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## Tipping the Balance Back: An Argument for the Mixed Motive Theory Under the ADEA

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## **TIPPING THE BALANCE BACK: AN ARGUMENT FOR THE MIXED MOTIVE THEORY UNDER THE ADEA**

### INTRODUCTION

One day in May 2010, Gregory Wehking, a clerical clerk, sat nervously in his boss Rachel Moro's office.<sup>1</sup> His employer, the Bown Company, was undergoing restructuring, and his job could be in jeopardy. Gregory didn't want to lose his job because he enjoyed working; he thought at the age of 66 it would be difficult to find a new job; and he needed the income to pay the family's bills. Ms. Moro started the meeting by putting Gregory at ease when she spoke highly of his performance record. However, the meeting's tone changed quickly. Gregory's boss next noted Gregory had been with the Bown Company for quite a long time, over 35 years. Then, Ms. Moro asked Gregory how old he was. Upon learning Gregory was 66 years old, she suggested he retire. Gregory protested, and he told her he did not want to retire; he felt good, and he liked to work. Despite his protest, Ms. Moro fired Gregory.

Gregory was fired during the Bown Company's corporate restructuring, during which it reduced the number of clerical clerk positions. At Gregory's office, a younger clerical clerk employee was allowed to keep her job. After the restructuring, the Bown Company had positions similar to a clerical clerk available in Gregory's office and other offices. Gregory was qualified for these positions. The Bown Company has a history of providing job training when transferring employees to new positions. The Bown Company did not offer to relocate any clerical employees to different cities. Gregory was not offered any of these positions.

Despite some strong evidence Gregory's boss used his age as a factor in the termination, he cannot state a viable claim under the Age Discrimination Employment Act ("ADEA"). Gregory was required, under "but for" causation, to show the Bown Company fired him because of his age and that age was a determinative factor in his firing. Since the Bown Company reduced Gregory's position during its corporate restructuring, it can claim more than half of its reason for firing Gregory resulted from the restructuring. Without the mixed motive theory, Gregory could not prove his age motivated his firing. The court dismissed Gregory's age discrimination claim. The Bown Company was not required to defend its decision to fire Gregory.

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1. This hypothetical is based on *Hnizdor v. Pyramid Mouldings, Inc.*, No. 05 C 1740, 2010 WL 1752544, at \*2 (N.D. Ill. Apr. 30, 2010).

Gregory is not alone. All too often plaintiffs lose employment discrimination suits.<sup>2</sup> Of the 100,000 employment discrimination claims filed with the Equal Employment Opportunity Commission (“EEOC”) each year, roughly 20,000 cases are filed in federal court.<sup>3</sup> “Only about fifteen percent of the claims filed with the [EEOC] result in some relief being provided to plaintiffs, a percentage that tends to fall below other administrative claims.”<sup>4</sup>

While discrimination cases are already very difficult for plaintiffs to win, the Supreme Court *recently* made it more difficult to win an age discrimination claim under the ADEA claim. In *Gross v. FBL Financial Services*, the Court removed the mixed motive theory from the ADEA framework and left behind the “but for” causation analysis.<sup>5</sup> “But for” causation imperfectly serves the purpose of the ADEA because it does not account for the human decision making process.<sup>6</sup> Further, the standard favors the defendant, which limits the law’s deterrent effect and increases the chance an older worker will be harmed mentally and economically by discrimination.<sup>7</sup> The mixed motive theory should be available under the ADEA.

This Comment first explores the statutory and case law histories of the Civil Rights Acts of 1964 and 1991 and the ADEA, culminating with *Gross*. Second, it proposes viable interpretations of the ADEA that bring the mixed motive theory within the ADEA framework. Finally, it explains why the ADEA still needs the mixed motive theory.

#### I. BACKGROUND OF THE CIVIL RIGHTS ACTS AND AGE DISCRIMINATION EMPLOYMENT ACT

In response to growing societal pressures to value and protect certain classes of people from discrimination at the federal level, Congress enacted the Civil Rights Act of 1964 (“CRA of 1964”).<sup>8</sup> The Act, specifically Title VII, protects an individual based on his or her race, color, religion, sex, or national origin.<sup>9</sup> It recognizes, however, the protected status may be explicitly considered with bone fide occupational qualifications (“BFOQ”) or disproportionately affected if that practice is a business necessity.<sup>10</sup> The

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2. Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561 (2001).

3. *Id.* at 557–58 & n.10 (the years surveyed were 1992-1999).

4. *Id.* at 558.

5. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2350 (2009).

6. *See infra* Part IV.B.1.

7. *See infra* Part IV.B.2.

8. RAYMOND F. GREGORY, *AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE* 16–17 (2001).

9. 42 U.S.C. § 2000e-2 (2006).

10. *Id.*; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

overall purpose of Title VII is to protect individuals in these classes from adverse employment decisions because of his or her protected status.<sup>11</sup> In short, employment ought to be based on an individual's abilities, but at the very least, employers ought not to discriminate systematically against members of traditionally disadvantaged groups.

Drafts of the CRA of 1964 included age as a protected status,<sup>12</sup> but the final version of this CRA excluded age.<sup>13</sup> Congress concluded age differed from the Title VII protected statuses and therefore ordered the Secretary of Labor W. Willard Wirtz to determine if age discrimination should be similarly prohibited.<sup>14</sup>

During this time, age discrimination was not uncommon. For example, by the 1890s and 1900s, it was commonplace for workers over forty to be shut out of the workforce.<sup>15</sup> A 1957 survey of 121 companies found employers were more likely not to hire women aged thirty-five years or more and men aged thirty years or more because of their age.<sup>16</sup> Fifty-six percent of these employers would not even consider an application from a woman who was over the age of fifty.<sup>17</sup> Forty-two percent of these employers would not consider a man's application if he was over fifty.<sup>18</sup>

Secretary Wirtz's report revealed no surprises: older workers were in need of statutory protection from age discrimination. The report contained five basic premises. First, many employers have implicit or explicit age limits in which they will hire or retain employees.<sup>19</sup> Second, by implementing these age limits, employers notably affect the rights and opportunities of those employees.<sup>20</sup> Third, though age discrimination differs from race or religious discrimination because age stereotypes are typically not fueled by animus,<sup>21</sup> age stereotypes are still not based on objective fact.<sup>22</sup> Fourth, the performance

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11. 42 U.S.C. § 2000e-2.

12. GREGORY, *supra* note 8, at 17.

13. 42 U.S.C. § 2000e-2.

14. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (codified at 42 U.S.C. 2000e-14 (2006)); DEP'T. OF LABOR, SEC. OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT* iii (1965).

15. KERRY SEGRAVE, *AGE DISCRIMINATION BY EMPLOYERS* 5 (2001).

16. *Id.* at 86 (citing *Old Men of 30, Crones of 35 Now Feel First Hiring Bars Because of Age*, BUS. WK., July 20, 1957, at 38).

17. *Id.*

18. *Id.*

19. GREGORY, *supra* note 8, at 17; DEP'T. OF LABOR, *supra* note 14, at 3, 16-17.

20. GREGORY, *supra* note 8, at 17.

21. The stereotypes can still be harmful without animus. 29 U.S.C. § 621(a) (2006). Accordingly, animus is not required to violate the statute. *E.E.O.C. v. Wyoming*, 460 U.S. 226, 231 (1983).

22. GREGORY, *supra* note 8, at 17; DEP'T. OF LABOR, *supra* note 14, at 16-17.

of older workers was generally at or above the level of their younger cohorts.<sup>23</sup> Finally, age discrimination is harmful to the national economy because it removes a large number of able-bodied workers from the work force, drives up the costs of unemployment benefits and Social Security, and causes economic and psychological injury to older workers.<sup>24</sup>

As a result, in 1967, Congress passed the ADEA.<sup>25</sup> The ADEA's purpose is "to promote employment of older persons based on their ability rather than age."<sup>26</sup> Like Title VII, the ADEA prohibits employment decisions based on protected status—here, age.<sup>27</sup> A person belongs to the protected class once he or she is age forty or older.<sup>28</sup> The ADEA also recognizes two instances where employers can treat older workers worse than younger workers.<sup>29</sup>

The ADEA's first exception BFOQ is the affirmative defense to disparate treatment, or explicit age-based classification. A BFOQ is limited to situations that are reasonably necessary to the business' operation.<sup>30</sup> The Supreme Court and the EEOC narrowly define BFOQ.<sup>31</sup> An employer will only be allowed to limit a particular job to someone under thirty-nine if, for example, the functions of the job are age-linked or people over a certain age cannot do the work without endangering the safety of others.<sup>32</sup> There are few jobs that meet these stringent criteria.

