South Carolina Law Review

Volume 53 | Issue 2 Article 4

Winter 2002

Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers

Judith D. Fischer
Louis D. Bramdeis School of Law, University of Louisville

PUBLIC POLICY AND THE TYRANNY OF THE BOTTOM LINE IN THE TERMINATION OF OLDER WORKERS

JUDITH D. FISCHER*

---

* Assistant Professor, Louis D. Brandeis School of Law, University of Louisville. Thanks to Professors Donald Burnett, Elaine Shoben, and Marilyn Walter for their insightful comments on an earlier draft. Additional thanks to Richard Bonenfant and Greta Noe for their invaluable research assistance.

Grow old along with me!
The best is yet to be,
The last of life, for which the first was made . . . .[1]

I. INTRODUCTION

The *Wirtz Report*,[2] the Secretary of Labor's report that served as the basis for the 1967 Age Discrimination in Employment Act[3] (ADEA), opened with Victorian poet Robert Browning's hopeful lines about aging. Reporting that "[a] century later, reality still has not caught up with that poetry,"[4] Secretary Willard Wirtz identified harsh financial and psychological consequences for older Americans due to age discrimination in employment.[5] And the consequences did not stop with current and discharged older workers: they affected the whole society through lower productivity and higher unemployment insurance payments.[6]

Thirty-five years later, as the courts increasingly focus on corporate profit maximization, Browning's lines ring with irony for older workers as the following scene is repeatedly played out. An older worker, over forty or fifty years of age, is called into his supervisor's office and terminated. He may have received excellent performance reviews up to the time of his termination,[7] accompanied by periodic merit and cost-of-living raises. But his very achievements are now working to his disadvantage. Because his salary is comparatively high, the corporation wants to hire a younger, less expensive worker to do his job.[8] Whether the termination involves a single worker or is part of a wider downsizing, the supervisor may be quite direct about her reason

---

1. ROBERT BROWNING, *Rabbi Ben Ezra*, *in* DRAMATIS PERSONAE (1864), *reprinted in* 1 ROBERT BROWNING, THE POEMS 781, 781 (John Pettigrew ed., 1981).

2. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT: REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter WIRTZ REPORT].

3. 29 U.S.C. §§ 621-634 (1994).

4. WIRTZ REPORT, *supra* note 2, at 1.

5. *Id.* at 55-57.

6. *Id.* at 53-55.

7. *See* EEOC v. Clay Printing Co., 955 F.2d 936, 938-39 (4th Cir. 1992) (finding no violation of the ADEA where five employees at least 40 years old were terminated without evidence of prior complaints or reprimands); Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 15-16 (7th Cir. 1987) (finding an ADEA violation where two employees over 40 years old were terminated despite receiving consistently superior performance reviews), *overruled on other grounds by*, Coston v. Plitt Theatres, Inc., 860 F.2d 834 (7th Cir. 1988).

8. *See* cases cited *infra* note 11.

for it.[9] She knows that the courts are unlikely to afford a remedy to a worker terminated on economic grounds.[10]

This development is relatively recent. For about twenty-five years after the ADEA became effective, most of the federal courts considering the issue held that salary-based terminations[11] and other economically-based discrimination against older workers[12] were not permitted. The reasoning behind these opinions seemed consistent with the Act's objectives.[13] Indeed, one court observed that if older workers can be terminated because of their higher salaries, "then the purpose of the ADEA will be defeated."[14]

The business climate began to shift in the 1980s, as businesses increasingly focused on bottom-line profits at the expense of other interests.[15] Even prosperous firms laid off workers in a quest to become "lean and mean."[16]

---

9. *See, e.g.*, Culley v. Trak Microwave Corp., 117 F. Supp. 2d 1317, 1321-22 (M.D. Fla. 2000) (granting summary judgment for an employer who terminated an employee for explicitly economic reasons).

10. *See infra* note 62 and accompanying text.

11. *See* Jardien v. Winston Network, Inc., 888 F.2d 1151, 1157-58 (7th Cir. 1989); Uffelman v. Lone Star Steel Co., 863 F.2d 404, 408 (5th Cir. 1989); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1207 (7th Cir. 1987); *Graefenhain*, 827 F.2d at 21; Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 691 (8th Cir. 1983); Franci v. Avco Corp., 538 F. Supp. 250, 259 (D. Conn. 1982); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978), *aff'd in part, rev'd in part*, 608 F.2d 1369 (2d Cir. 1979). *But see* Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1319 (E.D. Mich. 1976) (citing former 29 C.F.R. § 860.103(h) to find that salary can be a reasonable factor on which to base the termination of an individual, but not a group); Donnelly v. Exxon Research & Eng'g Co., 12 Fair Empl. Prac. Cas. (BNA) 417, 421-22 (D.N.J. 1974) (holding that the termination of an older worker whose salary had outpaced his productivity did not violate the ADEA).

12. *E.g.*, EEOC v. Chrysler Corp., 733 F.2d 1183, 1186 (6th Cir. 1984) (holding that forced early retirements based on economic necessity violated the ADEA unless certain tests were met); EEOC v. City of Altoona, 723 F.2d 4, 5, 7 (3d Cir. 1983) (holding that a statute based on economic considerations that required termination of workers near retirement violated the ADEA); Dace v. ACF Indus., Inc., 722 F.2d 374, 378 (8th Cir. 1983) (holding that the demotion of an older worker to save money could violate the ADEA); Geller v. Markham, 635 F.2d 1027,1032-34 (2d Cir. 1980) (holding that refusal to hire teachers with greater experience violated the ADEA); Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975) (finding that termination based on length of service, a factor inevitably related to age, would violate the ADEA).

13. *See infra* note 27 and accompanying text.

14. *Leftwich*, 702 F.2d at 691 (holding that terminating older, more experienced professors for economic reasons violated the ADEA).

15. *See* Michael Useem, *Corporate Restructuring and Organizational Behavior*, *in* TRANSFORMING ORGANIZATIONS 44, 53-55 (Thomas A. Kochan & Michael Useem eds., 1992) (stating that in the mid to late 1980s, corporations became increasingly focused on shareholder welfare at the expense of the interests of other corporate stakeholders); Louis Uchitelle & N.R. Kleinfield, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at A1 (noting "the stern insistence of Wall Street on elevating profits even if it means casting off people").

16. Karen E. Mishra et al., *Preserving Employee Morale During Downsizing*, SLOAN MGMT. REV., Winter 1998, at 83, 83. *See also* COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, ABA, DOWNSIZING IN AN AGING WORK FORCE 3 (1992) (reporting that according to Eric

Management used phrases like "downsizing," "re-engineering," "reduction in force, " and its abbreviated form, "RIF," to characterize the terminations less bluntly.[17] Unlike the traditional word "layoff," these terms suggest not a temporary condition, but "the permanent interruption of the employee's job."[18] Meanwhile, senior executives' pay, which was often tied to stock prices, rose dramatically, sometimes contemporaneously with layoffs.[19] The business climate became one that had "little respect for human dignity or welfare."[20]

Courts responded to these changes by gradually shifting their views of salary-based terminations. However, instead of recognizing a need to protect older workers caught in this wave of profit-driven decisions, courts increasingly approved business profit as a justification for terminating older workers.[21]

This Article argues that it is bad public policy to allow unfettered salary-based terminations of older workers. Whether a policy is good or bad is to some extent a matter of opinion. However, empirical evidence and commentary from the disciplines of economics, business, psychology, and sociology show the negative effects of the current policy. Part II will present an overview of the legal and economic background concerning this issue. Part III will examine scholarship and commentary demonstrating that the current case law creates bad public policy. Part IV will discuss what values ought to be applied to the problem. Part V will show that courts can apply current law to protect against salary-based terminations. It will further suggest legislative changes to address the problem if the courts do not do so.

Greenburg, editor of the American Management Association's research reports, downsizing is "an ongoing corporate activity without regard to a company's economic performance"); JILL ANDRESKY FRASER, WHITE-COLLAR SWEATSHOP 41 (2001) (reporting that successful companies are laying off older workers partly in order to replace "higher-paid, older workers with less expensive junior [workers]"); Kenneth P. De Meuse et al., *Announced Layoffs: Their Effect on Corporate Financial Performance*, 33 HUM. RES. MGMT. 509, 510 (1994) (naming prosperous companies that laid off workers); Enid Mumford & Rick Hendricks, *Business Process Re-Engineering RIP*, PEOPLE MGMT., May 2, 1996, at 22, 22 (identifying AT&T as a company that "made large numbers of staff redundant despite record profits"); Uchitelle & Kleinfield, *supra* note 15 (naming prosperous companies that downsized); Allan Sloan, *The Hit Men*, NEWSWEEK, Feb. 26, 1996, at 44, 44 ("Something is just plain wrong when stock prices keep rising on Wall Street while Main Street is littered with the bodies of workers discarded by big companies like AT&T and Chase Manhattan and Scott Paper.").

17. *See* FRASER, *supra* note 16, at 216 (stating that RIF sounds "nothing if not jazzy and upbeat"); Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*, 48 HASTINGS L.J. 511, 511 nn.1-2 (1997) [hereinafter Minda, *Opportunistic Downsizing*] (describing "downsized" as a corporate euphemism for harsher words like "fired" and "dismissed" and observing that "RIF has a euphemistic quality similar to downsizing").

18. Gary Minda, *Aging Workers in the Postindustrial Era*, 26 STETSON L. REV. 561, 574 (1996) [hereinafter Minda, *Aging Workers*].

19. *See infra* notes 192-94 and accompanying text.

20. ALAN DOWNS, CORPORATE EXECUTIONS: THE UGLY TRUTH ABOUT LAYOFFS—HOW CORPORATE GREED IS SHATTERING LIVES, COMPANIES, AND COMMUNITIES 39 (1995).

21. *See infra* Part II.A.

II. BACKGROUND

A. Legal Background

Others have covered the history of the ADEA[22] in depth and the structure of claims under it,[23] but the brief overview that follows will put the discussion in context.

1. History of Salary-Based Terminations Under the ADEA

When the Civil Rights Act of 1964 was passed, Congress did not include age discrimination provisions, but instead directed the Secretary of Labor to conduct a study of issues affecting older workers.[24] Secretary Wirtz's report, filed the next year, identified grave problems facing older workers due to employment discrimination.[25] The ADEA was enacted in 1967 "hard on the heels of the [*Wirtz Report*]."[26]

In enacting the ADEA, Congress found that "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs."[27] Among the Act's provisions was a proscription on limiting 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."[28] The Act's exceptions include situations where age is a "bona fide occupational qualification" or where the challenged decision is based on "reasonable factors other than age."[29]

Since the enactment of the ADEA, various economically-based decisions have been challenged under it, including employers' failure to hire more

22. *See* 1 HOWARD C. EGLIT, AGE DISCRIMINATION §§ 2.01-2.02 (2d ed., West 2000); Roberta Sue Alexander, Comment, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-*Hazen Paper *World*, 25 U. DAYTON L. REV. 75, 78-81 (1999).

23. *See* 2 HOWARD C. EGLIT, AGE DISCRIMINATION *passim* (2d ed., West 2000); 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.37 (2d ed. 1999); Jeff Morneau, *Too Good, Too Bad: "Overqualified" Older Workers*, 22 W. NEW ENG. L. REV. 45, 52-61 (2000); Don R. Sampen, *Age Discrimination and Reasonable Non-Age Factors*, 24 J.C. & U.L. 1, 9-17 (1997).

24. *See* Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the* Wirtz Report *Agenda*, 31 U. RICH. L. REV. 757, 758 (1997).

25. WIRTZ REPORT, *supra* note 2, at 19-33.

26. *See* Mullin v. Raytheon Co., 164 F.3d 696, 703 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999).

27. 29 U.S.C. § 621(a)(1) (1994).

28. *Id.* § 623(a)(2).

29. *Id.* § 623(f)(1).

experienced teachers in order to save money,[30] denial of employee pension rights,[31] and demotions of older workers to save salary costs.[32]

Salary-based terminations of older workers have generated numerous lawsuits.[33] A prominent case representative of the trend during the first twenty-five years was *Metz v. Transit Mix, Inc.* where a fifty-four-year-old longtime employee was fired.[34] Due to annual raises throughout his twenty-seven years of employment with the company, Metz was among its highest-paid employees, and he alleged that he was fired because of his high salary.[35] The trial court found for the defendant.[36] On appeal, the Seventh Circuit found Metz's plight to be "one of the very problems the ADEA was intended to address: the likelihood that the employee will be less employable in other

---

30. *See* EEOC v. Atlantic Cmty. Sch. Dist., 879 F.2d 434, 435-36 (8th Cir. 1989) (holding that hiring less-experienced, younger teacher to avoid paying higher wage did not violate the ADEA).

31. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993) (holding that terminating an older worker to avoid vesting of his pension did not violate the ADEA); Abbott v. Fed. Forge, Inc., 912 F.2d 867, 877-78 (6th Cir. 1990) (holding that refusing to re-hire older workers to avoid paying pension benefits did not violate the ADEA).

32. *See* Mullin v. Raytheon Co., 164 F.3d 696, 699 (1st Cir. 1999) (holding that demotion to save salary costs did not violate the ADEA).

33. Federal cases where courts held that salary-based terminations did, or might, violate the ADEA include *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1157-58 (7th Cir. 1989); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 408 (5th Cir. 1989); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1211 (7th Cir. 1987); *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 21 (7th Cir. 1987); *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 691 (8th Cir. 1983); *Quercia v. Allmerica Fin.*, 84 F. Supp. 2d 222, 227-28 (D. Mass. 2000); *Camacho v. Sears Roebuck de P.R.*, 939 F. Supp. 113, 118 (D.P.R. 1996); *Gelof v. Papineau*, 648 F. Supp. 912, 927 (D. Del. 1986), *vacated in part on other grounds*, 829 F.2d 452 (3d Cir. 1987); *Franci v. Avco Corp.*, 538 F. Supp. 250, 259 (D. Conn. 1982); *Marshall v. Arlene Knitwear, Inc.*, 454 F. Supp. 715, 730 (E.D.N.Y. 1978), *aff'd in part, rev'd in part*, 608 F.2d 1369 (2d Cir. 1979).

Federal cases where courts held that salary-based terminations did not, or would not, violate the ADEA include *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951-53 (8th Cir. 1999); *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1208 (8th Cir. 1997); *Lewis v. Aerospace Cmty. Credit Union*, 114 F.3d 745, 749 & n.4, 750 (8th Cir. 1997); *Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 647 (8th Cir. 1997); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415, 419 (8th Cir. 1996); *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 763 (8th Cir. 1995); *Serben v. Inter-City Mfg. Co.*, 36 F.3d 765, 766 (8th Cir. 1994); *Allen v. Diebold, Inc.*, 33 F.3d 674, 679 (6th Cir. 1994); *Anderson v. Baxter Healthcare Corp*, 13 F.3d 1120, 1126 (7th Cir. 1994); *Hamilton v. Grocers Supply Co.*, 986 F.2d 97, 99 (5th Cir. 1993); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 941-43 (4th Cir. 1992); *Wheeldon v. Monon Corp.*, 946 F.2d 533, 536 (7th Cir. 1991); *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 117 (2d Cir. 1991); *Wado v. Xerox Corp.*, 991 F. Supp. 174, 214 (W.D.N.Y. 1998), *aff'd sub nom. Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); *Sperling v. Hoffman-La Roche, Inc.*, 924 F. Supp. 1396, 1410-11 (D.N.J. 1996); *Kraemer v. Franklin & Marshall Coll.*, 909 F. Supp. 268, 271 (E.D. Pa. 1995); *Wilson v. Popp Yarn Corp.*, 680 F. Supp. 208, 212-13 (W.D.N.C. 1988); *Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299, 1319 (E.D. Mich. 1976).

34. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1203 (7th Cir. 1987).

35. *Id.*

36. Metz v. Transit Mix, Inc., 646 F. Supp. 286, 294 (N.D. Ind. 1986) (stating that the ADEA was intended to cover older workers only as a group).

settings."[37] It also concluded that the ADEA was meant to protect individuals like Metz, not just groups.[38] Determining that Metz's salary was a proxy for age,[39] the court reversed and remanded the case.[40] Acknowledging that employers must be able to control costs, the court emphasized that it would be "unwise" to convert that principle into a rule that allows salary-based terminations of older workers when less burdensome alternatives, such as pay cuts, are available.[41] The court said that such a rule would make employees with long service and higher pay "totally vulnerable."[42]

Judge Easterbrook delivered a strong dissent supported by legal,[43] policy,[44] and economic[45] arguments. Of particular interest here is his statement that the Act's business necessity justification should exonerate the defendant: "It is hard to imagine how the use of wages could *not* be valid; wages correspond precisely to the costs of doing business, and hence to profitability."[46]

In the 1990s, courts began to shift away from the majority view in *Metz*. In 1990, the Sixth Circuit held that a company's decision to save pension costs by not recalling laid-off older employees was economic and therefore acceptable because it was based on a factor other than age.[47] Soon afterward, Judge Posner wrote an opinion holding that an employee allegedly terminated, in part, to save pension costs could not recover under the ADEA.[48] Then two salary-based termination cases were decided for the defendants.[49] Although both cases were decided on lack of sufficient evidence to support the claims, in *Bay v. Times Mirror Magazines, Inc.*, the Second Circuit made the broader policy comment that "there is nothing in the ADEA that prohibits an employer from making employment decisions that relate an employee's salary to contemporaneous market conditions and . . . concluding that a particular employee's salary is too high."[50]

---

37. *Metz*, 828 F.2d at 1205.
38. *Id.* at 1206.
39. *Id.* at 1208-09.
40. *Id.* at 1211.
41. *Id.*
42. *Id.* at 1209.
43. *Metz*, 828 F.2d at 1214-16 (Easterbrook, J., dissenting).
44. *Id.* at 1212-14, 1216-21.
45. *Id.* at 1220-21.
46. *Id.* at 1219.
47. Abbott v. Fed. Forge, Inc., 912 F.2d 867, 871-72, 875-77 (6th Cir. 1990). The court was able to distinguish prior case law on economic decisions because some union issues were involved. *Id.* at 876.
48. Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 656-60 (7th Cir. 1991). The claim failed for lack of evidence that either age or pension status was a factor in the termination. *Id.* at 658. Interestingly, the dissenting judges laid out what they saw as sufficient evidence to establish a prima facie case. *Id.* at 662-63 (Flaum, Bauer, and Cudahy, JJ., dissenting).
49. EEOC v. Clay Printing Co., 955 F.2d 936, 946 (4th Cir. 1992) (finding insufficient evidence to support the claim); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 118 (2d Cir. 1991) (finding insufficient evidence to support the claim).
50. *Bay*, 936 F.2d at 117.

In 1993, the U.S. Supreme Court decided *Hazen Paper Co. v. Biggins*, a key age discrimination case that examined economically-motivated employer conduct.[51] *Hazen Paper* concerned a sixty-two-year-old employee who was terminated a few weeks before his pension was to vest.[52] He alleged that the company had violated the ADEA by firing him to avoid vesting of his pension.[53] The Court phrased its holding in carefully restricted language: "[A]n employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service."[54] Elsewhere in its opinion, the Court stated that a decision "wholly motivated by factors other than age" does not violate the ADEA, even if the factor in question correlates with age.[55] The Court did comment that because the employee's claim concerned pension rights, he could bring a claim under the Employee Retirement Income Security Act (ERISA) and thus was not completely without a remedy.[56] That alternative does not exist in the ordinary salary-based termination case.

After *Hazen Paper*, courts began applying its language to hold that salary-based terminations did not violate the ADEA. For example, the Seventh Circuit denied a claim on the basis that salary could not be equated with age,[57] and the Second Circuit held that the ADEA does not prohibit "decisions that relate an employee's salary to contemporaneous market conditions."[58] Similarly, a California appellate court interpreting the ADEA denied a claim with the comment that "*all* businesses . . . have a legitimate interest in saving money."[59] A few courts questioned salary-based terminations,[60] but the legal climate was increasingly becoming one where "age discrimination law is largely ineffectual in protecting older workers."[61]

---

51. Hazen Paper Co. v. Biggins, 507 U.S. 604, 608-14 (1993).

52. *Id.* at 607. The Court left open whether the result would be different where pension vesting was tied not to years of service but to age. *Id.* at 613.

53. *Id.* at 607.

54. *Id.* at 613.

55. *Id.* at 611.

56. *Id.* at 612. ERISA is found at 29 U.S.C. §§ 1001-1461 (1994).

57. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125-26 (7th Cir. 1994).

58. Bay v. Times Mirror Magazines, 936 F.2d 112, 117 (2d Cir. 1991); *see also supra* note 33 for cases denying ADEA claims for salary-based terminations of older workers. *But see* Minda, *Opportunistic Downsizing*, *supra* note 17, at 538 (arguing that it is still debatable whether the ADEA permits the use of salary as a proxy for age).

59. Marks v. Loral Corp., 68 Cal. Rptr. 2d 1, 21 (Ct. App. 1997). *Marks* was called into doubt by statute. *See infra* notes 292-93 and accompanying text.

60. *E.g.*, Quercia v. Allmerica Fin., 84 F. Supp. 2d 222, 227-28 (D. Mass. 2000); Camacho v. Sears Roebuck de P.R., 939 F. Supp. 113, 118 (D.P.R. 1996). In each of these salary-based termination cases, the employer's motion for summary judgment was denied.

61. Minda, *Aging Workers*, *supra* note 18, at 580-81; *see also* Harper, *supra* note 24, at 779 (stating that the goals of the *Wirtz Report* cannot be reached while employers can justify terminating older workers by citing older workers' higher costs); Jan W. Henkel, *The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After* Hazen Paper Co. v. Biggins, 47 SYRACUSE L. REV. 1183, 1184 (1997)

2. *Frameworks for ADEA Claims*

There are two conceptual frameworks for ADEA suits: disparate treatment and disparate impact, which parallel the bases for Title VII[62] discrimination claims.[63] Case law, currently in some dispute on important issues, does not present a clear framework for analyzing economically-based decisions under the ADEA.[64] Salary-based termination claims have been brought under both disparate treatment and disparate impact theories.[65]

A disparate treatment claim is the most straightforward: it alleges that an employer has intentionally treated an older employee or employees differently because of age.[66] Under this approach, the plaintiff may offer direct or circumstantial proof of age discrimination.[67] Direct proof takes the form of a direct statement by the employer—the smoking gun or open comment about

---

(asserting that current case law has "greatly limited the ability of plaintiffs to successfully challenge discriminatory practices"); Kester Spindler, Comment, *Shareholder Demands for Higher Corporate Earnings Have Their Price: How Courts Allow Employers to Fire Older Employees for Their Achievements*, 27 PEPP. L. REV. 807, 808 (2000) (describing the argument that allowing salary-based discrimination "in effect extinguishes the protections of the ADEA because employers could easily circumvent" the Act); Brendan Sweeney, Comment, *"Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527, 1575 (1996) (concluding that recent decisions have "seriously limited" the protections for older workers under the ADEA).

62. Title VII is found at 42 U.S.C. § 2000e-2 (1994) and covers discrimination based on an individual's race, color, gender, religion, or national origin.

63. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) (analyzing a Title VII claim under a disparate treatment framework); *Camacho*, 939 F. Supp. at 116-18 (analyzing an ADEA claim under a disparate treatment framework). The genesis and purposes of the two acts have often been viewed as similar. *See* Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978) (stating that "[a]ge discrimination, while often more subtle than race or sex discrimination, is equally pernicious"). *But see* Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 781-82 (1997) (arguing that the antidiscrimination model should not be applied to the problems of older workers).

64. *See* 1 ROTHSTEIN, *supra* note 23, § 2.37, at 330-31.

65. *See* 1 EGLIT, *supra* note 22, § 4.19, at 4-75 to 4-76; 2 EGLIT, *supra* note 23, §§ 7.52-53, at 315-31 (1997 & Supp. 2001). *But see* Stacey Crawshaw-Lewis, Comment, *"Overpaid" Older Workers and the Age Discrimination in Employment Act*, 71 WASH. L. REV. 769, 783 & n.96, 784 & n.97 (1996) (finding that although a few cases have been brought under disparate impact and disparate treatment analysis, most cases presented disparate treatment claims). Cases applying both disparate impact and disparate treatment analysis include: *Geller v. Markham*, 635 F.2d 1027, 1032-35 (2d Cir. 1980); *Camacho*, 939 F. Supp. at 116-23; *Franci v. Avco Corp.*, 538 F. Supp. 250, 255-61 (D. Conn. 1982).

66. *Camacho*, 939 F. Supp. at 116. *See also Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15 (defining a disparate treatment claim).

67. Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990). The analytical framework applied to disparate treatment claims has varied in reduction-in-force cases. *See* Jessica Lind, Note, *The Prima Facie Case of Age Discrimination in Reduction-in-Force Cases*, 94 MICH. L. REV. 832, 833-34 (1995).

age that proves violation of the ADEA without inference or presumption.[68] Alternatively, the plaintiff may offer statistical evidence to prove the employer's intent to discriminate.[69]

An obstacle to a disparate treatment claim for a salary-based termination is the need to show intentional discrimination because of age. The worker will ordinarily not be able to show the employer's intent unless salary is viewed as the essential equivalent of age. The proxy theory provides a framework for doing this.[70] The broadest conception of this theory would allow a factor that is correlated with age to stand in for age.[71] Thus in *Metz*, a higher salary achieved through years of service was held to be the statutory equivalent of age that supported a disparate treatment claim.[72] The narrower conception would apply the proxy theory only where the factor masks actual reliance on age—that is, where "the employer may suppose a correlation between the two factors and act accordingly."[73] The Court in *Hazen Paper* wrote disapprovingly of the "statutory equivalent" approach and stated that while there may be some correlation between salary and age, the correlation is too imperfect for one factor to be a proxy for the other.[74] However, the Court did "not preclude" the possibility that an employer could violate the ADEA under the second, narrower use of the proxy doctrine.[75] After *Hazen Paper*, the proxy theory's

---

68. *See* Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990) (quoting the hypothetical statement "Fire Earley—he is too old" as an example of direct evidence).

69. *See* Culley v. Trak Microwave Corp., 117 F. Supp. 2d 1317, 1319-20 (M.D. Fla. 2000) (holding that statistics showing that a higher percentage of older workers rather than younger workers were laid off did not establish the plaintiff's claim where no statistics were offered to show the percentage of older workers among the employees in general).

70. *See* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1207-08 (7th Cir. 1987).

71. *See* White v. Westinghouse Elec. Co., 862 F.2d 56, 62 (3d Cir. 1988) (applying the proxy theory because pension status and age are "inextricably linked"); *Metz*, 828 F.2d at 1208 (using high salary as a proxy for age because the salary was a direct result of the plaintiff's many years of employment); Coates v. Nat'l Cash Register Co., 433 F. Supp. 655, 661 (W.D. Va. 1977) (equating training level with age because of the direct relationship between the two). Professor Gary Minda has argued that this theory should apply to the salary-based termination cases. Minda, *Opportunistic Downsizing*, *supra* note 17, at 568.

72. *Metz*, 828 F.2d at 1207-08. Also see *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993), where the Court interpreted *Metz* as using "proxy" to mean statutory equivalence.

73. *Hazen Paper*, 507 U.S. at 613.

74. *Id.* at 611-13. Judge Easterbrook's dissent in *Metz* was an early judicial expression of this point. *Metz*, 828 F.2d at 1217-18 (Easterbrook, J., dissenting) (presenting statistics that contradicted the correlation between salary and age). *But see* Toni J. Querry, Note, *A Rose by Any Other Name No Longer Smells As Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 81 CORNELL L. REV. 530, 580 (1996) (concluding that the Court's narrowing of the age proxy doctrine "permits employers to evade the ADEA by implementing employment decisions based on seemingly non-age criteria that correlate highly with age").

75. *Hazen Paper*, 507 U.S. at 613; *see also* Robert J. Gregory, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After* Hazen Paper Co. v. Biggins, 11 HOFSTRA LAB. L.J. 391, 426-27 (1994) (arguing for the more limited application of the age proxy theory).

application to salary-based claims is in question as courts have become reluctant to recognize salary as a proxy for age.[76]

It is now well acknowledged that as employers become more aware of the threat of discrimination claims, a plaintiff has little likelihood of finding direct proof of a violation.[77] For this reason, the Supreme Court, in the Title VII case *McDonnell Douglas Corp. v. Green*, established a burden-shifting method of proving disparate treatment.[78] This method puts on the employer some of the burden concerning the facts to which it has unique access,[79] and it has been extended to cover ADEA claims.[80]

The second framework for discrimination claims, the disparate impact approach, was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*, a race discrimination case.[81] This framework allows a claim to be made without proof of intent.[82] To prove disparate impact, a plaintiff must show that a specific or identifiable employment practice or policy caused a disparate impact on a protected group.[83] The burden then shifts to the defendant to justify the challenged practice by showing that it serves a "legitimate employment goal[]."[84]

---

76. *See, e.g.*, Slathar v. Sather Trucking Corp., 78 F.3d 415, 418-19 (8th Cir. 1996) (finding that even if the employee was fired because of salary or experience, "age discrimination cannot necessarily be inferred"); Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 (6th Cir. 1995) (holding that an economic reason that correlated with age was not an age proxy absent evidence that age itself was the employer's real motivation).

77. *See, e.g.*, Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298, 1303 (7th Cir. 1990) (stating that typically in age discrimination cases, there is no "smoking gun"); Minda, *Opportunistic Downsizing*, *supra* note 17, at 538-39 (reasoning that "smoking gun" evidence is rare because employers "have become more sophisticated in insulating their actions from ADEA attack").

78. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

79. *Id.* at 804-05.

80. *See Hazen Paper*, 507 U.S. at 612; Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994). In ordinary cases, the plaintiff must establish a prima facie case by showing that "(1) [he or] she was a member of the protected class (age 40 or over), (2) [he or] she was doing the job well enough to meet [the] employer's legitimate expectations, (3) [he or] she was discharged or demoted, and (4) the employer sought a replacement." *Anderson*, 13 F.3d at 1122. If the prima facie case is established, then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. *Id.* If the employer is successful, the presumption dissolves and the burden shifts back to the employee. *Id.*

Several courts have modified this framework for use in RIF cases. *See, e.g.*, Williams v. Gen. Motors Corp., 656 F.2d 120, 129 (5th Cir. Unit B Sept. 1981) (replacing the second and fourth factors above with requirements that the worker show that he or she was qualified to assume another position at the time of the discharge or demotion and the worker produce evidence that the employer intended to discriminate).

81. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

82. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Camacho v. Sears Roebuck de P.R., 939 F. Supp. 113, 118 (D.P.R. 1996).

83. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

84. *Id.* at 658-59. The exact nature of the burden, whether of persuasion or merely production, is unclear. *Id.* at 660 (interpreting case law as establishing burden of production). After *Wards Cove Packing Co.*, Congress amended Title VII to re-establish that the defendant has the burden of persuasion on this issue. Civil Rights Act of 1964, Pub. L. No. 102-166, 105

For years after *Griggs*, courts assumed that the disparate impact analysis would apply to ADEA claims as well as Title VII claims because of the similar genesis and wording of the two acts.[85] Today, whether disparate impact can be applied at all in age discrimination cases is the subject of vigorous debate,[86] particularly after three concurring Justices in the *Hazen Paper* case said there are "substantial arguments" that it should not.[87] They contended that the ADEA was meant to cover only cases based on the intentional conduct covered by the disparate treatment scheme.[88] Like the age-proxy theory, the disparate impact approach has been increasingly limited after *Hazen Paper*,[89] partly due to the concurring Justices' language. Courts have freely allowed the business justification defense, emphasizing that an economically-based practice need not be based on an essential need to be justified under the Act.[90] This construction

---

Stat. 852 (1991) (codified at 42 U.S.C. § 2000e-2(k)(1)(A) (1994)). However, Congress did not amend the ADEA at the same time, leaving some question as to what standard applies under it. *See* Smith v. City of Des Moines, 99 F.3d 1466, 1471 (8th Cir. 1996) (applying the pre-*Wards Cove* business necessity standard, which places the burden of persuasion on the defendant, to the ADEA); Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another:* Mullin v. Raytheon Co. *as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA from Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303, 307 n.18 (2000) (recognizing that although it may be an open question whether the Title VII amendments apply to the ADEA, the ultimate result is that the pre-*Wards Cove* standard applies).

85. *See, e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999) (citing pre-1993 cases applying disparate impact to ADEA claims).

86. *See, e.g., id.* at 700-01, 706 (discussing cases for and against the application of disparate impact under the ADEA and holding that the theory is not applicable); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1291 & n.6 (9th Cir. 2000) (assuming that disparate impact remains viable but citing contrary cases from other circuits), *cert. denied sub nom.*, Gentile v. Quaker Oats Co., 121 S. Ct. 2592 (2001).

See generally Jennifer J. Clemons & Richard A. Bales, *ADEA Disparate Impact in the Sixth Circuit*, 27 OHIO N.U. L. REV. 1, 28 (2000) (arguing that without the availability of disparate impact in ADEA claims some plaintiffs will be left "virtually unprotected," and urging Congress to codify the approach under the ADEA); Henkel, *supra* note 61, at 1185 (defending "the use of disparate impact under the ADEA"); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 660 (1996) (arguing that the doctrine should not be available under the ADEA because complex issues involved in disparate impact could not be resolved by lay juries); Issacharoff & Harris, *supra* note 63, at 835-36 (arguing that disparate impact analysis should not apply to salary reductions among older workers); Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 272-78 (1990) (analyzing the majority and minority approaches to the application of disparate impact); Sweeney, *supra* note 61, at 1575-76 (arguing that *Hazen Paper's* limitation on disparate impact analysis "seriously limited" the scope of ADEA protection).

87. Hazen Paper Co. v. Biggins, 507 U.S. 604, 618 (1993) (Kennedy and Thomas, JJ., and Rehnquist, C.J., concurring).

88. *Id.* at 617-18.

89. *See* Alexander, *supra* note 22, at 86 & nn.79-84.

90. *See, e.g.*, Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687, 694-95 (7th Cir. 2000) (affirming summary judgment for the defendant when plaintiff failed to prove defendant's business justification was a pretext).

seems to bypass the "reasonable" language in the Act's "reasonable factors other than age" defense,[91] a significant omission that is discussed below.[92]

B. The Human Capital Theory

In addition to legal background, an understanding of the salary-based termination cases requires an overview of the human capital theory. That theory holds that while a company invests in training a younger worker, he may be paid less than he can actually produce, but in his later years he may be paid more than he produces, resulting in the worker receiving his due over the lifetime of his employment.[93] From the employer's perspective, the reason for the increasing pay over the years is to "discourage employee shirking and malfeasance," which may be difficult to detect but will be punished, if discovered, by terminating the worker before the later, highly paid years play out.[94] Under this theory, it is unfair for a company to terminate a worker without cause just when he is receiving his expected higher pay in his later working years. Such terminations are called "opportunistic," because to accomplish them the employer must breach an implicit agreement with the worker.[95]

The human capital theory recognizes the justice of paying an older worker his due, but at the same time the theory may encourage executives to think of workers "like a used-up piece of machinery" to be thrown out at will.[96] Companies have an economic motive to opportunistically terminate the worker who has achieved a higher salary, whether through years of work with the same

---

91. *See* 29 U.S.C. § 623(f)(1) (1994).

92. *See infra* notes 265-73 and accompanying text.

93. *See* Robert M. Hutchens, *Seniority, Wages and Productivity A Turbulent Decade*, 3 J. ECON. PERSP. 49, 50-52 (1989). For discussions of how the human capital theory applies to age discrimination see Harper, *supra* note 24, at 780-83; Minda, *Opportunistic Downsizing*, *supra* note 17, at 523-25.

A related theory, the life-cycle theory, holds that employees enter into delayed payment arrangements, in which part of their compensation is withheld until the last years of their work cycle. *See* Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 J. POL. ECON. 1261, 1264 (1979) (explaining the advantages for both workers and employers to agree to a wage stream that starts out paying workers less than their productivity would justify in their early years, but more than it would justify in their later years). *See also* Issacharoff & Harris, *supra* note 63, at 788 n.33 (citing numerous authorities supporting Lazear's life-cycle theory); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 43-47 (1993) (applying the life-cycle theory to explain seemingly contradictory results in employment cases).

94. *See* Hutchens, *supra* note 93, at 55; Schwab, *supra* note 93, at 10. *See generally* Sherwin Rosen, *Transaction Costs and Internal Labor Markets*, 4 J. L. ECON. & ORG. 49 (1988) (discussing the affects of the competitive price mechanism on the labor market).

95. *See* Minda, *Opportunistic Downsizing*, *supra* note 17, at 512; Schwab, *supra* note 93, at 20-21.

96. *See* Minda, *Opportunistic Downsizing*, *supra* note 17, at 559.

employer[97] or in the work force generally,[98] although doing so avoids a "realistic assessment" of the true value of those workers, which includes their acquired firm-specific skills.[99]

III. ALLOWING SALARY-BASED TERMINATIONS OF OLDER WORKERS ESTABLISHES BAD PUBLIC POLICY

A. The Meaning of Public Policy

The meaning of "public policy" is difficult to pin down precisely,[100] but *Black's Law Dictionary* provides a workable definition: "[T]hat general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation."[101] Sources of public policy are constitutions, statutes, and judicial decisions.[102] The court-made rules allowing economically-based terminations of older workers thus create a public policy. It is one that harms the affected older workers, the surviving workers, the companies they work for, and society in general; it stands counter to our best cultural values. Moreover, it is not even based on well-settled public opinion. A widely distributed survey has shown that only forty percent of U.S. middle managers agree that a company's real goal is profit and does not involve considering other corporate stakeholders like employees.[103]

---

97. *See* Minda, *Aging Workers*, *supra* note 18, at 576-77. Minda pointed out that thirty years ago unions would have stepped in to curtail these opportunistic firings, but that unions have now lost much of their power. *Id.* at 577-78.

