “solutions” to “minority problems” depend on the underlying approach. For example, toddlers in inner city ghettos have an abnormally high incidence of lead poisoning because of eating lead paint chips from flaking walls. Rather than develop a program to provide better housing or at least require landlords to remove lead-based paint from rented dwellings, the solution found was a program to educate mothers to keep their children from eating the paint.
\end{itemize}
women, older Americans face discrimination because of inaccurate stereotypes. For these experts, the immutability demand of the disparate impact critics is irrelevant to the reality of ageism. Indeed, requiring immutability makes no sense in either the context of minority groups generally or older Americans specifically. For example, neither blacks nor hispanics were members of a minority group until they came to the United States. That a Mexican-American has lived in this country for only five years does not lessen the ethnic prejudice directed against that person today. 96 Similarly, that older persons are old for only a portion of their lives does not mitigate the discrimination they face in their later years. Once individuals cross the biological age line, they are considered "old"—regardless of their individual characteristics. In each case societal perceptions of the person change although the individual has not. 97

cause they exhibit no group consciousness, are not negatively stereotyped, are not discriminated against because of age, and do not spend their entire lives as old people. Streib, Are the Aged a Minority Group, in Middle Age and Aging 33-35 (1965). These criteria closely parallel those used by the disparate impact critics to argue that age discrimination is dissimilar to title VII discriminations. See supra notes 77-78 and accompanying text. Streib, however, may very well be misconstruing group consciousness and its application to older Americans. See J. Levin & W. Levin, supra note 93, at 66-69. Group consciousness can take two forms—an attempt to reject membership in one's group because of the prejudice and discrimination one faces or banding together in an attempt to change society or otherwise overcome that prejudice and discrimination. Blacks have done both. Thousands "passed" while others joined groups ranging from the NAACP to the Black Panthers. Older Americans also approach the issue from both sides. Some "pass," or attempt to pass, for younger while others band together in groups ranging from retirement communities to the Gray Panthers. Id. at 66-69.

96. Similarly, a person who has lived as a white and looks white may suddenly be considered a black and face prejudice for the first time. For decades many states statutorily defined race (Caucasian and Negro) based on the race of one's ancestors. A mulatto had one Negro parent, a quadroon had one Negro grandparent and an octodroon had one Negro great-grandparent. In most southern states all of these were considered Negro and even individuals with only one Negro great, great grandparent were often legally defined as Negro. Many such "legal Negroses" did not "look" black and hence "passed" as white, unless or until exposed by a birth certificate. See generally States Laws on Race and Color (P. Murray ed. 1950 & Supp. 1955) (survey of state laws). A similar statutory definition of race was developed in Germany in the 1930s. The Nuremberg Laws of 1935, for example, declared all individuals with at least three Jewish grandparents to be Jewish. Subsequently, the Nazi persecution was directed also at people with fewer Jewish ancestors. As a result, many Germans who had been Christian or atheist for two generations and who had maintained no cultural contact with their ethnic heritage suddenly "became" Jewish. See H. Holborn, III A History of Modern Germany 759-60 (1969).

97. Age and its meaning are socially defined. All societies develop age sta-
Equally without foundation is the belief that ageism is not real discrimination because its stereotypes are neither harmful nor pervasive nor rooted in the past. Stereotypes about older people, whether recent or ancient, are plentiful and frequently are used to justify the discrimination against them. In the last thirty years, research about age stereotypes and their validity has shown that most individuals have specific beliefs about older people, that they respond to elders based on those beliefs, that most of those beliefs are inaccurate, and that the stereotypes have changed little during almost three decades. For example, older people are perceived as set in their ways, conservative, disliking change, physically and mentally inactive (if not incapacitated), and generally without much to offer those around them. Because of this perception, youth is preferred and older people are excluded. Yet a number of stud-
Nonetheless, the misperceptions abound and continue to disadvantage older Americans. This disadvantage is starkly visible in the economic sphere. The labor force participation rate of those over sixty-five has dropped dramatically in thirty years, from 27.2% in 1947 to 17.2% in 1967 to 13.8% in 1975. The patterns for both the forty-five to fifty-four age group and the fifty-five to sixty-four age group reflect an increase from 1947 to 1969, then by 1975 a decrease for the older group to the 1947 level, and a steady but slightly lower participation rate for the younger group.