The second exception is the affirmative defense to disparate impact: reasonable factors other than age ("RFOA").<sup>33</sup> A disparate impact is not illegal

23. GREGORY, *supra* note 8, at 17; DEP'T. OF LABOR, *supra* note 14, at 16–17.

24. GREGORY, *supra* note 8, at 17; DEP'T. OF LABOR, *supra* note 14, at 97–104.

25. Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2006).

26. 29 U.S.C. § 621(b) (2006). Today older workers face the negative stereotypes of inadaptability, incompetence with technology, and inability to learn new technology. Barbara L. Hassell et al., *An Examination of Beliefs about Older Workers: Do Stereotypes Still Exist?*, 16 J. OF ORG. BEHAV. 457, 458 (1995). However, positive stereotypes are associated with older workers: loyalty and experience. *Id.* at 459.

27. 29 U.S.C. § 623(a)-(c) (2006).

28. *Id.* at § 631(a).

29. *Id.* at § 623(f).

30. *Id.* at § 623(f)(1).

31. *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985); *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977); *Tullis v. Lear Sch., Inc.*, 874 F.2d 1489, 1491 (11th Cir. 1989); Open Letter from Dianna B. Johnston, Assistant Legal Counsel, Equal Employment Opportunity Comm'n (July 25, 2002), [http://www.eeoc.gov/eeoc/foia/letters/2002/adea\\_liability\\_insurance.html](http://www.eeoc.gov/eeoc/foia/letters/2002/adea_liability_insurance.html).

32. *W. Air Lines, Inc.*, 472 U.S. at 412–14.

33. 29 U.S.C. § 623(f)(1). Disparate impact differs from disparate treatment because with disparate treatment the employer explicitly uses age as the criterion for the employment decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610–12 (1993). If the employer's decision is not made because of age itself, there is no disparate treatment even if the reason is age based. *Id.* The exception is if the employer chose the reason to target older people. *Id.* However if this reason does not constitute as disparate treatment, it might still cause an illegal disparate impact. *Id.*

if a factor other than age is reasonable, which is something less than a business necessity as required by Title VII.<sup>34</sup> RFOA marks a substantial distinction from Title VII because the RFOA exception is interpreted broadly.<sup>35</sup> Further, a RFOA does not need to be the least discriminatory option available.<sup>36</sup> In order to successfully use the RFOA defense, the criterion only needs to be reasonable.<sup>37</sup>

Overall, the ADEA and Title VII are strikingly similar in purpose and in creation of negative rights.<sup>38</sup> The main difference, albeit a substantial difference, is the RFOA exception in the ADEA. Notwithstanding this difference, from the 1960s to the summer of 2009, courts, including the Supreme Court, analyzed the ADEA and Title VII similarly.<sup>39</sup> Many analyses of the ADEA heavily borrowed from the analyses of Title VII. Even as late as 2005 in *Smith v. City of Jackson*, the Supreme Court held Congress intended the ADEA to be subject to the same analysis used in Title VII because Congress used the same language in each statute and enacted each within a short time span.<sup>40</sup> The Court departed from this longstanding practice in *Gross*.

## II. CASE LAW HISTORY

After Congress passes a law, that law is not self-enforcing. Rather, the judiciary must interpret the meaning of the text and apply the law to particular factual scenarios to fully flesh out its meaning. A statute's meaning can be static or dynamic over time because of influences such as an individual judge's philosophy and/or current societal views. Professor William Murphy, in observing the Supreme Court's treatment of anti-discrimination law, notes that not since the New Deal has the Court interpreted statutes in such a hostile manner by severely restricting these laws' applicability.<sup>41</sup> Congress passed the anti-discrimination laws to provide greater protection for employees,<sup>42</sup> but the Supreme Court has largely interpreted these laws, including the ADEA, to favor employers.<sup>43</sup> Over the years, various courts have interpreted the ADEA

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34. *Smith v. City of Jackson*, 544 U.S. 228, 238 (2005).

35. *Id.* at 240; *Hazen Paper*, 507 U.S. at 610–14.

36. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 95–96 (2008).

37. *Smith*, 544 U.S. at 238–39.

38. *See* 29 U.S.C. § 623 (2006); 42 U.S.C. § 2000e-2 (2006); *Smith*, 544 U.S. at 233.

39. *Smith*, 544 U.S. at 233–43; *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2354–55 (2009) (Stevens, J., dissenting).

40. *Smith*, 544 U.S. at 233; 29 U.S.C. § 623; 42 U.S.C. § 2000e-2.

41. William P. Murphy, *Meandering Musings about Discrimination Law*, 10 LAB. LAW. 649, 654 (1994) (noting in the 1989 session, the Supreme Court found for the employer in 13 of the 14 employment law cases).

42. 29 U.S.C. § 621(b) (2006); *see* 42 U.S.C. § 2000e-2.

43. Murphy, *supra* note 41, at 654.

to include the disparate impact theory as well as the disparate treatment theory and its mixed motives variation.<sup>44</sup> Of the three, the latter two, disparate treatment and mixed motives, will be the focus of this Comment.

Under disparate impact, an employer is liable for its actions if they are discriminatory in operation, whether or not they have a discriminatory purpose or appear facially neutral in the abstract.<sup>45</sup> An employer, under Title VII, may avoid liability by showing the practice is a business necessity.<sup>46</sup> In 1989, the plaintiffs in *Wards Cove Packing v. Atonio* presented statistical evidence in order to satisfy their burden of persuasion.<sup>47</sup> The Supreme Court held the plaintiffs could not establish causation and therefore carry their burden by merely showing statistical deviations.<sup>48</sup> A plaintiff must identify the specific employment practice that is the source of the statistical disparity in order to establish a prima facie case of disparate impact.<sup>49</sup> Then, the defendant bears the burden to demonstrate the requirement is a business necessity.<sup>50</sup> If the defendant meets the burden, the plaintiff may still prevail if he or she shows other less discriminatory methods were available to reach the employer's desired goal(s).<sup>51</sup>

The Supreme Court recognized the disparate impact theory under the ADEA in *Smith v. City of Jackson*.<sup>52</sup> The Court held *Wards Cove*, a case Congress statutorily overrode,<sup>53</sup> controls the ADEA disparate impact theory.<sup>54</sup>

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44. *Smith*, 544 U.S. at 232 (using the disparate impact theory under the ADEA); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (using the disparate treatment theory under the ADEA); *Rachid v. Jack in the Box Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (using the mixed motive theory under the ADEA).

45. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971).

46. *Id.* A business necessity is a practice that “accurately—but not perfectly—ascertains an applicant’s ability to perform successfully the job in question.” *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007).

47. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071.

48. *Wards Cove*, 490 U.S. at 657.

49. *See id.* at 650–52.

50. *Id.* at 658.

51. *Id.* at 660.

52. 544 U.S. 228, 240 (2005).

53.

The Civil Rights Act of 1991 rejects many, but not all, of the principles that the majority had adopted in *Wards Cove*. Section 105(a) retains the requirement of *Wards Cove* that a complainant isolate particular practices causing disparate impact. It allows the parties, however, to view the entire decision-making process as one employment practice if the complaining party shows that one cannot separate the elements of an employer’s decisionmaking [sic] process analytically. The Act is broad enough to cover the situation where interaction of two or more components in hiring or promotion causes the adverse impact.

Differences exist between disparate impact under Title VII and the ADEA. Unlike Title VII's narrowly-construed business necessity defense, the ADEA's RFOA defense is broadly construed.<sup>55</sup>

Disparate treatment cases, by far the more prototypical case, focus on intentional discrimination.<sup>56</sup> A plaintiff must show three elements to succeed: 1) discriminatory intent, 2) differential treatment "because of" a protected status, and 3) a link between the discriminatory intent and the differential treatment.<sup>57</sup> In a motion for summary judgment, the *McDonnell Douglas/Burdine* test can be used to establish a prima facie case.<sup>58</sup> This test largely serves a procedural function: once the plaintiff shows a prima facie case of discrimination, a presumption of discrimination is raised.<sup>59</sup> Then, the employer must "articulate some legitimate, non-discriminatory reason" for the different treatment.<sup>60</sup> If the employer does this, the presumption of discrimination disappears and becomes only a permissible inference.<sup>61</sup> At this

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Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 933–34 (1993).