98. *See* Jardien v. Winston Network, Inc., 888 F.2d 1151, 1157-58 (7th Cir. 1989) (allowing a discharged employee to recover because of a positive correlation between salary and age, even though the employee's higher salary was due to experience gained elsewhere in the industry); Harper, *supra* note 24, at 788 (suggesting that the delayed payment agreement should apply even for mobile workers, "regardless of which employer in an industry takes advantage of [the worker's] experience"); Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1815 (1996) (arguing that worker mobility necessitates the ADEA to enforce employers' implicit agreements to pay older workers more).

99. Minda, *Opportunistic Downsizing*, *supra* note 17, at 549-50.

100. *See* Black Indus., Inc. v. Bush, 110 F. Supp. 801, 804 (D.N.J. 1953) (stating that the term "public policy" is vague); McKendree v. S. States Life Ins. Co. of Ala., 112 S.C. 335, 338, 99 S.E. 806, 807 (1919) (referring to public policy as a "wide domain of shifting sands").

101. BLACK'S LAW DICTIONARY 1231 (6th ed. 1990) (citing Hammands v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 796 (N.D. Ohio 1965)); *see also* Sabich v. Nat'l R.R. Passenger Corp., 763 F. Supp. 989, 994 (N.D. Ill. 1991) (stating that "'public policy concerns what is right and just and what affects the citizens of the State collectively.'" (quoting Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981))).

102. *See* Hoover v. Radabaugh, 123 F. Supp. 2d 412, 426 (S.D. Ohio 2000); *Sabich*, 763 F. Supp. at 994; *Palmateer*, 421 N.E.2d at 878.

103. *See* Thomas W. Dunfee, *Corporate Governance in a Market With Morality*, LAW & CONTEMP. PROBS., Summer 1999, at 129, 143-44 (citing a survey of 15,000 middle managers in seven countries reported in CHARLES HAMPDEN-TURNER & ALFRONS TROMPENAARS, THE SEVEN CULTURES OF CAPITALISM 32 (1993)).

B. *The Impact of Salary-Based Terminations on Discharged Older Workers*

> *You can't eat the orange and throw the peel away—a man is not a piece of fruit!*
>
> —*Willy Loman*[104]

Arthur Miller created Willy Loman more than fifty years ago, but Willy's words on being fired are especially applicable today. As management consultant Alan Downs wrote in 1995, "Employees, once seen as assets to be cultivated and protected, now are more like disposable units to be used, then discarded at will."[105] An EEOC lawyer observed that businesses see workers like "physical capital and land."[106] In the language of a computer expert, workers are treated like "bits and bytes."[107] Columbia anthropology professor Katherine Newman put it simply: today many companies see workers "as disposable as Kleenex."[108]

However it is phrased, being disposable has profound effects, which the salary-based termination cases vividly illustrate. For example, Aida Camacho, forty-seven years old when she lost her job, was unable to find new work by the time of the trial in 1996, lost her longtime companion, and developed alcoholism.[109] George Coates, a field engineer acknowledged to be a "good employee[]," lost his job in a reduction in force at the age of fifty.[110] The court found that his termination had "serious effects," both social and economic, on him and his wife.[111] Coates' co-plaintiff became unresponsive to his family, and his wife was forced to miss her mother's funeral for lack of money.[112] The downsized plaintiffs in another case were described as suffering "emotional distress, depression, increased drug use, decrease in feelings of a useful life, a contracted social life, increased cigarette consumption, lassitude, sexual problems, and a reduced sense of well-being."[113]

The widespread and similarly profound effects on other discharged workers are well documented. Research for the *Wirtz Report* identified the "psychological shock" to terminated older workers, which was often

---

104. Arthur Miller, *Death of Salesman* (1949), *reprinted in* 3 A TREASURY OF THE THEATRE 1063, 1083 (John Gassner ed., rev. ed. 1963). These lines were also quoted in Metz v. Transit Mix, Inc., 828 F.2d 1202, 1205 n.6. (7th Cir. 1987).

105. DOWNS, *supra* note 20, at 30-31.

106. Marc Rosenblum, *The Prerogative to Downsize–A Commentary on Blumrosen, et al.*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 417, 417 (1998).

107. Mumford & Hendricks, *supra* note 16, at 25.

108. KATHERINE S. NEWMAN, FALLING FROM GRACE: DOWNWARD MOBILITY IN THE AGE OF AFFLUENCE 239 (U. of Cal. Press 1999) (1988).

109. Camacho v. Sears Roebuck de P.R., 939 F. Supp. 113, 116 (D.P.R. 1996).

110. Coates v. Nat'l Cash Register Co., 433 F. Supp. 655, 658 (W.D. Va. 1977).

111. *Id.* at 659.

112. *Id.*

113. EEOC v. Chrysler Corp., 733 F.2d 1183, 1186 (6th Cir. 1984).

manifested as "resentment, bewilderment or what might be called bereavement."[114] Older workers, who bear a "disproportionate burden of the current era of restructuring,"[115] experience "serious distress when job loss interrupts their expected pattern" of working until the normal retirement age of sixty-five.[116]

Job loss may make the difference between financial stability and long-term financial hardship for older workers who often have children in college and planned to save for their retirement in their later working years.[117] Their pension accumulation is interrupted,[118] they lose social security credits,[119] and they must dip into savings.[120] Even the taken-for-granted ability to buy birthday presents, visit friends, or use the telephone may be threatened.[121] Women may be particularly hard hit, suffering greater earnings loss and being more likely to end their lives in poverty.[122]

The financial losses may continue for years.[123] Indeed, financial journalist Jill Andresky Fraser reported that "[m]any families never recover from the financial hit of a job loss."[124] Her analysis of Department of Labor statistics showed that half of displaced workers are unable to find new work promptly.[125] Fraser further explained that finding work is more difficult for those over

---

114. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, RESEARCH MATERIALS 102 (1965) [hereinafter RESEARCH MATERIALS].

115. Karen Nussbaum, *Social Insecurity: The Economic Marginalization of Older Women Workers*, *in* THE AGING OF THE AMERICAN WORK FORCE 374, 375 (Irving Bluestone et al. eds., 1990). *See generally* Sewin Chan & Ann Huff Stevens, *The Effects of Job Loss on Older Workers: Employment, Earnings, and Wealth*, *in* ENSURING HEALTH AND INCOME SECURITY FOR AN AGING WORKFORCE 189, 208 (Peter P. Budetti et al. eds., 2001) (concluding that the impact of job loss on an older worker's economic well-being is likely to be substantial).

116. Janice O. Brewington & Sylvia Nassar-McMillan, *Older Adults: Work-Related Issues and Implications for Counseling*, CAREER DEV. Q., Sept. 2000, at 2, 8.

117. In 1965, Secretary Wirtz's research showed that older workers faced "a higher risk of unemployment at a time when earnings are crucial to meet heavy family expenses, to build pension credits, and to save for future supplementation of retirement incomes." RESEARCH MATERIALS, *supra* note 114, at 98.

118. *See* Chan & Stevens, *supra* note 115, at 206.

119. *See* DOWNS, *supra* note 20, at 65 (reporting that displaced workers often reach retirement with "few or no benefits"); Steven H. Sandell & Stephen E. Baldwin, *Older Workers and Employment Shifts: Policy Responses to Displacement*, *in* THE AGING OF THE AMERICAN WORK FORCE, *supra* note 115, at 126, 132 (finding that displaced older workers may incur hardship because they cannot add to Social Security credits and savings).

120. FRASER, *supra* note 16, at 54.

121. *See* SUE GLYPTIS, LEISURE AND UNEMPLOYMENT 73 (1989).

122. *See* Nusbaum, *supra* note 115, at 376-78.

123. *See* Sandell & Baldwin, *supra* note 119, at 133-36 (discussing the economic harm to older workers who lose their jobs).

124. FRASER, *supra* note 16, at 54.

125. *Id.*; DOWNS, *supra* note 20, at 17-18; *see also* Chan & Stevens, *supra* note 115, at 200 (finding that earnings reductions associated with job loss are persistent).

forty.[126] Ample data indicates that displaced older workers are likely to remain unemployed longer than younger persons.[127] To compound the problem, just being jobless puts an individual at a disadvantage in the job market.[128] Moreover, for experienced workers even past accomplishments may become liabilities, causing prospective employers to shun them as "overqualified."[129] Earnings reductions are common; Professors Chan and Stevens found that older workers who lost their jobs experienced a thirty-two percent reduction in earnings that continued for several years.[130] Rutgers political science professor Carl Van Horn reported that twenty-six percent of displaced workers find full-time jobs, but earn less than before.[131]

All of this creates a heavy emotional toll. Professors Darity and Goldsmith summarized the literature as showing that unemployment damages mental health in many ways, "including depression, anxiety, low self-esteem and strained personal relations."[132] Professor Newman identified "[f]eelings of anger or dismay, a sense of injustice," as typical responses to downward mobility.[133] The displaced workers also experience a sense of helplessness that damages their psychological health.[134] Older workers in particular suffer greater emotional distress when displaced than do younger workers.[135] This is partly because, in addition to economic support, employment provides for "social

126. FRASER, *supra* note 16, at 54.

127. *See* Julie Ann McMullin & Victor W. Marshall, *Ageism, Age Relations, and Garment Industry Work in Montreal*, 41 GERONTOLIGIST 111, 112 (2001); John C. Rife & Richard J. First, *Discouraged Older Workers: An Exploratory Study*, 29 INT'L J. AGING & HUMAN DEV., 195, 196 (1989); Sandell & Baldwin, *supra* note 119, at 133.

128. *See* Note, *Finding a Place for the Jobless in Discrimination Theory*, 110 HARV. L. REV. 1609, 1609 (1997) (explaining that the unemployed experience "stigmatization, economic and social invisibility, stereotyping, denial of authority, and exclusion from the job market").

129. *See* NEWMAN, *supra* note 108, at 66; Morneau, *supra* note 23, *passim*.

130. Chan & Stevens, *supra* note 115, at 200. Even after six years, percentages of lost earnings remained close to that level. *Id.*

131. CARL E. VAN HORN, *Economic Change and the American Worker*, *in* NO ONE LEFT BEHIND: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON RETRAINING AMERICA'S WORKFORCE 55, 78 (1996); *see also* FRASER, *supra* note 16, at 55 (calculating from Department of Labor statistics that about forty percent of displaced workers who do find jobs take pay cuts, often of twenty percent or more).

132. William Darity, Jr. & Arthur H. Goldsmith, *Social Psychology, Unemployment and Macroeconomics*, 10 J. ECON. PERSP. 121, 122, 132 (1996). *See also* GLYPTIS, *supra* note 121, at 77 (noting that the unemployed often feel inadequate, deviant, stigmatized, and even ashamed); Peter Warr, *Age, Work, and Mental Health*, *in* IMPACT OF WORK ON OLDER ADULTS 252, 260 (K. Warner Schaie & Carmi Schooler eds., 1998) (summarizing studies as consistently showing that "people who are involuntarily unemployed tend to be psychologically harmed in a range of ways").

133. NEWMAN, *supra* note 108, at 229. *See also* Brewington & Nassar-McMillan, *supra* note 117, at 4 (discussing the relationship between job loss and psychological distress).

134. Arthur H. Goldsmith et al., *The Psychological Impact of Unemployment and Joblessness*, 25 J. SOCIO-ECON. 333, 336 (1996); *see also* Warr, *supra* note 132, at 260 (summarizing studies showing psychological harm to the involuntarily unemployed).

135. Brewington & Nassar-McMillan, *supra* note 116, at 4 (compiling authorities about the effect of joblessness on older workers).

interaction, status, and a structure for one's time."[136] Unemployed older workers approach the normal age of retirement facing a very different retirement life than they had planned on.[137] They may even declare themselves retired, but do so to avoid the humiliating job search, although they continue to suffer reduced economic conditions.[138] They face their retirement years in the sort of economic difficulty that family and associates may see as "a 'final grade' of professional failure."[139] Indeed, late-career job loss often "remains a watershed that divides [people's] lives into a happy before and a tragic after that stubbornly refuses to resolve into a life they can live with."[140] These profound effects on people's lives must be considered as society evaluates the merit of allowing unrestricted economic justifications for terminating older workers.