When these groups are broken down by gender, however, an even gloomier picture emerges for older male workers. In both categories the labor force participation rate for males dropped, dramatically for the fifty-five to sixty-four age group and significantly for the forty-five to fifty-four age group. But for the substantial influx of older women into the labor market, both the fifty-four to sixty-five and forty-five to fifty-four age groups would have experienced an overwhelming overall decline.

The severity of this shift cannot be explained by demographic changes or the allure of retiring early and receiving Social Security and other “old age benefits.” Indeed, with other factors held constant, the aging of the American population...
should have resulted in an increasing rather than decreasing proportion of older Americans in the work force.\textsuperscript{109} And to suggest that the lower participation rate results from the desire and ability of older Americans to retire "young" ignores economic reality: older Americans are not retiring on a cushion of financial security.\textsuperscript{110} In 1970, persons over sixty-five, whether head of household or single, had a lower median income than younger people. At the same time, 27.3\% of older Americans lived in poverty while only 8.2\% of their younger compatriots did.\textsuperscript{111} Social Security has undeniably eased the way for some Americans but it has also institutionalized old age at sixty-two or sixty-five years of age and thus denied many older Americans any choice about working. Thus, although older Americans now comprise a larger share of the total population both numerically and proportionately, their role in the workforce and their share in society's tangible economic benefits have declined.

These unfavorable employment statistics, economic indicators, and survey data reflect widespread discrimination against older Americans. Employers are not rejecting older workers in favor of younger ones because the latter can outperform the former. Rather, they respond to older workers based on their stereotypic assumptions about aging. Like subjects in experiments, employers avoid older workers because of false perceptions about their physical, mental, and emotional capabilities.\textsuperscript{112} They look at chronological age and not at the

\textsuperscript{109} The postwar baby boom created an anomalous demographic bulge for the current generation of workers 30 to 40 years old. Nonetheless, changing mores, prosperity, birth control, and medical advances have combined to alter the pattern of American population growth. Fewer children are born and more adults live longer than ever before. The result is a clear demographic shift to the upper age categories. See U.S. Bureau of the Census, Statistical Abstract of the United States 29-30 (1980).

\textsuperscript{110} See supra note 99.

\textsuperscript{111} See Gottlieb & Anderson, supra note 104, at 7-24.

\textsuperscript{112} One study on the effects of age stereotypes on employment decisions showed that age significantly affected how individuals might be characterized. A group of realtors and business students were asked to indicate the extent to which a number of characteristics applied to a 60-year-old man and a 30-year-old man. The older man received favorable ratings only for reliability and honesty; he was rated negatively in regard to capacity for job performance and potential for development. He was also seen as accident prone, rigid, and dogmatic. The younger man, on the other hand, was seen as more productive, efficient, motivated, capable of working under pressure, future-time oriented, open to new ideas, capable of learning, adaptable, and versatile. See J. Levin & W. Levin supra note 93, at 76-78. In another study, business students were asked to make managerial decisions about certain employment issues. When a computer programmer whose technical skills had become obsolete was de-
person, just as many employers once looked at skin color or
gender rather than capability.

These considerations show that age discrimination cannot be
distinguished from other forms of discrimination in a way that permits rejection of disparate impact analysis in ADEA cases. Courts have developed and applied disparate impact analysis to prevent the disproportionate impact of policies on members of a protected group—regardless of why Congress gave that group statutory protection. Furthermore, although Congress did not examine age discrimination outside of the work place, research suggests that stereotypes based on age not only exist but result in discrimination. Like blacks and women, older Americans are treated differently because of their group membership.

III. CLOSING THE BACK DOOR: A STANDARD FOR
ESTABLISHING THE PRIMA FACIE CASE AND
ITS REBUTTAL IN ADEA DISPARATE
IMPACT CASES

Once a court has held that an ADEA plaintiff can rely on the disparate impact theory, it must decide what proves, rebuts, or exempts a disparate impact. Predictably, the evidentiary problems encountered in title VII disparate impact cases also arise in ADEA cases. Both the role of statistics in establishing a prima facie case and the role of the statutory and judicial exemptions need clarification.