54. *Smith*, 544 U.S. at 240.

55. *Id.* A RFOA, unlike a business necessity, only needs to be reasonable and not necessary. *Id.* at 253. Reasonableness does not require relevance; however, if the explanation is unreasonable, there is an inference of pretext for intentional discrimination. *Id.*

56. Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 2 (7th ed. 2008).

57. ZIMMER ET AL., *supra* note 56, at 2, 6, 86 ("[T]he Court [in *Reeves v. Sanderson Plumbing*] instructed the lower courts to take a more holistic review of the record evidence and reminded them to draw all inferences in favor of the party opposing summary judgment . . . . The Court accepted any evidence indicating discrimination as relevant and probative of the ultimate question of discrimination and made clear that cases were not confined to any particular theory or claim of discrimination"); *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 143 (2000) (holding the plaintiff's ultimate burden is to persuade the trier of fact that the adverse employment action happened because of his or her protected status).

58. *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981).

59. *Id.* at 254; *Reeves*, 530 U.S. at 142–43; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The prima facie test is flexible and bends itself to the factual circumstances. *Webb v. Level 3 Commc'ns, LLC*, 167 F. App'x. 725, 728 (10th Cir. 2006) (noting the fourth prong of the *McDonnell Douglas/Burdine* test is modified in a Reduction in Force situation because the employee is not always replaced); *Berquist v. Wash. Mut. Bank*, 500 F.3d 344, 349–51 (5th Cir. 2007) (noting the fourth prong consists of showing the plaintiff "was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of his age."); *Bellaver v. Quanex Corp.*, 200 F.3d 485, 494 (7th Cir. 2000) ("Recognizing that these burdens should not be applied rigidly, we have adapted them in special cases to reflect more fairly and accurately the underlying reality of the workplace.").

60. *McDonnell Douglas*, 411 U.S. at 802.

61. *Id.* at 807; *Burdine*, 450 U.S. at 255 n.10.



point, the plaintiff can only prevail by showing the employer's proffered reason is a pretext for discrimination.<sup>62</sup>

The Supreme Court in *Hazen Paper v. Biggins* incorporated the disparate treatment theory in the ADEA. An employer is liable if the adverse employment action is motivated by age itself.<sup>63</sup> But, if a decision is motivated by something that is not literally age, even though it is closely correlated with age, the employer is not liable.<sup>64</sup> A decision to terminate an employee because his pension is vesting is a decision based on a factor closely correlated with age.<sup>65</sup> Such a decision is not rooted in the behavior the ADEA seeks to discourage.<sup>66</sup> Thus, the Court concluded it is permissible under the ADEA to base employment decisions on pension plans vesting, even though these employees are likely to be within the protected class.<sup>67</sup>

The Supreme Court in *Price Waterhouse v. Hopkins* realized that forcing the plaintiff to prove the discriminatory intent to be more than half of the decision's motivation proved untenable and defeated the purpose of Title VII.<sup>68</sup> Decisions, such as employment decisions, result from a variety of motivations.<sup>69</sup> Therefore, the plurality established the mixed motive theory

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62. *McDonnell Douglas*, 411 U.S. at 807; *Burdine*, 450 U.S. at 255–56. A plaintiff shows pretext by demonstrating the reason offered by the defendant in court is not the reason for the defendant's actions. *Reeves*, 530 U.S. at 143.

63. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993).

64. *Id.*

65. *Id.*

66. *Id.* at 610–11.

67. *Id.* at 612–13. Though no liability was found under the ADEA, Employee Retirement Income Security Act bars Hazen Paper's action that prevented the vesting of the pension plan. 29 U.S.C. § 1001 (2006).

Employment discrimination cases are fact intensive. In *Hazen Paper*, the Court focuses on the pension plan vesting in only ten years. 507 U.S. at 611. Because the vesting period is only ten years, employees under forty could have pensions vesting. *Id.* Arguably if the pension vested after twenty-five years of service, the *Hazen Paper* decision may have been different because if an employee started at age 18, (s)he would be 43 when the pension vested.

The Court has used similar reasoning in Title VII sex discrimination claims. In *General Elec. Co. v. Gilbert*, the Court held the exclusion of pregnancy from an employer's short-term disability plan was not discrimination based on sex. 429 U.S. 125, 145–46 (1976). Pregnancy, though closely correlated to sex, is analytically distinct from sex. The plan created the groups non-pregnant persons and pregnant women. *Id.* at 135. Non-pregnant persons (women and men) were covered. *Id.* Further, this disability program was not based on a sex animus or with a purpose to discriminate against women. *Id.* at 136, 138. In response to *Gilbert*, Congress passed the Pregnancy Discrimination Act, which stated "because of" sex includes decisions made on the basis of pregnancy. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (2006)).

68. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–41 (1989) (plurality opinion).

69. *Id.* Consider this hiring hypothetical: A school district superintendent will be the deciding vote in the hiring of a new principal. WAYNE K. HOY & C. JOHN TARTER, ADMINISTRATORS SOLVING PROBLEMS OF PRACTICE: DECISION-MAKING CONCEPTS, CASES,

under disparate treatment, although not without first causing confusion over what the controlling opinion was and then what it meant.<sup>70</sup> The plurality did agree liability attached when a plaintiff showed an employer was motivated even in part by the employee's protected status.<sup>71</sup> The employer, then, may avoid liability if the employer can show, usually with objective evidence, by a preponderance of the evidence the same decision would have been made absent the protected status.<sup>72</sup>

The plurality's definition of "because of" stems from the statute's text and structure. First, the plurality used a textual approach and simply considered a common understanding of the language. "Because of" was not colloquial shorthand for "but for" or sole causation; this interpretation misunderstood the text and context of Title VII.<sup>73</sup> "Because of" meant the protected status *motivated* the decision.<sup>74</sup> For the plurality, the purpose of the act was violated if the employer relied on the protected status at all in forming its decision.<sup>75</sup>

The textual argument is then supported by a structural one. Congress acknowledged protected statuses could be considered in the BFOQ affirmative defense.<sup>76</sup> No other provision of Title VII indicates it is proper to consider the protected status under the disparate treatment theory.<sup>77</sup> The absence of other exceptions indicates Congress allows decision makers to consider protected statuses in conjunction with BFOQs and at no other time.<sup>78</sup>

Justice O'Connor concurred in the Court's opinion, finding an employer could be liable if part of its decision was based on a protected status, in spite of the fact she believed "because of" actually does mean "but for."<sup>79</sup> She recognized:

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AND CONSEQUENCES 113 (1995). The superintendent feels pressure from the board of education to find a new hire that will fill the shoes of the old beloved principal. *Id.* at 110. Minority parents pressure the superintendant to focus more on the minority students' needs. *Id.* at 111. These parents would like to see a minority principal. *Id.* The school board wants the new principal to be highly educated with impeccable credentials. *Id.* The school's current vice president expects to be appointed principal. *Id.* at 112. In this simple scenario, the superintendant only feels pressure from five sources. By the time the superintendant has made a recommendation, she will have considered a multitude of factors.

70. *Price Waterhouse*, 490 U.S. at 247 n.12.

71. *Id.* at 258.

72. *Id.* After the Civil Rights Act of 1991, a Defendant may avoid damages but not liability. 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

73. *Price Waterhouse*, 490 U.S. at 240.

74. *Id.* at 240–41.

75. *Id.* at 242.

76. *Id.* (citing 42 U.S.C. § 2000e-2(e) (2006)).

77. *Id.* (citing 42 U.S.C. § 2000e-2(e)).

78. *Id.*

79. *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring).

Particularity in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that *any* one fact was definitive cause of the decision makers' act may be tantamount to declaring Title VII inapplicable to such decisions.<sup>80</sup>

Because of the difficulty in demonstrating the “but for” reason for the action, the plaintiff then bears the burden to prove the protected trait was a *substantial* factor in the adverse employment decision.<sup>81</sup> The burden of proof—substantial factor—is required in part because the protected traits of race, color, religion, sex, or national origin can never be completely discounted in the professional world.<sup>82</sup> For Justice O'Connor, a high standard of proof is required because people can observe and comment on these traits benignly, while not harboring discriminatory animus.<sup>83</sup> In addition, the plaintiff must show the protected status was a substantial factor through *direct* evidence only.<sup>84</sup> A requirement of direct evidence better serves Title VII's deterrent function by identifying the situations clearly targeted by the statute.<sup>85</sup> Once the burden shifted, the employer could avoid liability by showing more likely than not it would have made the same decision absent the protected status.<sup>86</sup>

Justice White concurred that a plaintiff did not need to show the protected status was the sole cause in order to shift the burden to the defendant.<sup>87</sup> He agreed with the plurality the plaintiff met his or her burden by showing the decision was in part motivated by illegal factors.<sup>88</sup> Though, unlike the plurality, he believes an employer could satisfy its burden with objective evidence or with credible testimony.<sup>89</sup> Unlike Justice O'Connor, but like the plurality, he is silent on whether or not direct evidence is required to shift the burdens.<sup>90</sup> Similar to the plurality and Justice O'Connor, he believed the defendant could avoid liability if it could prove by a preponderance of the evidence it would have taken the same action absent the protected status.<sup>91</sup>

The Civil Rights Act of 1991 (“CRA of 1991”) attempted to codify and overrule various Supreme Court decisions from the 1980s, including *Price*

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80. *Id.* at 273.