C. The Impact of Salary-Based Terminations on Other Workers

The impact of an older worker's job loss extends beyond her own life. Workers who remain at the company suffer adverse effects when they see others laid off for purely economic reasons. University of Chicago economist Sherwin Rosen explained that workers' attempts to climb higher on the corporate ladder are strong inducements of their productivity.[141] Today when companies with "record profits" are laying off employees in an attempt to become "lean and mean,"[142] termination of an older worker for salary reasons suggests to younger workers that all their hard work and attendant raises will simply make them prime candidates for termination. An employee who survived downsizing at Chase Manhattan Corporation told a *New York Times* reporter, "Every day there's that stock price staring at you. If it's too low, managers say, 'Why let's get rid of some more people and watch it rise'. . . . All they seem to care about is the bottom line."[143] The result, Professor Barry Shore concluded, is that while one might expect surviving

---

136. *See* Carrie R. Leana & Daniel C. Feldman, *Finding New Jobs After a Plant Closing: Antecedents and Outcomes of the Occurrence and Quality of Reemployment*, 48 HUM. REL. 1381, 1387 (1995).

137. *See* ROBERT D. MANNING, CREDIT CARD NATION 278 (2000).

138. *See* Sandell & Baldwin, *supra* note 119, at 136.

139. MANNING, *supra* note 137, at 276; *see also* Brewington & Nassar-McMillan, *supra* note 116, at 7 (reporting that "[t]he belief that one has not accomplished worthwhile goals leads to despair"); WIRTZ REPORT, *supra* note 2, at 2 (stating that there is "no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep").

140. NEWMAN, *supra* note 108, at 248.

141. Rosen, *supra* note 94, at 61-62 (explaining that employees perceive "a kind of 'option' value" to their work, because of the possibility of moving to the next level and ever higher in the organization); *see also* Darity & Goldsmith, *supra* note 132, at 125 (noting that a worker's increased fear of becoming unemployed forces the worker to increase productivity by working harder).

142. *See supra* note 16.

143. N.R. Kleinfield, *The Company as Family, No More*, N. Y. TIMES, Mar. 4, 1996, at A1.

workers to feel lucky, they actually feel threatened and abandoned.[144] There may be an initial surge of productivity as those remaining work harder for fear of losing their jobs, but research shows that this is usually followed by depression and lethargy.[145] Consequently, their productivity often declines.[146]

D. The Impact of Salary-Based Terminations on the Employer's Firm

The toll on the surviving workers also negatively affects company morale and productivity, as suggested by numerous studies of downsizing.[147] A recent study identified fairness at work, and care and concern for employees, as key influences on employee loyalty.[148] But companies that downsize are "unwittingly destroying the very qualities they need for competitive advantage, namely their employees' *trust* and *empowerment*."[149]

The loss of morale and loyalty after a downsizing can decrease job performance and increase the likelihood that the most desirable workers will look elsewhere for employment.[150] Professor Shore's study showed that surviving workers "feel threatened, abandoned, burdened with more work, and

---

144. Barry Shore, *The Legacy of Downsizing: Putting the Pieces Back Together*, BUS. F., Summer/Fall 1996, at 5, 5.

145. Darity & Goldsmith, *supra* note 132, at 124.

146. *Id.* at 132.

147. *See, e.g.*, Mark W. Richey, *The Impact of Corporate Downsizing on Employees*, BUS. F., Summer 1992, at 9, 10 (reporting survey results showing that fifty-seven percent of layoff survivors report decreased loyalty to their employers).

148. *Retention: Why Loyalty Is Not Enough*, HRFOCUS, Nov. 2000, at 1, 14 (reporting a study finding that loyalty, combined with affective commitment, is exhibited by those employees who are willing to "go the extra mile, help maintain profitable customer relationships, and be advocates for the company").

149. Mishra et al., *supra* note 16, at 84; *see also* Darity & Goldsmith, *supra* note 132, at 124 (stating that "[m]any managers reported that layoffs have a decidedly negative effect on their subordinates' productivity, morale and commitment to the organization"); DOWNS, *supra* note 20, at 202-03 (stating that more than half of white-collar workers surveyed report they do not trust top management because managers state an economic need for cutbacks while the managers themselves are highly paid); FRASER, *supra* note 16, at 111-12 (reporting that workers who believe management is not interested in their welfare are less loyal to their companies); FREDERICK F. REICHHELD, THE LOYALTY EFFECT: THE HIDDEN FORCE BEHIND GROWTH, PROFITS, AND LASTING VALUE 3, 95 (1996) (stating that layoffs "destroy loyalty," and that "the only way to achieve *sustainable* improvement in performance is by building *sustainable* improvements in value creation and loyalty"); Harry J. Van Buren III, *The Bindingness of Social and Psychological Contracts: Toward a Theory of Social Responsibility in Downsizing*, 25 J. BUS. ETHICS 205, 208 (2000) (stating that firms that violate "psychological contracts" to treat employees equitably often experience a "decline in employee loyalty"); VAN HORN, *supra* note 131, at 81 (quoting workers who are less loyal to their employers because they believe that management is interested only in profit).

150. *See* Joseph A. Raelin, *Job Security for Professionals*, PERSONNEL, July 1987, at 40, 45; Richey, *supra* note 147, at 11.

subject to greater job stress."[151] He identified poor morale as the most prominent reason that the expected benefits of downsizing are not achieved.[152]

The surviving workers may disassociate themselves mentally from the company or even become enraged at it. A study in the *Sloan Management Review* concluded that the survivors of downsizings become suspicious of management and may see themselves "as independent contractors, viewing the organization in purely instrumental terms."[153] Another professor's study found that "[w]hen some employees are terminated," the survivors "experience long periods of rage toward the company and paranoia that they may be next."[154] Other studies have reached similar conclusions.[155]

In the drive to downsize, the company loses its investment in important worker experience.[156] In a downsizing, "key talent" is lost along with "organizational memory."[157] The cost of hiring and training a worker and the worker's experience on the job create an asset that does not appear on a current balance sheet, but nonetheless has economic value.[158] Moreover, worker alienation may mean companies will derive less economic benefit from the training they gave surviving workers, who become "less willing to commit to a job for the long run for fear of being displaced when they are old."[159] Even teamwork among workers may suffer as experienced employees fear that by training new workers they will put their own jobs in jeopardy.[160]

The rationale usually given for downsizing is that it will increase profits.[161] Some firms do find that downsizing increases their productivity and profits,[162] and it may lead to at least short-term increases in companies' stock prices.[163]

---

151. *See* Shore, *supra* note 144, at 5.

152. *Id.* at 6, 8.

153. Mishra, et al., *supra* note 16, at 85.

154. Shore, *supra* note 144, at 7.

155. *See* FRASER, *supra* note 16, at 111-12 (reporting anecdotal evidence that surviving workers care less about their jobs); PAUL C. WEILER, GOVERNING THE WORKPLACE 148 (1990) (reporting that when workers feel individual employees are being treated unfairly, they may be unwilling to do more than "the bare minimum necessary to keep their job").

156. *See* Mishra et al., *supra* note 16, at 84 (stating that the "loss of key talent" diminishes the expected returns from downsizing); WEILER, *supra* note 155, at 147 (explaining that a new employee must acquire knowledge specific to the job and employer).

One study pegged the cost of replacing a worker at an average of $30,000. *Why Loyalty Is Not Enough*, *supra* note 148, at 15.

157. Mishra et al., *supra* note 16, at 84. *See also* Robert J. Grossman, *Damaged, Downsized Souls: How to Revitalize the Workplace*, H.R. MAG., May 1996, at 54, 62 (stating that with each termination, a business "loses some of its corporate memory").

158. *See* Grossman, *supra* note 158, at 62 (stating that workers' training and the information they absorb on the job create an asset).

159. Minda, *Aging Workers*, *supra* note 18, at 592.

160. WEILER, *supra* note 155, at 149-50.

161. *See* Uchitelle & Kleinfield, *supra* note 15; VAN HORN, *supra* note 131, at 105.

162. *See* VAN HORN, *supra* note 131, at 102 (noting that while some firms report positive results from layoffs, layoffs are "a mixed bag of positive and negative outcomes").

163. *See* Uchitelle & Kleinfield, *supra* note 15 (describing increases in stock prices following layoffs).

But there is now a considerable body of evidence that reveals that these results are often ephemeral. Studies show that downsizing companies "went on to trail their industries in productivity, profitability and shareholder value."[164] In a background paper for a Twentieth Century Fund task force report on retaining America's workforce, Professor Carl Van Horn collected study results showing that most downsizing firms do not experience increases in productivity or profits.[165] An analysis of available studies prompted human resources expert Alan Downs to conclude that the "wholesale acceptance of layoffs" is a "risky, painful, and inhumane form of management."[166] Consultant Frederick Reichheld put it bluntly, "The truth is, layoffs *lower* productivity; in some cases they decimate it."[167]

Clearly it is not the courts' role under the ADEA to second-guess employers' business judgments, even where they may be erroneous or illogical.[168] The mounting evidence that layoffs often harm the companies that conduct them does not gainsay that basic principle. It does, however, suggest that a public policy that enshrines layoffs, downsizings, and salary-based terminations has a shaky foundation indeed.

---

164. Adam Cohen & Cathy Booth Thomas, *Inside a Layoff: An Up-Close Look at How One Company Handles the Delicate Task of Downsizing*, TIME, Apr. 16, 2001, at 38, 40 (describing Michigan Business School professor Kim Cameron's summary of studies on layoffs); *see also* De Meuse et al., *supra* note 16, at 520 (concluding from data that layoffs do not improve or even halt a decline in financial performance); DOWNS, *supra* note 20, at 11-13 (reporting studies showing the negative effects of downsizing); Ronald Henkoff, *Getting Beyond Downsizing*, FORTUNE, Jan. 10, 1994, at 58, 58 (reporting that only thirty-four percent of downsizing companies reported increases in productivity and only forty-five percent have seen operating profits improve); Mishra et al., *supra* note 16, at 84 (stating that "[t]he promised payoffs of downsizing have been mixed at best"); VAN HORN, *supra* note 131, at 103 (noting numerous empirical studies showing "that many firms are doing a poor job of implementing cutbacks and are not achieving their goals").

165. *See also* VAN HORN, *supra* note 131, at 103. According to British management consultant Gary Hammel, "This continuous downsizing—it's corporate anorexia. You can get thin, but it's not the way to get healthy." *Id.* at 106 (quoting Steven Pearlstein, *Corporate Cutbacks Yet to Pay Off*, WASH. POST, Jan. 4, 1994, at B6).

166. DOWNS, *supra* note 20, at 13.

167. REICHHELD, *supra* note 149, at 146 (citing examples of lower productivity after downsizing).

168. Ellis v. United Airlines, Inc., 73 F.3d 999, 1006 (10th Cir. 1996) (stating that the ADEA does not prohibit discrimination between applicants and incumbent employees); *see also* EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1187 (5th Cir. 1996) (stating that "the ADEA plays no role" in evaluating the merits of a company's business decisions); Grafenhain v. Pabst Brewing Co., 827 F.2d 13, 21 n.8 (7th Cir. 1987) (stating that "although the ADEA does not hand federal courts a roving commission to review business judgments, the ADEA *does* create a cause of action against business decisions that merge with age discrimination"); Marks v. Loral Corp., 68 Cal. Rptr. 2d 1, 22 (Ct. App. 1997) ("A court 'does not sit as a super-personnel department that reexamines an entity's business decisions.'" (quoting Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986))).

E. The Impact of Salary-Based Terminations on Society

The *Wirtz Report* described effects of age discrimination beyond those on the unemployed older worker. Effects on society included the loss of "a million man-years of productive time" each year due to unemployment of older workers,[169] with even more productivity lost because of "forced, compulsory, or automatic retirement."[170] The report identified the cost of unemployment insurance for victims of age discrimination as another component of society's cost.[171]

Society continues to suffer such losses when older workers are terminated. A 1996 article in the *Journal of Socio-Economics* identified "lower tax revenue and increased government expenditures on unemployment insurance and social programs" as effects of unemployment,[172] effects that increase with older workers[173] because of their greater difficulty in finding new jobs.[174] Moreover, displaced older workers contribute less to the economy as consumers.[175] Downsizings of older workers will exacerbate the social security crisis, as displaced workers create a drain on the social security system.[176] Opportunistic firings of those nearing retirement will also widen income inequality, as wealth is shifted from middle-class workers to managers whose compensation is tied to stock values.[177] Professor Newman summarized widespread worker displacement as adding "up to a monumental waste of intelligence, motivation, and aspiration."[178]

Even "social institutions like schools and churches are often ripped apart" when companies are downsized.[179] Perhaps the most subtle but far-reaching effect of terminations of older workers will be to increase older workers' alienation in society. Employees may have hoped their hard work would lead to success, but the culture of the bottom line sends the disillusioning message

---

169. WIRTZ REPORT, *supra* note 2, at 53.

170. *Id.* at 54.

171. *Id.*

172. Goldsmith et al., *supra* note 134, at 334; *see also* DOWNS, *supra* note 20, at 55, 64-65 (discussing the additional government expenditures and lost tax revenues occasioned by worker displacement).