A. ESTABLISHING A PRIMA FACIE CASE WITH STATISTICS

Under disparate impact theory, a plaintiff establishes a prima facie case by demonstrating that a neutral policy adversely affects a protected group differently than it does others. Thus a would-be plaintiff faces two threshold issues: what benchmark\(^\text{113}\) best reflects the expected nondiscriminatory result, and what statistical measure best compares the employer's workforce with that benchmark.

The benchmark issue is particularly bewildering in employ-

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\(^{113}\) A benchmark is "a point of reference from which measurements of any sort may be made." Webster's Seventh New Collegiate Dictionary 79 (1971). In this Note, benchmark refers to the standard group against which subgroups of employees are compared.
ment discrimination cases because the possible group comparisons seem limitless. The employer's work force might be compared to the general population, the labor force, the qualified labor force, the qualified and interested labor force, the applicants, the qualified applicants, persons offered the job, or persons actually hired (or promoted or fired). The geographical boundaries of this benchmark might be local, regional, or national. The federal courts generally adopt the qualified labor force as the appropriate benchmark, but determine the specific qualifications and geographic boundaries on a case-by-case basis.

For hiring or firing decisions, use of the qualified labor force is generally the standard. However, in cases where the employer is shown to have engaged in discriminatory hiring or firing decisions, the use of the qualified labor force might be inappropriate. One's view of how the economic system and job market work also can affect the choice of a benchmark. See Smith & Abram, Quantitative Analysis and Proof of Employment Discrimination, 1981 U. Ill. L. F. 33, 36-48 (1981). Such an influence, however, is inappropriate in disparate impact cases because the underlying assumption that employers cannot be neutral in employment decisions is diametrically opposed to the statutory purpose of neutrality at least in regard to the protected categories. In the employment setting, the legal requirement of neutrality outweighs theories or beliefs about how the economic structure should or might best function. Smith and Abram discuss statistical analysis of employment discrimination from the perspective of a free market economy without considering social or government policies, such as antitrust or discrimination laws, that put limits on what an employer may do. See id. at 33-35.

114. The issue of a correct benchmark is the same under disparate treatment analysis.

115. One's view of how the economic system and job market work also can affect the choice of a benchmark. See Smith & Abram, Quantitative Analysis and Proof of Employment Discrimination, 1981 U. Ill. L. F. 33, 36-48 (1981). Such an influence, however, is inappropriate in disparate impact cases because the underlying assumption that employers cannot be neutral in employment decisions is diametrically opposed to the statutory purpose of neutrality at least in regard to the protected categories. In the employment setting, the legal requirement of neutrality outweighs theories or beliefs about how the economic structure should or might best function. Smith and Abram discuss statistical analysis of employment discrimination from the perspective of a free market economy without considering social or government policies, such as antitrust or discrimination laws, that put limits on what an employer may do. See id. at 33-35.

116. For example, the Griggs standards were quite vague. The two questioned employment requirements were a high school diploma and a passing score on a general ability test. The Court discussed the relevant statistics and the employee group/labor market comparison in one footnote where it referred to 1960 census statistics showing that 34% of white North Carolina males but only 12% of black North Carolina males had high school diplomas. It also noted that 58% of the white applicants passed the required test but only 6% of the black applicants did so. After noting that this disproportionate impact was discriminatory, the Court concentrated its remaining efforts on explaining why neither requirement fell under the business necessity exception. Griggs v. Duke Power Co., 401 U.S. 424, 430-36 (1971). Dothard addressed the issue more directly. It accepted the use of general population statistics rather than those describing only the actual applicants because the questioned policy was an initial bar and hence might discourage many individuals from even applying which would distort the actual applicant pool. Also, national data was considered reliable absent any showing that Alabamians differed markedly from the national population. Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977). Similarly, Teamsters relied on general population statistics as a benchmark because the jobs in question were entry level positions requiring few skills but noted that if the employer had reason to believe these were not an accurate reflection of the qualified applicants, such evidence would be relevant. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 (1977). Hazelwood added that such general statistics were not generally appropriate when the job required special qualifications. Hazelwood School District v. United States, 433 U.S. 299, 308 n.13 (1977). See also supra note 21 and accompanying text.