81. *Id.* at 276.

82. *Id.* at 277.

83. *Id.*

84. *Id.* at 276.

85. *Price Waterhouse*, 490 U.S. at 276.

86. *Id.*

87. *Id.* at 259 (White, J., concurring).

88. *Id.*

89. *Id.* at 261

90. *See id.* at 258–60.

91. *Price Waterhouse*, 490 U.S. at 253; *id.* at 260 (White, J., concurring); *id.* at 276 (O'Connor, J., concurring).

*Waterhouse*.<sup>92</sup> At this time, Congress codified the mixed motive theory.<sup>93</sup> Under § 2000e-2(m), a defendant is liable for discriminatory conduct if the plaintiff can show a protected status was a *motivating factor*, even if other legal factors also motivated the decision.<sup>94</sup> Congress, when drafting § 2000e-2(m), chose the plurality and White’s “motivating” factor standard and not Justice O’Connor’s “substantial” factor.<sup>95</sup> Congress, however, rejected the *Price Waterhouse* plurality scheme that allowed a defendant to avoid liability if it could show by a preponderance of the evidence it would have acted the same absent the protected class.<sup>96</sup> While the burden shifting framework remained, § 2000e-5(g)(2)(B) no longer allowed the employer to avoid liability but, instead, limited the damages available to the plaintiff.<sup>97</sup> The ADEA text was not amended explicitly to include the mixed motive language or damages provision.<sup>98</sup>

Despite its attempt, the amendment only partially clarified the confusion of *Price Waterhouse*.<sup>99</sup> It provides that unlawful employment practices occur when illegal factors are a motivating factor in the decision.<sup>100</sup> Therefore, the amendment addresses to what degree the illegal factors can play a role in a decision before liability is attached, which is none.<sup>101</sup> Nevertheless, the

92. Civil Rights Act of 1991, *supra* note 47, at § 2.

93. 42 U.S.C. § 2000e-2(m) (2006).

94. *Id.*

95. *Price Waterhouse*, 490 U.S. at 244–45 (plurality opinion); *id.* at 259 (White, J., concurring); *id.* at 261–62, 276 (O’Connor, J., concurring).

96. *Id.* at 258 (plurality opinion); 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

97. 42 U.S.C. § 2000e-5(g)(2)(B).

(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

*Id.* at § 2000e-5(g)(2).

98. Age Discrimination in Employment Act, *supra* note 25; *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2349 (2009). Other explicit amendments, however, were made to the ADEA at this time. Age Discrimination in Employment Act, *supra* note 25; *Gross*, 129 S. Ct. at 2349.

99. *See Desert Palace v. Costa*, 539 U.S. 90, 92 (2002).

100. 42 U.S.C. § 2000e-2(m) (2006).

101. *Id.*

amendment did not address the remaining disagreement between the Justices in *Price Waterhouse* about what type of evidence was needed to shift the burden to the defendant.<sup>102</sup> In applying the amendment to mixed motive cases, many courts found Justice O'Connor's concurrence controlled and required direct evidence to shift the burden to the defendant.<sup>103</sup> Other courts found circumstantial evidence to be sufficient because the CRA of 1991 was silent on a heightened evidentiary standard.<sup>104</sup>

In *Desert Palace v. Costa*, the Supreme Court found circumstantial evidence is sufficient in Title VII cases to obtain a mixed motive instruction and shift the burden to the defendant.<sup>105</sup> The Court based its decision solely on the statute and not on the pre-amendment *Price Waterhouse* decision.<sup>106</sup> Title VII's statutory language does not include a heightened evidentiary standard, so the Court found there is no heightened evidentiary standard.<sup>107</sup>

After *Price Waterhouse* and the CRA of 1991, courts applied the mixed motive theory in ADEA claims.<sup>108</sup> Courts assumed mixed motive existed under the ADEA because the ADEA uses the same "because of" language that was held in *Price Waterhouse* to encompass mixed motives, although the ADEA text was not amended to include the explicit mixed motive language.<sup>109</sup>

Because the ADEA did not contain the mixed motives language, a circuit split developed over whether direct or circumstantial evidence was sufficient to

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102. *Desert Palace*, 539 U.S. at 93–95.

103. *Id.* at 95. Many Courts treated O'Connor's concurrence as *Price Waterhouse*'s controlling opinion based on the *Marks* doctrine, which states that when there is a plurality, the controlling opinion is the one based on the narrowest grounds. *Gross*, 129 S. Ct. at 2357 (Steven, J., dissenting).

104. *Desert Palace*, 539 U.S. at 97.

105. *Id.* at 98–99.

106. *Id.* at 99. In her *Desert Palace* concurrence, Justice O'Connor highlighted the importance of the 1991 amendments by specifically noting circumstantial evidence is allowed only because of the 1991 amendments; otherwise, only direct evidence would suffice. *Id.* at 102 (O'Connor, J., concurring). Scholars and academics disagree over *Desert Palace*'s effect on the *McDonnell Douglas/Burdine* test. For the argument that *Desert Palace* replaced the *McDonnell Douglas/Burdine* test, see William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 213–14 (2003). For the argument that *McDonnell Douglas/Burdine* is only applicable in limited settings, see Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1931–32 (2004). For the argument that *Desert Palace* had no effect on *McDonnell Douglas/Burdine*, see Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004).

107. *Desert Palace*, 539 U.S. at 98–99.

108. For example, the Second Circuit in *Donovan v. Milk Mktg.* affirmed that *Price Waterhouse*'s mixed motive theory applied to the ADEA. *Donovan v. Milk Mktg.*, 243 F.3d 584, 586 (2d Cir. 2001); *Rachid v. Jack in the Box*, 376 F.3d 305, 312 (5th Cir. 2004).

109. Age Discrimination in Employment Act, *supra* note 25; *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2349 (2009).

shift the burden to the defendant for a mixed motive claim.<sup>110</sup> The *Desert Palace* decision was based on statutory text not found in the ADEA.<sup>111</sup> Yet, in *Rachid v. Jack in the Box* the Fifth Circuit held the mixed motive theory—post *Desert Palace*—did not require direct evidence under the ADEA.<sup>112</sup> The theory is a merging of the pre-amendment theories from *McDonnell Douglas/Burdine* and *Price Waterhouse*.<sup>113</sup> In justifying its holding, the Fifth Circuit noted the ADEA and Title VII are both similarly silent as to a heightened evidentiary standard and the two statute's texts are analyzed almost identically.<sup>114</sup>

*Gross v. FBL Financial Services* opposed *Rachid*. The Eighth Circuit, relying on O'Connor's *Price Waterhouse* concurrence, held a plaintiff must present direct evidence in order to receive a mixed motive instruction.<sup>115</sup> Direct evidence, for the Eighth Circuit, properly showed the causal link between the decision and discriminatory animus.<sup>116</sup>

The plaintiff, Gross, petitioned for certiorari on the availability of a mixed motive jury instruction with only circumstantial evidence.<sup>117</sup> However, the Supreme Court ruled on a threshold issue: the mixed motive theory's availability under the ADEA.<sup>118</sup> Peculiarly, the origin of the Supreme Court's decision is not found in the petition for certiorari, only in the respondent's brief.<sup>119</sup> The defense counsel's statement at oral argument adeptly summarizes the respondent and the Court's reasoning. He urged:

I would hope that the Court would seize upon this as an opportunity to provide some significant clarity in the law, rather than seize this as an opportunity to decide this case on the potentially most narrow ground, which . . . will not do anything to resolve the mass confusion that seems to exist among the lower courts.<sup>120</sup>

The Court seized the opportunity to end the confusion by completely removing its perceived source—the mixed motive theory.<sup>121</sup> Now, the mixed motive theory is not available under the ADEA.<sup>122</sup>

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110. *Gross*, 129 S. Ct. at 2348; *Rachid*, 376 F.3d at 311.