173. *See* Jerome M. Rosow, *Extending Working Life*, *in* THE AGING OF THE AMERICAN WORK FORCE 399, 402 (Irving Bluestone et al. eds., 1990) (discussing data showing that "early retirement represented a significant loss in federal revenues").

174. *See supra* notes 123-26 and accompanying text.

175. *See* Rosow, *supra* note 173, at 403 (noting that increased employment of older workers would promote their ability to contribute to the Gross National Product as consumers).

176. Minda, *Aging Workers*, *supra* note 18, at 579-80.

177. *See id.* at 573, 597.

178. NEWMAN, *supra* note 108, at 240.

179. *See* DOWNS, *supra* note 20, at 19; Uchitelle & Kleinfield, *supra* note 15 (describing the harm to civic groups caused by job loss).

that instead, they can look forward to becoming prime candidates for termination.[180]

IV. THE ROLE OF VALUES IN THE ANALYSIS

Thomas Davenport, who helped create the downsizing trend,[181] later described it as a good idea that went "off the tracks so badly" due to its cavalier treatment of people.[182] How society decides to treat salary-based terminations of older workers is a social and political decision based on values. Two primary strains of values appear in case law and commentary on this subject. One makes companies' bottom-line profit the measure of a corporate decision's legitimacy. The other strain recognizes that the bottom line cannot measure what is truly important,[183] and is thus more consistent with our higher national values.

A. Economic Reasoning: The Primacy of Profit

Despite the negative effects of worker displacement, corporations continue to engage in layoffs,[184] even when they are not in financial difficulty.[185] The usual explanation is that the first goal of corporate executives is to increase corporate profit.[186] Courts have reinforced this emphasis on the bottom line, reasoning that in a free market, companies must be free to do whatever is necessary to increase profits. For example, Judge Easterbrook's influential dissent in *Metz* approved salary-based terminations on the ground that wages

---

180. *See supra* notes 142-44 & 151-55 and accompanying text.

181. *See generally* Thomas H. Davenport & James E. Short, *The New Industrial Engineering: Information Technology and Business Process Redesign*, SLOAN MGMT. REV., Summer 1990, at 11 (discussing the relationship between information technology and business redesign).

182. Thomas H. Davenport, *The Fad That Forgot People*, FAST COMPANY, (Nov. 1995), *at* http://www.fastcompany.com/online/01/reengin.html.

183. *See* CHRISTOPHER CONTE & ALBERT R. CARR, U.S. DEP'T OF STATE, AN OUTLINE OF THE U.S. ECONOMY, *at* http://usinfo.state.gov/products/pubs/oecon/chap11.htm (last visited Jan. 24, 2002) (quoting the late Senator Robert Kennedy as stating that gross national product "measures neither our wit nor our courage; neither our wisdom nor our learning; neither our compassion nor our devotion to our country; it measures everything, in short, except that which makes life worthwhile. And it can tell us everything about America except why we are proud to be Americans.").

184. *See* Philip M. Berkowitz, *Workforce Reductions: They Are Back*, N.Y. L.J., May 31, 2001, at 5 (listing recent layoffs at such major corporations as Dell, Corning, Motorola, Goodyear, and Sears). *See also infra* notes 205-07 and accompanying text.

185. *See supra* note 16 and accompanying text.

186. *See* Dennis P. Quinn & Thomas M. Jones, *An Agent Morality View of Business Policy*, 20 ACAD. MGMT. REV. 22, 22 (1995) (stating that one view of business policy holds that maximizing the company's present value is the "appropriate motivating principle for management," but proposing instead a view based on "principled moral reasoning") (Easterbrook, J., dissenting).

correspond to profitability.[187] Similarly, the California Court of Appeal approved a salary-based termination as based on a reasonable factor other than age with the explanation that "salary is as 'reasonable' a factor as is imaginable in a market economy."[188] The court added that Congress did not intend the ADEA to inhibit the "free market economy" or "decision-making on the basis of cost" through which "real jobs and wealth are created."[189] The Sixth Circuit voiced perhaps a more cynical expression of the same idea, commenting that Congress and the courts have made the social judgment that "[t]he rules of the marketplace govern."[190] As Professor Minda put it, today "it is the 'bottom line,' more than anything else, that drives corporate and some judicial thinking."[191]

Behind this emphasis on the bottom line are the short-term profits of the shareholders and the Chief Executive Officer (CEO). The drive to increase shareholder revenue frequently occurs because the chief executive's salary and bonuses are tied to the company's stock price.[192] This encourages CEOs to engage in "snapshot accounting," which forsakes the long view for the profit of the moment.[193] Under the primacy of profit in today's business climate "anything is acceptable as long as it is legal and makes money."[194]

Those who would freely allow salary-based terminations contend that a dispassionate focus on profitability benefits society, including the workers that the ADEA seeks to protect.[195] This reasoning is based on the premise that members of a free-market system will act to maximize their own wealth, thereby increasing society's wealth and benefitting all of its members.[196] But

187. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1219 (7th Cir 1987).

188. Marks v. Loral Corp., 68 Cal. Rptr. 2d 1, 9-10 (Ct. App. 1997) (holding that a salary-based termination violated neither the ADEA nor California's Fair Employment and Housing Act).

189. *Id.* at 24.

190. Allen v. Diebold, Inc., 33 F.3d 674, 679 (6th Cir. 1994).

191. Minda, *Opportunistic Downsizing*, *supra* note 17, at 550.

192. *See id.* at 549; DOWNS, *supra* note 20, at 24-26; R.C. Longworth, *CEO Pay 531 Times That of Workers Study: Gap Grows Despite Downturn*, CHI. TRIB., Aug. 28, 2001, § 3, at 1 (discussing a study by the Institute for Policy Studies and United for a Fair Economy); *Widening Pay Gap*, WASH. POST, May 4, 1997, at H2; Louis Uchitelle, *1995 Was Good for Companies, and Great for a Lot of C.E.O.'s*, N.Y. TIMES, Mar. 29, 1996, at A1. A recent study suggests that executives have managed to insulate themselves in the current stock market downturn. The study reports that the "layoff leaders" of the year 2000 received large pay raises. SARAH ANDERSON ET AL., INSTITUTE FOR POLICY STUDIES AND UNITED FOR A FAIR ECONOMY EXECUTIVE EXCESS 6 (2001).

193. *See* REICHHELD, *supra* note 149, at 4.

194. DOWNS, *supra* note 20, at 26.

195. *See* Richard A. Posner, *Employment Discrimination: Age Discrimination and Sexual Harassment*, 19 INT'L REV. L. & ECON. 421, 434 (1999) [hereinafter Posner, *Employment Discrimination*] (arguing that if employers are prevented from using efficient methods of analyzing their costs, workers as a whole will be affected).

196. *See* Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 251-52 (2000).

this approach, focused on wealth for the sake of wealth,[197] recognizes only part of the picture. It ignores effects on the terminated workers[198] and others,[199] that may be intangible and not always quantifiable, but nevertheless deserve attention because they profoundly affect people's lives.

Some writers on the subject display an optimism that seems unwarranted in the light of subsequent developments.[200] In his dissent in *Metz*, Judge Easterbrook discussed the human capital theory, acknowledging the temptation for employers to fire more highly paid older workers.[201] However, he theorized that such opportunism would be curtailed by firms' desire to protect their reputations.[202] Judge Posner similarly acknowledged the temptation for employers to fire older workers to save on pension costs, but said this was "shortsighted" because it would create "ill will among employees" and force employers to pay higher salaries to new employees to compensate for the risk.[203] But perhaps because it is difficult for younger workers to assess and act on companies' reputations,[204] such compunctions have not curtailed opportunistic firings of older workers.

The number of opportunistic firings cannot be known,[205] but recent news reports indicate that rather than tapering off, they are on the rise. A recent *Chicago Tribune* article reported that age discrimination complaints are increasing due to "[c]orporate America's determination to cut costs by weeding out many of its highest-paid workers."[206] Numerous other news accounts support this conclusion.[207] Because salary-based terminations remain

197. *See id.* at 252.

198. *See supra* Part III.B.

199. *See supra* Parts III.C - III.E.

200. *See* Alexander, *supra* note 22, at 104 (citing authorities that question Judge Easterbrook's optimistic claims that the market will prevent unreasonable discrimination based on age).

201. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1221 (7th Cir. 1987) (Easterbrook, J., dissenting).

202. *Id.*

203. Visser v. Packer Eng'g Assoc., Inc., 924 F.2d 655, 657 (7th Cir. 1991).

204. Minda, *Opportunistic Downsizing*, *supra* note 17, at 550-51 (stating that reputation is not an effective check on firms' behavior unless younger workers can act on the reputation by going elsewhere); Schwab, *supra* note 93, at 27 (stating that young workers cannot easily assess employers' reputations partly because knowledge of opportunistic firings is not easily exchanged between generations).

205. *See* Glen Fest, *Age Angle: Despite Hard-Working Reputations, Older Workers Say They Believe They're Victims of Discrimination*, STAR-TELEGRAM (Fort Worth), Apr. 9, 2001, Tarrant Bus. Section, at 9 (quoting AARP policy advisor Sara Rix as saying that "[s]niffing out age discrimination is nearly impossible").

206. Robert Manor & T. Shawn Taylor, *Age-Bias Complaints Up Sharply*, CHI. TRIB., July 15, 2001, § 1, at 1.

207. *See, e.g.*, Berkowitz, *supra* note 184, at 5 (reporting that workforce reductions have increased in 2001); Bruce Butterfield, *'A Very Scary Time': Laid-Off Older Workers See Options Fade as Boom Ends*, BOSTON SUN. GLOBE, May 20, 2001, at H1 (quoting Boston career center manager Rosemary Alexander as saying "It may be hard to prove, but job discrimination is alive and well for older workers. It's a real problem today."); Fest, *supra* note 205, (quoting a trade organization head as saying that "companies routinely ignore older candidates because of salary

widespread, Professor Minda argued, the "ADEA must be allowed to protect late-career employees."[208]

B. *Values Beyond Economics*

> *And how do you benefit if you gain the whole world but lose your own soul in the process?*[209]

Although public discourse in the United States has paid much lip service to "values" lately,[210] the word often appears without definition. If we are serious about our values, we should examine their content. Some current discussion of business decisions has overemphasized the value of business profitability.[211] Americans appreciate economic success, but more humane values are also deeply rooted in our culture. Americans are a compassionate people who care about the individual and believe in fairness. Two presidents in the last century expressed these high values succinctly. President Theodore Roosevelt exhorted Americans that "[t]his country will not be a permanently good place for us to live unless it's a good place for all of us to live."[212] President Woodrow Wilson said, "Sometimes people call me an idealist. Well, that is the way I know I am an American. America is the only idealistic nation in the world."[213]

In the context of the ADEA, these nobler values should prompt society to look beyond profit to the well-being of individual employees. That approach

---

reasons"); Mike Myers, *Under Pressure in the New Economy*, STAR TRIB. (Minneapolis-St. Paul), Jan. 22, 2001, at 1D (reporting that in the 1990s "older, experienced employees" were laid off more than younger workers).

See also Minda, *Aging Workers*, *supra* note 18, at 571 & n.35 (citing Bureau of Labor Statistics data that show older workers' risk of losing their jobs was increasing in the mid 1990s and that older workers "suffered most as a result of corporate downsizing"); Sweeney, *supra* note 61, at 1530 n.13 (listing sources reporting job loss by middle-aged workers as a result of downsizings).

208. Minda, *Opportunistic Downsizing*, *supra* note 17, at 566. *But see* Issacharoff & Harris, *supra* note 63, at 836-37 (arguing that antidiscrimination law should not apply to older Americans, who are "not penurious" and not in need of special treatment).

209. *Mark* 8:36 (New Living Translation 1996).

210. *See* George F. Will, *Forget Values, Let's Talk Virtues*, WASH. POST, May 25, 2000 at A37 (commenting that "everyone" is talking about values).

211. *See* Allen v. Diebold, Inc., 33 F.3d 674, 676 (6th Cir. 1994) (stating that "[t]he ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations"); Marks v. Loral Corp., 68 Cal. Rptr. 2d 1, 9-10 (Ct. App. 1997) (stating that "[a] differentiation based on salary is as 'reasonable' a factor as is imaginable in a market economy"); Posner, *Employment Discrimination*, *supra* note 195, at 429 n.22 (1999) (arguing that treating salary-based decisions as age discrimination would hinder firms' "rational steps to reduce their costs").

212. *See* Rheta Grimsley Johnson, *Reflections of an Idealistic Nation*, THE ATLANTA J.-CONST., July 5, 1995, at B1 (quoting President Roosevelt).