117. Promotion or demotion decisions must take into account the composi-
force avoids both over- and under-inclusiveness. For example, if a more narrow measure, such as job applicants, were adopted, an employer could distort the benchmark by minimizing its recruitment of protected group members.\textsuperscript{118} Also, employers often do not keep records compiling such data. Even if they did, potential plaintiffs usually would not have access to the information unless they had already shown sufficient cause to proceed with discovery. Using the qualified labor force, on the other hand, allows a potential plaintiff relatively easy access to the necessary data in the form of census reports and information collected by labor and professional organizations.\textsuperscript{119}

At the same time, the qualified labor force avoids over-inclusiveness by tying job qualifications to the decisionmaking process. Thus this standard does not require an employer to match its work force to the population but only mandates that the employer choose from the entire pool.\textsuperscript{120}

To define the qualified labor force, one must identify the specific job qualifications and the relevant geographic market. Job qualifications range from none to various levels of educational, physical, emotional, and personal achievement. For a given geographic area, jobs with few requirements have a broad pool of qualified applicants; increasing the minimum qualifications shrinks the qualified pool.

The geographic constraints are likely to move in the opposite direction. As the minimum qualifications increase, the labor pool decreases and hence an employer may need to draw from a larger geographic area. In addition, the employer's past practice or location of recruiting and the number of available positions may affect the relevant geographic market.\textsuperscript{121} As

\textsuperscript{118} B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1349 (2d ed. 1983).

\textsuperscript{119} Both the availability and timeliness of the data will sometimes restrict the choices of benchmark. See id. at 1358-67. This discussion assumes that the data is available and that it reflects current conditions.

\textsuperscript{120} Id. Smith and Abram argue that even in a world of neutral employers, differing “skill[s], education, experience and work preferences between men and women, minorities and nonminorities, will affect relative earnings and employment.” Smith & Abram, supra note 115, at 38, 54-59. This problem disappears when the qualified labor market is used as the appropriate benchmark. Even in cases using general population figures, it is not as crucial as Smith and Abram imply because the employer can rebut a prima facie case by showing that necessary job requirements were not fulfilled by the protected group.

\textsuperscript{121} B. SCHLEI & P. GROSSMAN, supra note 118, at 1361-64. Such factors are necessary because the determination of appropriate geographic bounds may be complicated by inconsistent demographic patterns. For example, a crucial is-
sume an employer that currently draws its work force from several surrounding states, recruits on college campuses nationwide, and wants to hire eight chemical engineers with graduate training. The high number of positions, the substantial educational requirements, and the employer's past regional hiring practice and current national hiring effort suggest a benchmark of all chemical engineers in the country with graduate training (the potential qualified labor force). On the other hand, if an employer who traditionally has advertised and hired locally needs one person to fill an entry level job requiring few or no skills, the qualified labor market would probably consist of the town's unskilled workers.

Having determined the benchmark, the plaintiff must still present statistical evidence of a disparate impact. Under disparate treatment analysis, plaintiffs use statistical evidence inferentially to show that the treatment of their class is so different from the treatment of other employees that the employer must have intended the differential treatment. This analysis requires that Congress or the courts decide what level of difference is sufficiently high to create an inference of intent. In short, the statistical analysis shows the degree of differential treatment, while the policy analysis determines what level of difference is legally sufficient to infer bad motive. As might be expected, there is a great deal of uncertainty about what level is or should be appropriate.122

sue in Hazelwood was whether the applicant/employee group was to be measured against the qualified labor force in the county or the county and city combined. This was important because the proportion of blacks in the city was substantially different than in the county. 433 U.S. at 310-12.