111. *Desert Palace*, 539 U.S. at 99.

112. *Rachid*, 376 F.3d at 311–12.

113. *Id.*

114. *Id.* at 311.

115. *Gross*, 129 S. Ct. at 2348.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 2348 n.1; Brief for Respondent at 1, *Gross*, 129 S. Ct. 2343 (No. 08-441).

120. Transcript of Oral Argument at 29:20–21, *Gross*, 129 S. Ct. 2343 (No. 08-441).

121. *Gross*, 129 S. Ct. at 2348.

122. *Id.*

The Court squarely based its decision in the CRA of 1991's mixed motive amendment to Title VII and the lack of amendment to the ADEA.<sup>123</sup> Because the CRA of 1991 did not amend the ADEA to include the mixed motive theory in 1991, *Desert Palace's* mixed motive theory is inapplicable to the ADEA.<sup>124</sup> For the majority, Congress's silence regarding the ADEA and mixed motive signaled Congress did not intend the amendment of Title VII to reach the ADEA.<sup>125</sup>

Now, after passage of the CRA of 1991, the Court has ruled Title VII mixed motive case law was inapplicable to the ADEA. So in order to remove Title VII mixed motive case law from before the CRA of 1991, *i.e. Price Waterhouse*, from the analysis, the Court summarily stated it would have decided that case differently, and thus the analysis did not apply.<sup>126</sup> This Court would not and could not interpret the words "because of such individual's age" to encompass a mixed motive theory.<sup>127</sup> Even if the Court agreed with the mixed motive interpretation, it would have eliminated it because history has shown the burden-shifting framework was difficult to apply.<sup>128</sup>

In effect, the Court turned the ADEA's statutory scheme on its head. The removal of the mixed motive theory meant "because of" means "but for." For the plaintiff to recover he or she must show by a preponderance of the evidence the protected status, age, was the "but for" cause, or sole reason, for the adverse employment action.<sup>129</sup> Only having a "but for" standard significantly reduces a plaintiff's chance for a successful ADEA claim.<sup>130</sup>

With one sweep of the pen, the Supreme Court changed the relationship between Title VII and the ADEA analysis. The over forty-year history of substantially interpreting the Acts similarly is now questionable.

### III. THE ADEA & MIXED MOTIVE: HOW AND WHY

The Supreme Court made the wrong decision. Eliminating the mixed motive theory from the ADEA leaves a large segment of the population with weak protection against discrimination.<sup>131</sup> The Court, as it suggested, did not need to remove this theory.<sup>132</sup> The mixed motive theory is not inconsistent with the ADEA. The theory can be incorporated in the ADEA because it is

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123. *Id.* at 2349.

124. *Id.*

125. *Id.*

126. *Id.* at 2351–52.

127. 29 U.S.C. § 623(a)–(c) (2006); *see generally Gross*, 129 S. Ct. at 2351–52.

128. *Gross*, 129 S. Ct. at 2352.

129. *Id.*

130. *Id.*

131. JERRY W. HEDGE ET AL., *THE AGING WORKFORCE: REALITIES, MYTHS AND IMPLICATIONS FOR ORGANIZATIONS* 45 (2006).

132. *Gross*, 129 S. Ct. at 2350.

inherent to the statute; Congress intended the CRA of 1991 to apply to the statute; or the *Price Waterhouse* mixed motive theory controls the statute. Further, public policy strongly supports this theory. Discrimination is economically and mentally harmful.<sup>133</sup> In addition, incorporating the mixed motive theory in the ADEA includes a theory more compatible with human decision-making.<sup>134</sup> A theory such as this will likely find an employer is liable for its discriminatory actions more often. As a result, the ADEA will have a larger deterrent effect. Employers will be encouraged to be aware of possible discriminatory actions and employ people based on individual ability and not stereotypes.

A. *The ADEA and Mixed Motives: How to Find Mixed Motives*

Mixed motive causation exists in the ADEA. The following section analyzes how the mixed motive theory exists from three distinct analytical standpoints, beginning with the most desirable interpretation: 1) the mixed motives theory is inherent because of the statute's language and purpose; 2) the CRA of 1991 and its mixed motive amendment applies to the ADEA; and 3) the mixed motive test articulated in *Price Waterhouse* controls.

1. Best Analysis: Mixed Motive Theory is Inherent in the ADEA's Text and Purpose

Neither the CRA of 1991 nor prior case law are needed to find the mixed motive theory exists in the ADEA framework. The current language and purpose of the ADEA on its own supports a finding of the theory.

The ADEA and Title VII have similar origins and were prompted by similar concerns: to prevent discrimination against employees because discrimination denies them full participation in the workforce.<sup>135</sup> Taking these factors into account and the ADEA's text, a mixed motive theory can be found under the ADEA just as the *Price Waterhouse* Court found the mixed motives theory under Title VII. The *Gross* and *Price Waterhouse* Courts interpreted identical language in their respective statutes, save the enumeration of the protected status.<sup>136</sup> If the interpretation can be found by analyzing one statute, it can be found when interpreting identical language in another statute.

The ADEA was enacted to prevent discrimination in employment.<sup>137</sup> As Professor Blumrosen suggests, when interpreting a statute of this nature, the Court needs to understand the big picture and consider what Congress tried to

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133. See *infra* Part IV.B.2.

134. See *infra* Part IV.B.1.

135. See 42 U.S.C. § 2000e-2 (2006); 29 U.S.C. § 621 (2006).

136. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality opinion); *Gross*, 129 S. Ct. at 2351–52.

137. 29 U.S.C. § 621.



achieve with the statutory text.<sup>138</sup> In other words, let the reason for enacting the statute give context to the text. The ADEA states: “It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”<sup>139</sup> The key language is “because of.” Here, Congress established the ADEA to encourage employment decisions based on the individual’s abilities.<sup>140</sup> Discrimination is economically and mentally harmful whenever it exists, whether or not it co-exists with legal factors.<sup>141</sup>

Consequently, a finding of “but for” causation in the statute is inconsistent with its purpose. The definition of solely “but for” does not necessarily or naturally follow from the ADEA’s text, as Justice Thomas suggested.<sup>142</sup> After

138. Alfred W. Blumrosen, *The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. ON LEGIS. 99, 104–07, 117–20 (1983). Professor Blumrosen in reviewing Title VII found Title VII employed a novel concept of seeking to address needs of a select group in society. *Id.* at 104. Due to the novelty of the concept, Congress had a difficult time articulating the goals of the legislation with the current lexicon. *Id.* Therefore, by gaining an understanding of the Act’s overall purpose, legislative history, and limitation of the words used and their current and prior definitions, the statute can be properly interpreted. *Id.* at 104–07, 117–20.

139. 29 U.S.C. § 623(a)(1) (2006).

140. *Id.* at § 62; *W. Air Lines v. Criswell*, 472 U.S. 400, 422 (1985).

141. 29 U.S.C. § 621(a)(4) (2006).

142. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2350 (2009). For example, post-structuralism of the postmodern school of thought believes there is no one single definition to any word and that a word’s definition varies on its context. Peter C. Schanck, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2521 (1992).

In the structuralist view, language and its structures predate the individual and themselves create meaning, rather than meaning being created by individual consciousness or simply being out there in nature for people to identify. Meaning is not an objective, fixed “thing” that language reflects, but is something produced by language. Language, moreover, is a collective or shared system of signification, consisting of culturally and historically constituted codes transmitted to people through linguistic structures.

*Id.* Legal scholars routinely use elements of postmodernism to interpret the law and statutes; examples include legal realism, critical legal studies, feminist jurisprudence, critical race theory, pragmatism, and civic republicanism. *Id.* at 2575–76. Judge Learned Hand espoused similar beliefs:

All [legislators] have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave indisposed of what there is every reason to suppose they meant to provide for. Thus, it is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was intended; which would contradict or leave unfulfilled its plain purpose.

Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1114–15 (1993) (quoting Learned Hand, *How Far is a Judge Free in Rendering a Decision?*, in *THE SPIRIT OF LIBERTY* 103, 106 (Irving Dillard ed., 1952)).

all, the *Price Waterhouse* Court found an entirely different yet plausible definition of “because of.”<sup>143</sup> In his *Gross* dissent, Stevens adeptly noted that Webster’s Dictionary does not modify its “because of” definition, which is “by reason of” or “on account of,” with the words *solely* or *exclusively*.<sup>144</sup> The text “because of” only requires a causal link between the ageism and the adverse employment action. The ADEA’s purpose is to ensure the decision maker did not act with any age stereotypes.