213. *See id.* (quoting President Wilson).

is not a complete stranger to the business world. David Packard, co-founder of Hewlett-Packard, believed good management would consider the best interests of three corporate constituents: shareholders, management, and employees.[214] Similarly, business ethicists today call for principled behavior that considers the good of the employees. For example, Professor Thomas Dunfee has advocated that managers should be guided by more than the bottom line: they must consider the moral preferences of employees and "manifest universal norms,"[215] which are "reflected in a convergence of religious, philosophical, and cultural beliefs."[216] Business ethics professors Dennis Quinn and Thomas Jones argue that "[b]usinesses have no special rules or states that waive the moral obligations that managers have as humans."[217] They have articulated four commonly recognized "core principles": avoiding harm to others, respecting their autonomy, avoiding lying, and honoring agreements.[218] If managers wish to be moral, say Quinn and Jones, they "*must not* put duty to maximize the wealth of shareholders ahead of [the] four moral principles."[219] These principles are congruent with the Judeo-Christian ethics to which most U.S. citizens subscribe,[220] as well as with the principles of other major religions,[221] and it is curious that they should be largely absent from current discussion of the law's approach to older workers.

Particularly in the early years after passage of the ADEA, courts recognized values beyond profit. For example, in *Graefenhain v. Pabst Brewing Co.*, the court acknowledged that retention of older, more highly-paid employees frequently competes with "conceptions of economic efficiency," but the court said that the ADEA represents "a choice among these values. It stands for the proposition that this is a better country for its willingness to pay the costs for treating older employees fairly."[222]

As Professor Katherine Newman has written, "We should not allow a distorted vision of free-market economics to glorify irresponsibility and lack

214. *See* DOWNS, *supra* note 21, at 22-23; FRASER, *supra* note 16, at 110.

215. Dunfee, *supra* note 103, at 157. *See also* Van Buren, *supra* note 149, at 207 (proposing that business decisions should be guided by the premise that "employers owe duties to employees").

216. Dunfee, *supra* note 103, at 153.

217. *See* Quinn & Jones, *supra* note 186, at 30 (citing ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980)).

218. *Id. See also* Mumford & Hendricks, *supra* note 16, at 29 (arguing that "values are as important, if not more important, than they have ever been").

219. Quinn & Jones, *supra* note 186, at 40.

220. *See* Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 107-09 (1992) (citing authorities for the proposition that "we are a religious people").

221. *See id.* at 111 & n.98 (quoting religious sources that promote conduct beyond individual selfishness, including "Thou shalt love thy neighbor as thyself." *Leviticus* 19:18).

222. Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 21 n.8 (7th Cir. 1987).

of commitment."[223] We can choose a more nuanced and humane approach rather than simple reliance on the bottom line.

V. TOWARD A SOLUTION

A. Analytic Bases for Change

Congress considered the concerns of both employers and employees when enacting the ADEA,[224] and a reasoned approach to applying the Act should do so as well. Lately, however, interpretation of the Act has been heavily skewed toward employers.[225] There are sound bases for restoring a fairer balance.

Corporations are created by statute, and their officers and directors are afforded the special protection of immunity from some kinds of liability.[226] Values beyond profit are part of our laws regulating corporations. We require corporations and other businesses to act contrary to their apparent economic interest in various settings such as antitrust,[227] race discrimination,[228] and environmental law.[229] In these contexts, we have decided to pay the cost of "more important remedial and social objectives" than profit.[230] Moreover, the American Law Institute has recognized that corporations may take into account ethical values other than shareholder gain. Its *Principles of Corporate Governance* provides that "[e]ven if corporate profit and shareholder gain are not thereby enhanced," a corporation "[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business."[231] The United States Business Roundtable recognizes that "'[c]orporations are chartered to serve both their shareholders and society as a whole,'" including their employees.[232] Some states have codified provisions,

---

223. NEWMAN, *supra* note 108, at 239.

224. *See* Kaminshine, *supra* note 86, at 267-72.

225. *See supra* notes 47-50 and accompanying text.

226. *See* Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 6-8 (1994).

227. *See* 15 U.S.C. § 2 (1994).

228. *See* 42 U.S.C. § 2000e-2 (1994). Racial discrimination in employment is economically inefficient in that it narrows the pool of potential employees. *See* Sue A. Krenek, Note, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969, 1993 (1994). Furthermore, threats by third parties not to deal with nondiscriminatory employers may provide an economic rationale for discriminatory decisions. *Id.* at 1995-96.

229. *See* 42 U.S.C. § 7651 (1994).

230. *See* Kaminshine, *supra* note 86, at 232.

231. AM. LAW INST., 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(2) (1994).

232. *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 21 (1992) (citing The Business Roundtable, *Corporate Governance and American Competitiveness*, 46 BUS. LAW. 241, 244 (1990)).

providing, for example, that in making decisions, corporate directors may consider the interests of such constituencies as the employees and society.[233]

The question, then, is not whether we can regulate businesses–we do so now. The question is whether we choose to regulate salary-based terminations of older workers. As the *Wirtz Report* stated, "The development of responsible and effective public policy regarding discrimination based on age requires as steadfast and unfearing confrontation of reality as did the development of" other discrimination policies.[234] If we want to live up to our highest ideals today, we must squarely confront the harsh realities of the current spate of salary-based terminations of older workers.

Some commentators have argued that the ADEA was not meant to cover terminations, saying that Congress was focused more on hiring problems than on terminations.[235] That focus is not surprising in light of the then widespread practice of employment advertisements overtly stating that older workers need not apply.[236] At that time, the wave of downsizings and the emphasis on the bottom line of the 1980s and 1990s[237] were trends not yet realized. However, that does not mean that Congress meant to exempt salary-based terminations. When courts conclude that the ADEA was not meant to remedy salary-based terminations, they gloss over aspects of the Act's language and legislative history that suggest otherwise.

The *Wirtz Report* concluded that limits placed on older workers were due to assumptions made "without consideration of a particular applicant's individual qualifications."[238] More specifically, the report brought the problem of salary-based decisions to the attention of Congress, listing employers' statements that they could "hire younger workers for less money, and concern that older workers' earnings expectations are 'too high.'"[239] The report expressed "human concern" for the worker whose economic value "becomes marginal in traditional market place terms,"[240] and added that society has a stark economic choice: it can pay, "as customers," an older employee's higher wage, or, "in the alternative, pay[], as taxpayers, the full amount of his 'welfare'

---

233. *See* MINN. STAT. ANN. § 302A.251(5) (West Supp. 2001); Useem, *supra* note 15, at 53 (referring to state legislation enacted in the 1970s and early 1980s that incorporated the concerns of groups other than the shareholders). For a discussion of corporate constituency statutes see Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 633 (1997) (advocating enactment of corporate constituency statutes that require management to consider nonshareholder constituents, including employees).

234. WIRTZ REPORT, *supra* note 2, at 4.

235. *See* Issacharoff & Harris, *supra* note 63, at 786, 796-97.

236. *See* WIRTZ REPORT, *supra* note 2, at 17-18.

237. *See* DOWNS, *supra* note 20, at 3 (describing in 1995 "[t]he layoff fad of the past fifteen years"); *see generally* FRASER, *supra* note 16, at 110-11 (describing an increase in downsizings in the 1980s and 1990s).

238. WIRTZ REPORT, *supra* note 2, at 17-18.

239. *Id.* at 23.

240. *Id.* at 8.

upkeep (and get[] nothing in return)."[241] The report also mentioned financial loss to society due to "forced, compulsory, or automatic" retirement.[242] Salary-based terminations were thus clearly before the legislators as they deliberated on the ADEA. When the Act was formulated, Congress emphasized that older workers should be evaluated on their own abilities,[243] which strongly suggests disapproval of terminations based not on ability but on pay.

Yet some would eviscerate the ADEA. For example, Judge Posner has stated that older workers are not in need of protection because they are prosperous and "no longer constitute an oppressed class."[244] The basis for this assertion is not clear; government statistics show that for two-thirds of older Americans the major source of income is social security,[245] which provides only a minimal standard of living.[246] Judge Posner has even called the ADEA "a particularly misbegotten venture in tilting at the windmills of ageism."[247] But the Act and its legislative history indicate that Congress intended the Act to be read more expansively than it currently is. As Professor Minda retorted to Judge Posner, opportunistic terminations of older workers are an important reason for ADEA protection, and in ignoring their dangers, "Posner subordinates the anti-discrimination principle of ADEA to the cost containment rationales of business."[248] Similarly, Professor Christine Jolls has argued that the ADEA is necessary to check employers' inclination to deprive older workers, including mobile workers, of the higher wages they are due under an implicit bargain throughout their work lives.[249]

---

241. *Id.*

242. *Id.* at 53-55. The Report also noted the "personal frustrations and anxieties" resulting from uncertainties arising when the "*opportunity* to retire has been converted into *forced* retirement, and where there is no new opportunity for satisfying occupation." *Id.* at 57.

243. 29 U.S.C. § 621(b) (1994) (stating that the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age").

244. Posner, *Employment Discrimination*, *supra* note 195, at 423-24. *See also* Issacharoff & Harris, *supra* note 63, at 837 (stating that older Americans are among society's "most advantaged and secure").

245. SOC. SEC. ADMIN., PUB. NO. 05-10055, THE FUTURE OF SOCIAL SECURITY (Aug. 2000), *available at* http://www.ssa.gov/pubs/10055.html; *see also* 2 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 10.1, at 426 (2d ed. 1999) (stating that social security "provid[es] income to three times as many older individuals as do private pensions").

246. *See* Camilla E. Watson, *Machiavelli and the Politics of Welfare, National Health, and Old Age: A Comparative Perspective of the Policies of the United States and Canada*, 1993 UTAH L. REV. 1337, 1345.

247. RICHARD A. POSNER, AGING AND OLD AGE 361 (1995).

248. Minda, *Opportunistic Downsizing*, *supra* note 17, at 560-61.

249. Jolls, *supra* note 98, at 1829.

B. *Proposed Solutions*

1. *Changes to Case Law*

Within the contours of existing ADEA law,[250] there are ways to afford relief to older workers terminated not because of their individual abilities, but because of their higher salaries.

First, the proxy doctrine could be applied by the courts, as earlier cases applied it, to encompass factors so closely correlated with age as to be functionally identical with them.[251] The recent spate of employers justifying older workers' terminations because of their higher salaries[252] suggests that despite what some courts have said,[253] there is a meaningful correlation between age and salary that is creating harm and should be addressed through age discrimination law.

This broad proxy doctrine comports with the statutory language. Insufficient attention has been given to the core language that proscribes limiting an older worker "*in any way* which would . . . *tend* to deprive" the worker of employment opportunities "because of such individual's age."[254] The italicized language indicates a broad purpose. Terminating a worker because of his high salary *tend*s to limit his employment in a way that is less analytically direct, but fits the plain meaning of *in any way*. A proxy doctrine that recognizes age and salary as statutorily equivalent would effectuate this language. Such a proxy doctrine would also be congruent with (1) the Congressional finding that older workers are disadvantaged both in retaining employment and in regaining it once lost[255] and (2) the *Wirtz Report's* concern about older workers whose salaries are high and who will become drains on society without work.[256] This broad age proxy doctrine would help "thwart

250. Some commentators have suggested that the ADEA is not the best method for remedying unfair job terminations of older workers. *See* Issacharoff & Harris, *supra* note 63, at 796-801 (arguing that "protection of long-term employees could be accomplished by recognizing the important role of common law actions" or through the creation of "a statutory abrogation of employment at will"); Kathleen C. McGowan, Note, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 182-83 (1998) (arguing that a change in the at-will doctrine is a more appropriate way to address the problem of opportunistic terminations).

251. *See supra* notes 67-69 and accompanying text.

252. *See supra* notes 206-07.

253. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) ("[A]n employee's age is analytically distinct from his years of service.").

254. *See* 29 U.S.C. § 623(a)(2) (1994) (emphasis added).

255. *See id.* § 621(a)(1).

256. *See supra* notes 238-42 and accompanying text.

more sophisticated attempts by employers to discriminate against aging workers on the basis of age."[257]

Both Professor Minda and Professor Schwab believe that *Hazen Paper Co. v. Biggins* did not close the door on application of this theory to salary-based claims.[258] Professor Schwab bases his argument on the Court's "enigmatic" citation of *Metz v. Transit Mix, Inc.*, which he believes indicates support for the broader proxy approach.[259] Moreover, the Court's discussion of proxy theory in *Hazen Paper* is arguably dictum, since it lies outside the Court's carefully crafted holding.[260] Thus, even if the Supreme Court does not clarify this point, the lower courts may have some freedom to apply a broad proxy approach.