122. The courts have neither established a specific standard nor agreed upon a statistical measure. Both are decided on a case-by-case basis, with only vague guidance. Teamsters talked only of gross statistical disparities, 431 U.S. at 339 n.20, while Hazelwood reiterated the Teamsters guideline but also suggested that the "two or three standard deviation" disparity mentioned in Castaneda v. Partida, 430 U.S. 482 (1977), might be appropriate as well, 433 U.S. at 309 n.14. Disparate treatment cases make up the overwhelming proportion of cases discussing the issue of statistical standard. This is at least partially due to the theoretical basis of inferring intent, which engenders controversy about a "sufficient" level. See generally W. Connolly & D. Peterson, Use of Statistics in Equal Employment Opportunity Litigation (1982); B. Schlei & P. Grossman, supra note 118, 1347-67; Bompey & Saltman, The Role of Statistics in Employment Litigation—A University Perspective, 9 J.C. & U.L. 263 (1982-83) (The Supreme Court agrees that "gross disparities" or a differential of two or three standard deviations is enough to infer discrimination but has not yet developed a specific standard.); Grady, Statistics in Employment Discrimination, 30 Lab. L.J. 748 (1979) (Courts demand increasingly sophisticated statistical analysis and attorneys must learn how to use these tools.); McGuire, The Use of Statistics in Title VII Cases, 30 Lab. L.J. 361 (1979) (Teamsters and Hazelwood provide only general guidelines about the required degree of disparity but em-
This uncertainty need not and should not be allowed to spread to employment discrimination cases analyzed under disparate impact theory. As the Supreme Court recently noted, disparate impact analysis involves different issues and evidence than disparate treatment. Disparate impact theory uses statistical theory not to infer the motive of an employer but rather to describe the result of a policy. Underlying the theory is the policy judgment of Congress and the courts that employers cannot use facially neutral employment policies that disproportionately affect a protected class. Legally this means that, absent a business necessity reason or RFOA, a group of employees should reflect the composition of its appropriate benchmark, at least in terms of the protected category. Statistics enable courts to discover any difference between the two groups.

The Supreme Court, however, has not clarified the meaning of the term "significantly different," its test for adverse impact. Although courts could develop a "disparity level" test similar to that used in disparate treatment theory, both the theoretical basis of disparate impact and the appropriate statistical theories support a more direct and straightforward approach.


124. See infra notes 132-150 and accompanying text.

125. Thus if older persons comprise 20% of the qualified labor force, one would expect the employer's work force to be about 20% older persons.


127. Although "significant disparity level" is appropriate terminology in disparate treatment cases, it adds confusion to the term "significant" in disparate impact analysis, particularly when courts or federal guidelines talk about levels of disparity as "so significant as to show adverse impact." While significance in disparate treatment is a policy judgment about the level of disparity needed to infer intent, significance in disparate impact is a statistical term with a specific meaning. The two theories must be kept strictly separate in order to avoid misapplication of definitions, standards, and tests. See infra note 128.

At least one commentator has already criticized the blurring of lines between the two analyses which may have already undercut the business neces-
To find whether a disparate impact exists, the test need only discover if the policy affects the protected category and the rest of the employer's work force differently and, if so, whether that difference could have resulted by chance. As noted above, statistical analysis of the employer's work force and the appropriate benchmark can reveal such differences. More importantly, that same analysis also provides a determination of whether the difference is irrelevant because it occurred by chance or statistically significant because it resulted from some factor other than chance.

Interpreting the Supreme Court's exclusion used in disparate impact analysis. See Note, supra note 25, at 416-19.

Confusion about the theoretical basis of each theory is also responsible for a battle of the printed word between Professors Shoben and Cohn. Compare Cohn, On the Use of Statistics in Employment Discrimination Cases, 55 Ind. L.J. 493 (1980) (many current measures cannot be used to show adverse impact because of inappropriate statistical assurances and inferences) with Shoben, In Defense of Disparate Impact Analysis under Title VII: A Reply to Dr. Cohn, 55 Ind. L.J. 515 (1980) (Cohn's conclusions are based on a misunderstanding of the legal principles and his statistical model is aimed at only intentional discrimination, that is, the kind analyzed under disparate treatment theory) with Cohn, Statistical Laws and the Use of Statistics in Law: A Rejoinder to Professor Shoben, 55 Ind. L.J. 537 (1980) (if statutes are to be litigated with the use of statistics, they must be framed in ways that underlying theories can be statistically tested).