The ADEA, just like Title VII, wants to eliminate discrimination, so the causation standard needs to provide incentives for decision makers to not harbor such animus, or at the very least try to not allow the animus to influence the decision.<sup>145</sup> A high causation threshold standard creates little incentive to rid oneself of animus because there is a diminished chance of liability. Therefore, a motivating factor causation standard encourages decision makers to rid themselves of discriminatory intent because no amount of this intent is allowed to factor into the employment decision. A finding of liability when ageism is a motivating factor is consistent with the legislative intent.<sup>146</sup> As a result, “because of” means a motivating factor.

The ADEA’s structure further supports the motivating factor causation standard. The statute indicates lawful employment decisions can be based on age when the decision is based on a BFOQ reasonably necessary to the business.<sup>147</sup> The BFOQ section clearly indicates Congress contemplated situations when age can be a factor in the employment decision.<sup>148</sup> Since Congress indicated one instance and no other instances when employment decisions can consider age, a motivating factor causation standard is appropriate.

In keeping with the theme of a lower threshold, a mixed motive causation standard will be satisfied with the presentation of direct or circumstantial evidence. In *Desert Palace*, the Court held absent an explicit heightened evidentiary standard, the presumed standard is the preponderance of the evidence, shown with direct or circumstantial evidence.<sup>149</sup> Similar to Title VII’s text, the ADEA is devoid of a heightened evidentiary standard.<sup>150</sup> Without an explicit instruction, the law will favor neither circumstantial nor

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143. See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

144. *Gross*, 129 S. Ct. at 2354 n.4 (Stevens, J., dissenting).

145. See 42 U.S.C. § 2000e-2 (2006); 29 U.S.C. § 621 (2006).

146. 29 U.S.C. § 621.

147. *Id.* at § 623(f).

148. See *Price Waterhouse*, 490 U.S. at 242.

149. *Desert Palace v. Costa*, 539 U.S. 68, 99–100 (2003).

150. *Rachid v. Jack in the Box Inc.*, 376 F.3d 305, 311 (5th Cir. 2004); 29 U.S.C. § 623(a)(1) (2006) (“It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”).

direct evidence.<sup>151</sup> The subtle distinction between direct and circumstantial evidence causes categorization to be inconsistent.<sup>152</sup> Inconsistencies in categorization are problematic if one category allows a case to proceed and the other ends the matter. Further, the use of circumstantial evidence can be more influential than direct evidence to prove a fact.<sup>153</sup> Finally, in other ADEA contexts, the Court has rejected impositions of other special evidentiary standards.<sup>154</sup> As a result, burdens under the ADEA can be met with circumstantial evidence.<sup>155</sup>

The ADEA can be reasonably and should be interpreted to have a mixed motive causation standard, satisfied with either direct or circumstantial evidence.

## 2. Better Analysis: Congress Intended Civil Rights Act of 1991 to Apply to ADEA Claims

The mixed motive theory is available to the ADEA because of the CRA of 1991. Interpreting the ADEA and the general scheme of anti-discrimination statutes requires an understanding of Congress's intent: what are the Act's purposes and its intended extent.<sup>156</sup>

However, Justice Thomas, the author of the *Gross* majority opinion, candidly embraces textualism.<sup>157</sup> In *Harbison v. Bell*, Thomas, in his concurrence, flatly states it is not the Court's task to interpret statutes "in a way that it believes consistent with the policy outcome intended by Congress. . . . Rather, the Court must adopt the interpretation of the statute that is most

151. *Desert Palace*, 539 U.S. at 99–100.

152. *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 59 (1st Cir. 2000); Jennifer R. Gowens, *Plaintiffs' Direct Evidence Burden in Mixed-Motive Disparate Treatment Cases*, 54 CASE W. RES. L. REV. 149, 170–78 (2003).

153. *Rogers v. Mo. Pac. R. Co.*, 352 U.S. 500, 508 n.17 (1957).

154. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2358 (2009) (Stevens, J., dissenting).

155. 29 U.S.C. § 623(f)(1) (2006).

156. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1975) (Brennan, J., dissenting) (stating Title VII should be interpreted in the context of its social purpose); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *United States v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

157. Textualism can be understood as a rule-based approach to statutory interpretation. Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 398 (2005). Textualists gravitate to interpretations that are based on the text of the statute, if the language is otherwise unambiguous. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 439–40 (2005).

faithful to its text.”<sup>158</sup> Thomas adheres to this philosophy even if his or “the proper” interpretation of the statute results in “very bad policy.”<sup>159</sup>

Blind adherence to statutory text is an ill-guided way to interpret statutes. It leads to interpretations which harm society, fail to reach Congressional legislative goals, and misunderstand the legislative process and human nature.<sup>160</sup> A belief that statutory text tells it all involves false assumptions that Congress members fully understood the goals they were trying to reach, that Congress used the perfect language to convey these goals, and that the text’s words have a crystallized, universal definition.<sup>161</sup> To make this interpretation tool more palatable some courts justify their exclusive focus on the text through the Congressional acquiescence theory. This theory is based on the notion Congress is aware of all the Court’s statutory interpretations.<sup>162</sup> So, Congress must approve of the interpretation if it does not amend a statute to override an interpretation.<sup>163</sup>

The Congressional acquiescence theory fails to consider several factors. Legislation to overrule a statute is expensive and time consuming.<sup>164</sup> Merely because Congress amends a similar statute, it does not necessarily follow Congress was able to, and chose not to, amend the other statute.<sup>165</sup> Even if the statutes are similar, it is not necessarily easy to garner support or financially feasible to amend both statutes.<sup>166</sup> So, the failure to amend does not automatically signify Congress means for the case law to develop divergent paths.<sup>167</sup>

A second issue with the Congressional acquiescence theory is interpretational ambiguity. A Congress member may choose to refrain from action for reasons other than approval of the Court’s statutory interpretation.

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158. *Harbison v. Bell*, 129 S. Ct. 1481, 1493–94 (2009).

159. *Id.*

160. See generally Deborah A. Widiss, *Shadow Precedent and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009).

161. Blumrosen, *supra* note 138, at 111.

162. Jamie Darin Prekert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217, 236–37 (2007).

163. *Id.* at 237; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488–89 (1940) (“The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute to labor unions has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.”).

164. Prekert, *supra* note 162, at 250.

165. See *id.*

166. See *id.*

167. See *id.*

For example, the CRA of 1991's legislative history included a rule of construction for how the anti-discrimination statutes should be interpreted.<sup>168</sup> This amendment was rejected not necessarily for its content but for fear of its affect. Then President George H.W. Bush believed the provision would spur needless litigation over how to construe the statute.<sup>169</sup> Courts should not place significance on the failure to act but instead consider whether the proposed interpretation defeats the law's purpose.<sup>170</sup>

Consequently, Congressional overrides need to be guideposts for future court interpretation.<sup>171</sup> In the background, a court should consider that Congress cannot technically overrule case law, but only make the statutory text inconsistent with the interpretation Congress seeks to overrule.<sup>172</sup> According to Professor Farber, "enacting legislators would prefer courts give strong weight to stare decisis in statutory cases, even at the expense of fidelity to the original legislative deal."<sup>173</sup> In this situation, the interpretative relationship between Title VII and the ADEA should be preserved.

The *Gross* majority reasoned the lack of amendment to the ADEA was significant.<sup>174</sup> However, nineteen years had passed since the CRA of 1991, and throughout this time, courts applied the mixed motive theory to the ADEA.<sup>175</sup> Even FBL Financial's counsel did not consider the possibility of removing the mixed motive theory until after the petition for certiorari.<sup>176</sup> The parties and courts assumed the ADEA included a mixed motive theory. Parties fought over the required evidentiary standard necessary to receive the mixed

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168.

SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS. . . . "(c) INTERPRETATION.—In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of . . . age, . . . courts and administrative agencies shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.

Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1161–62 (1993) (quoting S. 2104, 101st Cong. § 11 (1990), set forth in H.R. REP. NO. 101-755, at 7 (1990) (Conf. Rep.)).