A broad proxy theory will be particularly useful in preempting a "reasonable factor other than age" defense because salary would be equated with age and therefore not "*other* than age."[261] It will also provide a workable framework for an individual who is the sole object of discriminatory conduct.[262] The alternative disparate impact framework involves a statistical showing that a challenged practice disproportionately affects a protected group,[263] a showing that the sole plaintiff will have difficulty making.

Second, to the extent that the "reasonable factors other than age" defense does apply,[264] economically-based decisions correlated with age should be required to meet a reasonableness requirement. In the first twenty-five years of the ADEA, several courts effectively applied such a requirement.[265] However, lately some courts have attempted to bypass the statute's word "reasonable"[266] by equating the ADEA with the Equal Pay Act, under which a business decision's reasonableness is not a factor.[267] These analyses ignore a significant

---

257. Minda, *Opportunistic Downsizing*, *supra* note 17, at 539; *see also* Spindler, *supra* note 61, at 822 (noting that an employer could raise the salary of an older worker and then fire the worker on economic grounds).

258. Minda, *Opportunistic Downsizing*, *supra* note 17, at 538-39 (interpreting Schwab's reading of *Hazen Paper*); Schwab, *supra* note 93, at 44-45.

259. Schwab, *supra* note 93, at 44-45.

260. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 613 (1993).

261. *See* Kaminshine, *supra* note 86, at 264.

262. *See infra* notes 295-96 and accompanying text.

263. *See* Clemons & Bales, *supra* note 86, at 7-8.

264. 29 U.S.C. § 623(f)(1) (1994).

265. Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 692-93 (8th Cir. 1983) (affirming a judgment in favor of a professor terminated for salary reasons and stating that "economic savings" was not "a legitimate justification under the ADEA for an employment selection criterion"); Geller v. Markham, 635 F.2d 1027,1034 (2d Cir. 1980) (finding in favor of a terminated employee and stating that economic reasons would not justify termination for the age-related criterion of experience level); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978) (finding in favor of an employee terminated for salary reasons and stating that under the ADEA, economic savings "directly related to an employee's age" may not be used as a basis for termination), *aff'd in part, rev'd in part*, 608 F.2d 1369 (2d Cir. 1979).

266. 29 U.S.C. § 623(f)(1) (1994).

267. *E.g.*, Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996) (denying a disparate impact cause of action under the ADEA); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076-78 (7th Cir. 1994) (holding that school's policy of linking salary to experience was

point: the Equal Pay Act allows discrimination based on a factor "other than sex," but does not include the ADEA's important "reasonable" qualifier.[268] One commentator even pointed out a court's erasure of the word "reasonable" from the ADEA through the use of ellipses, even while that court purported to focus closely on the statutory language.[269]

Of course, ignoring words of a statute does not comport with accepted statutory analysis.[270] If the word "reasonable" is to be more than surplusage, then the possibility of "unreasonable" factors must exist. When it passed the ADEA, Congress had before it the *Wirtz Report*'s mention of salary-based terminations[271] and may well have viewed them as a potentially "unreasonable" factor that must be scrutinized. Moreover, economic justifications do not exonerate companies in other discrimination contexts.[272] Particularly where an employer is not in economic difficulty, courts should inquire into the reasonableness of a salary-based termination, requiring the company to show real necessity beyond a simple desire to increase profits. No longer should employers be exonerated by any economic reason they may offer to justify a salary-based termination.

Third, the disparate impact theory could be accepted by the courts as applicable to ADEA cases, including salary-based termination cases.[273] The language of the statute supports a disparate impact approach. Although the ADEA contains no specific reference to that approach, neither did the original Title VII, the Act that spawned the disparate impact approach.[274] This is not surprising because the disparate impact theory had not yet been articulated when these acts were passed.[275] Since Congress could not use the term "disparate impact," which had not yet been coined, it used the words "tend" and "in any way" to suggest that an indirect approach was appropriate under

---

a reasonable economic justification for not hiring an older teacher).

268. *See* 29 U.S.C. § 206(d)(1) (1994).

269. Johnson, *supra* note 84, at 322-23 (exposing the *Mullin* court's use of an ellipsis to omit the word "reasonable" as a basis for holding that disparate impact claims are not available under the ADEA). *See* Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999).

270. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (stating that in construing a statute, the Court is "obliged to give effect, if possible, to every word Congress used").

271. *See* WIRTZ REPORT, *supra* note 2, at 23.

272. *See* Kaminshine, *supra* note 86, at 240 (noting the Title VII provides no exception for "economically motivated discrimination").

273. *See* Sweeney, *supra* note 61, at 1576-77 (arguing that disparate impact must be a part of the ADEA so plaintiffs can challenge employers' conduct without rare evidence of intent); *see also supra* note 86 and accompanying text.

274. *See* Civil Rights Act of 1964, Pub. L. No. 102-166, 105 Stat. 852 (1991) (amending 42 U.S.C. § 2000e-2 to include disparate impact). Title VII's disparate impact provision can be found at 42 U.S.C. § 2000e-2(k) (1994).

275. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971) (establishing the disparate impact approach in 1971); *see also* Rosenblum, *supra* note 106, at 432 (stating that "[i]t is unremarkable" that neither Title VII nor the ADEA addressed the disparate impact theory which had not yet been developed).

the ADEA.[276] This is consistent with the *Wirtz Report*'s concern about higher-salaried workers.[277] Some courts have relied on language in the *Hazen Paper* concurrence[278] that questioned the applicability of a disparate impact approach under the ADEA.[279] However, as the Ninth Circuit has observed, until the Supreme Court rules on this point, the question remains open and disparate impact remains viable.[280]

In applying the disparate impact analysis, real force must be given to the "business necessity" or "business justification" defense.[281] Many of the early cases held that economic reasons were insufficient to justify discrimination under the Act.[282] However, the Supreme Court, in the Title VII case *Wards Cove Packing Co. v. Atonio*, decided that the business justification standard does not require that the challenged conduct be "essential" or "indispensable," but "[a] mere insubstantial justification . . . will not suffice."[283] Subsequent ADEA decisions have diluted the concept of business justification[284] to the point that research has disclosed no ADEA case where a proffered justification was rejected as "insubstantial" under the *Wards Cove* approach. In practical application then, the defense provides employers near carte blanche permission for opportunistic firings.[285] To provide sufficient protection for older workers, the defense should be interpreted as requiring some significant showing by an employer.

A difficult issue is presented by an alternative to salary-based terminations. If allowed, employers could require older workers to accept reduced salaries instead of terminations. This approach has some appeal for both employers and employees. Employers in dire economic straights may want this option, and

---

276. *See* Alexander, *supra* note 22, at 108 (stating that the "ADEA's statutory language . . . indicate[s] a clear Congressional intent to permit disparate impact analysis in age discrimination suits). *But see* Sweeney, *supra* note 61, at 1573 (stating that the text and legislative history of the ADEA are inconclusive on whether the Act allows disparate impact claims).

277. *See supra* notes 239-42 and accompanying text.

278. *See supra* note 87 and accompanying text.

279. *See* Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999) (holding that disparate impact does not apply under the ADEA and citing cases that have so held). However, note that the *Mullin* court omitted consideration of the statutory word *reasonable* from its statutory construction analysis. *Id.* at 701-02. *See also supra* notes 267-69 and accompanying text.

280. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1291 & n.6 (9th Cir. 2000) (assuming that disparate impact is still a viable approach), *cert. denied sub nom.*, Gentile v. Quaker Oats Co., 121 S. Ct. 2592 (2001).

281. *See supra* notes 90-93 and accompanying text.

282. *See supra* notes 11-13 and accompanying text.

283. 490 U.S. 642, 659 (1989).

284. *E.g.*, Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687, 694-95 (7th Cir. 2000) (stating that a company need not be "financially desperate" in order for economic reasons to constitute a legitimate justification); Abbott v. Fed. Forge, Inc., 912 F.2d 867, 875 (6th Cir. 1990) (stating that an employer's practice that saved pension costs was based on a legitimate business interest, because a practice need not be "essential" to be acceptable).

285. *See supra* note 46 and accompanying text.

some of the threatened employees themselves may prefer a pay cut to outright termination. On the other hand, pay cuts are problematic in that employers may not wish to risk the employee disgruntlement pay cuts may create. More important, allowing pay cuts to be forced on older workers seems directly contrary to the purpose of the ADEA.[286] If allowed, such cuts might become widespread, essentially gutting the ADEA. On balance, then, this approach does not seem viable and is not recommended here.

2. *Statutory Changes*

Congress, too, could recognize that allowing salary-based terminations of older workers is poor public policy and implement the above changes without waiting for the courts to act. It could begin by reopening hearings on the issues covered by the ADEA. If it finds grounds to act, Congress could amend the ADEA to include language explicitly allowing claims arising from salary-based terminations.[287] Alternatively, Congress could expressly reinstate the age proxy and disparate impact theories, just as it previously reinstated overturned approaches under Title VII.[288]

State legislatures could also act.[289] After *Marks v. Loral*[290] barred ADEA and state law claims arising from a salary-based termination, the California legislature expressly overrode that decision.[291] The new California statute declares a legislative intent to override *Marks*, approves both the disparate treatment and the disparate impact methods of proof, and encourages courts to interpret age discrimination statutes "broadly and vigorously" to protect older workers both as individuals and as a group.[292]

---

286. Judge Easterbrook thought "[i]t would be a shocking violation of the ADEA" to allow age-based salary reductions. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1213 (7th Cir. 1987) (Easterbrook, J., dissenting).

287. *See* Alexander, *supra* note 22, at 107 (arguing that Congress, not the courts, should debate and decide "whether protecting older workers is more important than the desire to become the most economically-efficient business organization one can be"); Harper, *supra* note 24, at 787 (stating that "Congress could in part overrule *Hazen Paper*" by providing that salary cannot be used as a justification for discharging older workers); Sweeney, *supra* note 61, at 1577 (recommending that Congress amend the ADEA to provide for disparate impact analysis).

288. *See* 1 ROTHSTEIN ET AL., *supra* note 23, § 2.37, at 332.

289. The ADEA contains no blanket preemption of state legislation on the subject of age discrimination. *See* 1 EGLIT, *supra* note 22, § 2.05. Some states have enacted statutes that afford greater protection against age discrimination than does the ADEA. *Id.* In fact, the research materials for the *Wirtz Report* listed and commended state laws on the subject. RESEARCH MATERIALS, *supra* note 114, at 109-33.

290. 68 Cal. Rptr. 2d 1 (Ct. App. 1997); *see supra* note 59 and accompanying text.

291. *See* CAL. GOV'T CODE § 12941.1 (West Supp. 2001).

292. *Id.* The following is the text of the statute:

> The Legislature hereby declares its rejection of the court of appeal opinion in Marks v. Loral Corp. (1997) 57 Cal.App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its

The California statute goes far toward ameliorating the problems discussed in this Article.[293] However, it has not yet been interpreted by the courts, and its application where a sole worker is affected by a salary-based termination is unclear. It unequivocally allows salary-based claims that affect older workers "as a group," but it does not mention individuals in that same sentence.[294] However, its announced intent that older workers be protected "as individuals" may mean salary-based claims are available to individuals as well.[295] Terminations of sole individuals do occur; the *Metz* and *Marks* cases are perhaps the best-known examples.[296] The aggrieved individual worker is no less in need of redress because she stands alone. State legislatures should carefully consider this issue in drafting statutes aimed at remedying salary-based terminations of older workers.

VI. CONCLUSION

Recently, terminations of older, more highly paid workers in favor of younger, cheaper workers have become widespread. At the same time, instead of recognizing an increased need to protect older workers, courts have become less willing to provide them redress under the ADEA. The courts are allowing bottom-line profits to justify salary-based terminations, while ignoring their negative effects. This tyranny of the bottom line creates bad public policy, as data and commentary from the disciplines of sociology, economics, psychology, and business suggest. The current policy harms the discharged workers and sends surviving workers the disillusioning message that their best efforts will only set them up as prime candidates for termination.

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

Id.

293. At the time of this writing, the one case citing Section 12941.1 is *Guz v. Bechtel Nat'l Corp.*, 8 P.3d 1089 (Cal. 2000), which was decided on evidentiary grounds not requiring interpretation of the statute. *Id.* at 1121.

294. CAL. GOV'T CODE § 12941.1 (West Supp. 2001).

295. *Id.*

296. *See Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1203 (7th Cir. 1987); *Marks*, 68 Cal. Rptr. 2d at 4.

Putting some limits on salary-based terminations would better implement the language and purpose of the ADEA and would create better public policy. To effect this change, courts could allow a broad application of the age-proxy theory and confirm the viability and importance of the disparate impact approach. Alternatively, Congress or state legislatures could enact legislation to clarify the availability of effective redress for workers whose only transgression is being more experienced and therefore more highly paid than their juniors.

*