It is important to emphasize that the level of disparity does not play the same theoretical role under disparate impact analysis as it does under disparate treatment. With disparate impact, the issue is conceptually framed in terms of whether or not there is disparity. In that setting the only level that should be at issue is the amount of risk considered safe in concluding that the disparity did not occur by chance. That decision can be guided by standards from social science research where the usual levels are 95%, 98%, or 99% (i.e., significance levels of .05, .02, or .01). See generally W. Connolly & D. Peterson, supra note 122, at § 8.04; A. Larson & L. Larson, 3 Employment Discrimination § 74 (1983).

In statistical terminology, this process is called hypothesis testing (sometimes called rejection of the null hypothesis). This is done by assuming that the opposite of the primary hypothesis (called the null hypothesis) is true and comparing it with the data in hopes of being able to reject it at a specified level of probability that such a rejection would be wrong. This seemingly circular approach is necessary because probabilities of error can be calculated only for rejected hypotheses. The original hypothesis is not "proven" (nor can it ever be) but is supported by the rejection of its opposite at a 5% or 1% probability of having wrongly rejected it. Thus, while it is impossible to prove that two groups are the same, it is possible to support the inference that they are the same by showing that in rejecting the null hypothesis that they are different, there is only a X% chance of making a mistake. For additional discussion of hypothesis testing and significance levels, see A. Johnson, Social Statistics Without Tears ch. 12 (1977); H. Blalock, Social Statistics chs. 8-21 (1961); H. Loether & D. McTavish, Inferential Statistics for Sociologists chs. 6-9 (1974); S. Siegel, Nonparametric Statistics for the Behavioral Sciences chs. 2-3 (1956); J. Twartt & J. Monroe, Introductory Statistics chs. 6-7 (1979); Smith & Abram, supra note 115, at 36-54.
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This statistical approach would work in both Title VII and ADEA cases, although the method of measuring group membership differs. The protected category under the ADEA, people from forty to seventy, is measured on a continuum while race and gender tend to be dichotomous. This distinction, however, affects neither the statutory nor the theoretical basis for using disparate impact analysis in ADEA cases. It merely means that the statistical test for determining disparity in ADEA cases is different than that used for a dichotomous variable. Thus, whether the protected class is based on age, race, or gender, a prima facie case of employment discrimination under disparate impact analysis is established by a statistical measure indicating that the questioned policy disproportionately affects the protected class in a way not explained by chance.

B. EXEMPTIONS: BUSINESS NECESSITY AND THE RFOA

In defending an ADEA case under disparate impact analysis, an employer can turn to either the judicially created business necessity defense or the statutorily based reasonable factor other than age (RFOA) exemption. As with the stan-

130. Race, of course, can cover several categories (Black, Spanish surnamed, Asian surnamed, Native American, etc.) but is usually found in a dichotomous setting or at least treated as dichotomous. For example, one court that dealt with three racial groups (White, Black, Spanish-surnamed) combined the two minority groups into one since the different impact affected them both. See New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979). This dichotomous view of race, however, may have to change in the future as America's urban areas increasingly become centers where minorities compete with each other for jobs and social services.

131. In statistical research, variables measured on a continuum are often preferred over dichotomous ones because a wider variety of more sophisticated statistical theories can be applied to the former. In short, they provide more measureable information subject to a wider variation of manipulation. Continuous variables can be examined on the basis of the whole continuum from measures such as regression analysis or on ranked subcategories (e.g., 40-45, 45-50) through measures such as the Mann-Whitney-Wilcoxon Rank Survey Test or the Kolmogorov-Smirnov Test. See W. CONNOLLY & D. PETERSON, supra note 122, at §§ 10.05, 11.0-10. Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702 (1980); Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Colo. L. Rev. 737 (1980). For additional sources examining relevant statistical measures, see also supra note 129.


ards for statistical analysis, however, the courts have not agreed on guidelines for applying these defenses.