169. Presidential Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1634 (Oct. 22, 1990).

170. See Schnapper, *supra* note 142, at 1140.

171. See Prenkert, *supra* note 162, at 263; Schnapper, *supra* note 142, at 1099.

172. Widiss, *supra* note 160, at 514.

173. Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 12–13 (1988).

174. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2349 (2009).

175. See *Rachid v. Jack in the Box*, 376 F.3d 305, 310–11 (5th Cir. 2004); *Salter v. Alltel Commc'ns*, 407 F. Supp. 2d 730, 734 (E.D.N.C. 2005); *Machinchick v. PB Power*, 398 F.3d 345, 355 (5th Cir. 2005); *Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004).

176. *Gross*, 129 S. Ct. at 2348.

motive instruction.<sup>177</sup> The same logic the *Gross* majority uses to reach its conclusion can be used to reach the opposite: Congress approved the use of a mixed motive analysis. If Congress disapproved of a mixed motive theory in the ADEA, it would have amended the statute clearly to exclude the theory.

Courts need to keep a bird's eye view of the state of the law in order to keep statutory interpretation consistent with Congressional intent. Congress in the CRA of 1991 rejected the Court's use of the "plain meaning" statutory interpretation technique.<sup>178</sup> Since Congress rejected a number of "plain meaning" cases, this interpretation style likely does not properly interpret the statute.<sup>179</sup> Thus, the *Gross* Court should have looked to Congressional intent and determined Congress intended the CRA of 1991 to cover the ADEA.

Congress' failure to exclude the mixed motives theory in ADEA, after over 19 years of including the mixed motive theory, can be seen as Congress' approval of the theory. If Congress wanted to change the interpretation scheme of discrimination law, it would have expressly indicated its disapproval. Absent express disapproval, Congress prefers the Court interpret the statutes in accordance with its previous history.<sup>180</sup>

### 3. The Fallback Analysis: Mixed Motive and *Price Waterhouse*

At the very least, the ADEA has the mixed motive theory as set forth by *Price Waterhouse*. The retention of this mixed motive theory is not ideal because Congress did partially overrule *Price Waterhouse* in the CRA of 1991.<sup>181</sup> However, this analysis at least keeps the mixed motive theory within the ADEA and a semblance of stability within the ADEA and discrimination laws' framework. Courts should strive to keep stability in statutory interpretation and should always consider the ramifications of upsetting precedents.<sup>182</sup> When the interpretations of the law remain consistent, the law becomes predictable. Consistency helps parties avoid the possibility of liability, and it helps parties know when their rights have been violated and when to seek redress for their injuries.<sup>183</sup>

Of course, judicial interpretation of the law as applied to divergent fact patterns will create inconsistencies. However, this inconsistency happens on the micro level and can be expected with fact intensive inquiries, such as in employment discrimination law. The fundamental essence of the law remains the same. However, *Gross* creates inconsistency on the macro level because it

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177. *See id.*

178. *See Schnapper, supra* note 142, at 1101.

179. *Id.*

180. Farber, *supra* note 173, at 12–13.

181. *See* 42 U.S.C. § 2000e-2(m) (2006); 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

182. Widiss, *supra* note 160, at 560.

183. *Id.*

has removed the mixed motive theory altogether from the ADEA.<sup>184</sup> The Court should strive to avoid widespread inconsistencies and retain, at the minimum, *Price Waterhouse's* mixed motive theory under the ADEA.

In 2005, the Court in *Smith v. City of Jackson* was faced with a substantively similar question: whether there is a disparate impact cause of action under the ADEA, and if so, what governs the analysis.<sup>185</sup> The Supreme Court held the disparate impact theory, which developed in Title VII case law, was available under the ADEA.<sup>186</sup> Further, it held *Wards Cove*, a Title VII case that predated the CRA of 1991, controls the ADEA disparate impact analysis.<sup>187</sup>

To reach its holding, the Court examined the almost identical text between the two acts.<sup>188</sup> Because these texts are similar in word choice and enacted close in time, the Court interpreted the texts similarly.<sup>189</sup> The two statutes' structures are also analogous. The ADEA's affirmative defense of RFOA is analogous to Title VII's affirmative defense of business necessity.<sup>190</sup> However, the ADEA's affirmative defense is interpreted more broadly and, thus, provides more protection to employers.<sup>191</sup> As a result, the Court

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184. See *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2349, 2357 (2009) (Stevens, J., dissenting) ("Were the Court truly worried about difficulties faced by trial courts and juries, moreover, it would not reach today's decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims."); Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 554–56 (2008) (noting courts routinely apply the mixed motive theory to Americans with Disability Act claims, to Title VII retaliation claims, and to Pregnancy Discrimination Act claims in spite of the absence of explicit statutory text authorizing the mixed motive theory); *Williams v. District of Columbia*, 646 F. Supp. 2d 103, 109 (D.D.C. 2009) (finding since the Jury Systems Improvement Act's language "by reason of" is similar to the ADEA's "because of," "by reason of" also means "but for," as articulated by *Gross*); *Bolmer v. Oliveria*, 594 F.3d 134, 148 (2d Cir. 2010) (questioning whether the mixed motive theory exists under Title II after *Gross*).

185. *Smith v. City of Jackson*, 544 U.S. 228, 232, 240 (2005); *Gross*, 129 S. Ct. at 2348.

186. *Smith*, 544 U.S. at 240.

187. *Id.*

188. *Id.* at 232–33. In *Smith*, the Court analyzed this text of the ADEA: "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." *Id.* at 233 (quoting 29 U.S.C. § 623(a) (2006)). The *Wards Cove* Court had analyzed almost identical text found in Title VII: "to limit, segregate, or classify his employees in ways that would adversely affect any employee because of the employee's race, color, religion, sex, or national origin." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071; Civil Rights Act of 1964, *supra* note 14, at § 703(a)(2) (codified at 42 U.S.C. § 2000e-2(a) (2006)).

189. *Smith*, 544 U.S. at 233.

190. *Id.* at 240–41.

191. *Id.* at 240.

authorized a very narrow use of disparate impact, which heavily favors employers.

If the reasoning in *Smith v. City of Jackson* is followed with *Gross*, the unmodified *Price Waterhouse* holding should control the mixed motive theory under the ADEA. *Price Waterhouse* is to *Gross* as *Wards Cove* is to *Smith*. As determined in *Smith*, the ADEA and Title VII have similar purposes, which are achieved with substantially the same language.<sup>192</sup> Both Acts encourage basing employment decisions on an individual's ability and not on stereotypes.<sup>193</sup> In *Price Waterhouse*, the interpreted text is identical to the text interpreted in *Wards Cove*, which is still the same language interpreted in *Gross* and in *Smith*.<sup>194</sup> The ADEA and Title VII both contain the language "because of." Neither Act requires the protected employment characteristic to be the "but for," or sole cause, for the employment decision.<sup>195</sup> Therefore, just like *Price Waterhouse*, a decision can be made because of a protected status, so long as legal factors also motivate the decision.<sup>196</sup>

In addition, the statutes still have similar structures. Both contain the BFOQ defense, in which Congress explicitly contemplated when protected statuses could be considered.<sup>197</sup> Since Congress only specifically enumerated one instance, in all other instances a protected status cannot be a motivating factor in the decision.<sup>198</sup> However, an employer can avoid liability by showing with a preponderance of the evidence the same decision would have been made absent the protected status.<sup>199</sup>

The dissent was correct to have said Justice White's opinion in *Price Waterhouse* controls.<sup>200</sup> Under the *Marks* doctrine, in a plurality opinion, the narrowest opinion controls.<sup>201</sup> In *Price Waterhouse*, the plurality held the protected status only needs to be a motivating factor.<sup>202</sup> It is silent regarding whether a plaintiff must present direct evidence to receive a mixed motive analysis.<sup>203</sup> It further held an employer could prove the same decision defense

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192. *Id.* at 233.

193. 29 U.S.C. § 621(b) (2006); 42 U.S.C. § 2000e-2 (2006).

194. *Smith*, 544 U.S. at 240; *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2350 (2009).

195. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–41 (1989) (plurality opinion).

196. *Id.* at 258.

197. 42 U.S.C. § 2000e-2(e); 29 U.S.C. § 623(f) (2006).

198. *Price Waterhouse*, 490 U.S. at 242 (plurality opinion).

199. *Id.* at 258.

200. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2356–57 (2009) (Stevens, J., dissenting).

201. *Marks v. United States*, 430 U.S. 188, 193 (1977).

202. *Price Waterhouse*, 490 U.S. at 258 (plurality opinion).