Business necessity, which is sometime used interchangeably with "job-relatedness," was developed in Griggs as a defense to a prima facie finding of adverse impact on a protected group: "[Title VII] proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." In Albemarle Paper Company v. Moody, the Supreme Court refined the definition of business necessity and held that once the defendant proved necessity, the plaintiff could prevail only by showing a less discriminatory alternative.

By applying the Albemarle tests for business necessity and allocations of burden to ADEA cases, both the Geller and Leftwich courts logically extended the judicially created Title VII defense. Nothing about age discrimination or the ADEA is a subcategory of factors that can be considered "a reasonable factor other than age," this Note treats these two statutory exceptions as one. The presence of the dismissal for cause clause apparently results from the ADEA's sponsors' desire to assure congressional sceptics that the statute would not force employers to hire or retain unqualified workers. See 113 Cong. Rec. 31,254 (1967). The BFOQ defense, because it allows the use of age, is inapplicable in disparate impact cases, which concern the use of nonage factors that have an adverse effect on elder workers. See B. Schlei & P. Grossman, supra note 118, at 504-05.

In Griggs, job-relatedness was part of the business necessity standard in that the questioned test could hardly be considered necessary to the operation of the business if it were not related to the job for which the applicant was applying. Although courts sometimes use the terms interchangeably, the consensus is that job-relatedness is one way to show business necessity. Id. at 1328-29. Some commentators advocate that job-relatedness be used only in a testing context. See, e.g., Note, supra note 25, at 402-03.

Griggs, 401 U.S. at 431.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Burdine does not alter the burden shifts developed since 1972 because it does not apply to cases brought under disparate impact analysis. See supra note 15. The Supreme Court has defined business necessity as a policy or requirement "necessary to safe and efficient job performance," Dothard v. Rawlinson, 433 U.S. 321, 331-32 n.14 (1977). One commentator argues that business necessity should not be defined solely as job-relatedness because it would violate the holding of Albemarle, which discusses job-relatedness only with regard to an employment test, and result in an overly broad application of the exemption. See Note, supra note 25 at 402-03. Citing both Albemarle and Dothard, he urges that job-relatedness be used only in a testing context and business necessity in nontesting contexts. Id.


Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691-93 (8th Cir. 1983).

The only commentary focusing on the use of a business necessity ex-
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statute suggests that Congress intended greater protection for older persons than for persons protected by title VII. Moreover, in developing both the disparate impact theory and the business necessity defense in *Griggs*, the Supreme Court balanced the statutory employment rights of the title VII protected groups with the legitimate business needs of the employers. The same balance and protection are needed in age discrimination cases.

It has been argued that business necessity is too high a standard for ADEA defendants because the RFOA exemption is preemptive and requires only "reasonableness." However, in defining its "reasonable" standard, this theory relies on the constitutional three-tier analysis and analogizes its standard to the middle tier. Thus, this approach disregards the distinction between statutory and constitutional analysis and standards, while also ignoring the statutory location of the exemption and congressional intent. Section 623 of the ADEA contains the RFOA and the bona fide occupational qualification (BFOQ) exemptions: An otherwise prohibited action will not be unlawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or when the differentiation is based on reasonable factors other the the age." The placement of the BFOQ and RFOA exceptions in the same subsection, combined by the disjunctive "or," clearly indicates that Congress intended two exemption in ADEA cases appeared in 1979. See Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979). The discussion emphasizes the degree to which cost could be an appropriate business necessity or RFOA. Unfortunately, the Note does not address directly the issue of disparate impact theory and its analysis fluctuates between a disparate treatment approach and one implying disparate impact. Within these limitations, its comments about cost and older workers are useful.

140. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. TOLEDO L. REV. 1261, 1278-79 (1983). Player also asserts that "courts have yet to address a true [disparate] impact case, a case involving the utilization of a truly age neutral criteria." Id. at 1278 (emphasis added). Unfortunately his point is based on two misconceptions: his belief that Geller and Leftwich as well as Allison and Massarsky were decided on the basis of disparate treatment rather than disparate impact and his belief that a neutral criterion for age can be neutral only if it has no correlation with age. Id. at 1274-78. His first comment is explained only by an assumption that he misread the four cases, in terms of both theory and facts. The second comment simply makes no sense because the whole point of disparate impact analysis is to examine facially neutral policies that in effect are related to the protected status.

141. See id. at 1278-83.

142. See supra notes 86-87 and accompanying text.

emptions. To read the RFOA exemption to require only reasonableness, however, would define an RFOA exemption so broad as to swallow any distinct BFOQ exemption. Therefore the structure of section 623 implies that both the BFOQ and the RFOA must be "necessary to the normal operations of the particular business."

Furthermore, Congress could hardly have intended the RFOA to preempt a subsequent, judicially developed exemption. Rather, as noted above, Congress sought to provide title VII protection for older Americans while allowing for differences peculiar to them. The congressional debates reveal some concern that the ADEA might force employers to hire or keep physically or otherwise unqualified workers, and the RFOA provision was an assurance that such was not the case. It thus deals with a necessary business policy which is neutral on its face but adversely affects older workers.145

Finally, to replace "business necessity" with a reasonableness standard would completely subvert the ADEA. As its advocate noted, the reasonableness standard would not allow a plaintiff to demonstrate a lesser discriminatory alternative in order to rebut the defendant's proof of reasonableness; the alternative would be relevant only in determining whether the policy was reasonable. Under that rule, any showing of cost savings for a business could be found "reasonable" and hence a defense to an adverse impact on older workers. But this contravenes both the EEOC and the Wage and Hour Division guidelines stating that cost cannot be a RFOA.147 It also subverts the clear congressional goal of preventing economic discrimination against older workers.148

The same contravention of congressional intent would occur if courts give business necessity or RFOA status to factors that are so closely correlated with age that they act as proxies. Congress explicitly stated its desire to ameliorate the economic hardships suffered by older Americans because of age discrimination in employment. Congress was not trying merely to prohibit cost saving administrative devices that affected older workers but rather sought to prevent the use of

144. See supra notes 53-69 and accompanying text.
145. See 113 Cong. Rec. 31,251-254 (1967).
146. See Player, supra note 140, at 1280.
147. See supra note 61.
148. See supra notes 53-69 and accompanying text.
149. Both experience and rank are often correlated with age. See supra note 62.
cost as an overall factor in employment decisions affecting those between forty and seventy.\textsuperscript{150} To excuse cost standards under the guise of an exemption would subvert congressional intent and gut the statute.

One could argue that such a view is unfair because it extends an advantage to a group that has already had its chance in the marketplace or because restricting cost-based decision-making hinders business effectiveness. Nonetheless, such policy considerations cannot destroy Congress's conclusion that the economic plight of older Americans is serious enough to grant them special protection in the workforce.

CONCLUSION

The ADEA is a remedial statute passed by Congress to prohibit employment discrimination based on age just as title VII prohibited employment discrimination based on race, ethnicity, religion, or gender. The virtually identical language of the ADEA and title VII reflects the similarity of congressional goals for the two statutes. Moreover, in analyzing employment discrimination cases under a disparate treatment theory, the courts have used title VII and ADEA precedents interchangeably. The same should be true for cases based on a disparate impact analysis. Congress has statutorily declared race, ethnicity, religion, gender, and age to be protected classes. In title VII cases, the courts have interpreted that protection to include discriminatory effect as well as discriminatory intent. Since nothing about the ADEA and its protected class distinguishes it from title VII and its protected classes, disparate impact analysis should also apply in ADEA cases.

Furthermore, the use of disparate impact analysis in ADEA cases should not be subverted by blurring the theoretical bases for using statistical evidence in disparate treatment and disparate impact theories. A prima facie case in disparate impact analysis should be established when a plaintiff demonstrates a disproportionate effect of a policy on the protected group. As long as statistical analysis shows that the disparity did not occur by chance, courts should not require a minimum level of disparity. Moreover, although the defendant can rebut such a prima facie showing by demonstrating a business necessity for the policy or proving that the impact actually resulted from a factor other than age, the higher cost of employing older or

\textsuperscript{150} See 113 Cong. Rec. 31,252 (1967).
more experienced workers should not rebut a disparate impact. To do so would negate one of the most important reasons for the statute and completely contravene the statute’s wording and logical construction.

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