203. *Id.* at 256–58.



only through objective evidence.<sup>204</sup> Importantly, the plurality held a plaintiff only needs to show the protected status motivated the decision.<sup>205</sup>

White concurred the protected status need only be a motivating factor.<sup>206</sup> He, like the plurality, is silent on a heightened evidentiary standard that requires the plaintiff to produce direct evidence to receive the mixed motive analysis.<sup>207</sup> White wrote separate from the plurality because of their articulation of the same decision defense; he finds instead that employers can succeed on the credibility of their testimony alone and need not present objective evidence.<sup>208</sup> White concludes an employer can be liable when the protected status is a motivating factor in the adverse employment action.<sup>209</sup>

O'Connor concurred that the protected status must be a substantial factor.<sup>210</sup> She, unlike the plurality and White, held a plaintiff can only receive the mixed motive analysis upon a showing of direct evidence of discrimination.<sup>211</sup> A heightened evidentiary rule, like requiring direct evidence, departs from the conventional litigation rule.<sup>212</sup> A ruling requiring a heightened standard should be explicitly agreed to and is broader than not mentioning a heightened standard. White concurred on a narrower ground than O'Connor did, so his opinion is controlling. As a result, a plaintiff can satisfy his or her burden and receive the mixed motive analysis with direct or circumstantial evidence.

In following the logic of *Smith* and the desire to create some stability in the law, at a minimum the ADEA should have the mixed motive theory articulated in *Price Waterhouse*.

#### B. *The ADEA and Mixed Motives: Why Society Needs the Mixed Motive Theory*

Public policy strongly supports finding a reasonable interpretation of the ADEA that does not thwart its purpose to “promote employment of older persons based on their ability rather than age.”<sup>213</sup> Removing the mixed motive theory severely limits the opportunity a plaintiff has to succeed on a claim. The surviving standard of causation, “but for,” as Justice O'Connor noted, is

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204. *Id.* at 252, 261.

205. *Id.* at 258.

206. *Id.* at 259 (White, J., concurring).

207. *Id.* at 238–58 (plurality opinion); *id.* at 258–59, 261 (White, J., concurring).

208. *Price Waterhouse*, 490 U.S. at 260–61 (plurality opinion).

209. *Id.* at 259 (White, J., concurring).

210. *Id.* at 276 (O'Connor, J., concurring).

211. *Id.*

212. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).

213. 29 U.S.C. § 621(b) (2006).

tantamount to making the discrimination laws inapplicable to employment decisions.<sup>214</sup>

A “but for” standard narrowly construes the ADEA and allows an employer to commit harmful discriminatory acts without fear of liability. A broader causation standard such as mixed motive is needed to deter discriminatory employment practices based on ageism. First, the “but for” standard misunderstands how humans make decisions.<sup>215</sup> Many discriminatory motivations will be unchecked because humans rarely make decisions “but for” one factor.<sup>216</sup> Second, ageism will cause unemployment or underemployment, which will cause mental and economic hardship.<sup>217</sup> Society benefits with a less tolerant attitude to ageism because value is placed on employing individuals based on ability and not on discriminatory stereotypes.<sup>218</sup> Failing to deter ageism on a wide scale basis is mentally and economically harmful.<sup>219</sup> Consequently, the ADEA needs a mixed motive theory.

1. The Mixed Motive Theory is a Better Fit to the Human Decision-Making Process

Human decision-making is a process.<sup>220</sup> Simply defined, decision-making is a choice made amongst two or more alternatives.<sup>221</sup> But, more accurately, decision-making is a multi-step process. The first step is problem recognition and value assessment.<sup>222</sup> During this stage, the decision maker must determine his or her values and goals in order to orientate the decision maker to the problem and help to define the problem itself.<sup>223</sup> A problem is defined in

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214. *Price Waterhouse*, 490 U.S. at 273 (O'Connor, J., concurring).

215. *See infra* Part IV.B.1.

216. *See id.*

217. *See infra* Part IV.B.2.

218. *See id.*

219. *See id.*

220. *See* JOHN D. MULLEN & BYRON M. ROTH, *DECISION-MAKING: ITS LOGIC AND PROCESS* 5–6 (1991). Human decision-making process is simplified because there are too many stimuli in our environment to account for everything. *See id.* at 21–23. Humans have overcome these limitations with techniques such as bias. *Id.* at 22–23. The use of these techniques is unavoidable, without them, we would have to relearn everything, which is too much to process at any given moment in time. *Id.* at 41–42. Understanding the role and inevitability of bias can help limit the degree it affects the decision. *Id.* at 41.

221. J.T. BUCHANAN, *DISCRETE AND DYNAMIC DECISION ANALYSIS* 1 (1982).

222. MULLEN & ROTH, *supra* note 220, at 2.

223. *Id.* Values may simply consider the decision maker's own good or may consider the social good. *Id.* The value set the decision maker operates from affects the decision: Should I vote for this candidate considering the effects on myself, my community, of my country? *See id.* at 2, 81–82.

consideration of the relevant acts and possible outcomes.<sup>224</sup> The second and third steps involve the creation and evaluation of alternatives.<sup>225</sup> During these stages, a decision maker considers each alternative's benefit, regret, and cost to determine how well each alternative will fulfill the goal.<sup>226</sup> The fourth step is the choice.<sup>227</sup> After the choice is made, a decision maker will test the choice against a wide range of possible circumstances to confirm the choice.<sup>228</sup>

In contrast, legal decisions strive to create finality and certainty in order to simplify and condense the decision-making process.<sup>229</sup> Legal reasoning focuses on selecting a few facts, defining them, and then classifying them into categories.<sup>230</sup> Categorization simplifies the issue and "lends an aura of logical inevitability to the legal conclusion that follows the categorization."<sup>231</sup> Legal reasoning also strives to simplify the process because legal decisions need to capture the public's trust in order to achieve justice.<sup>232</sup>

An example of the legal reasoning is "but for" causation. With this standard, courts rely on the myth that a decision can have one reason and have defined "but for" causation to mean that, for example, age was the reason for the decision and had a determinative influence on the outcome.<sup>233</sup> Thus, legal decisions appear more final and certain when the decision maker focuses the scope of the decision by reducing the chaos of multiple facts and issues.<sup>234</sup>

Legal decision makers distrust uncertain factors, such as mixed motives, because they introduce ambiguity.<sup>235</sup> In order to avoid ambiguity, legal decision makers discount that beliefs are influenced by cultural, biological, and

224. MICHAEL D. RESNIK, CHOICES: AN INTRODUCTION TO DECISION THEORY 6-7 (1987).

225. MULLEN & ROTH, *supra* note 220, at 3.

226. WM. E. SOUDER, MANAGEMENT DECISION METHODS FOR MANAGERS OF ENGINEERING AND RESEARCH 4-6 (1980).

227. *See* MULLEN & ROTH, *supra* note 220, at 4-5.

228. SOUDER, *supra* note 226, at 5-6.

229. *See* Vladimir J. Konecni & Ebbe B. Ebbesen, *The Mythology of Legal Decision Making*, 7 INT'L J.L. & PSYCHIATRY 5, 5-7 (1984). Legal reasoning by judges is projected as a complex and well thought-out processes. *Id.* at 5. Judges say they think about problems complexly, but in reality, they must simplify the issue because of human cognitive limitations. *Id.* at 5-7.

230. Phoebe C. Ellsworth, *Legal Reasoning*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 685, 698 (Keith J. Holyoak & Robert G. Morrison eds., 2005).

231. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative and Imagination in Child Custody*, 18 S. CAL. INTERDISC. L.J. 259, 264-65 (2009).

232. *See* John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 PACE L. REV. 93, 93, 106-08 (1999-2000); Ellsworth, *supra* note 230, at 697-99.

233. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2350 (2009) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

234. Konecni & Ebbesen, *supra* note 229, at 6-9.

235. Jonathan Uffelman, *Hamlet was a Law Student: A "Dramatic" Look at Emotion's Effect on Analogical Reasoning*, 96 GEO. L.J. 1725, 1773 (2008).

situational forces because the actual influence these factors have on an individual is unknown.<sup>236</sup> Not surprisingly, these decision makers are also skeptical of applying overarching theories of human decision-making and bias to a single individual.<sup>237</sup> This distrust may be because social science research results are largely inconclusive and ambiguous when compared to legal decisions. Yet, the use of probabilistic social science research data can also help achieve justice.<sup>238</sup> The ADEA targets intangible motivations of human behavior. Quantifying and qualifying human nature and motivations is not precise.<sup>239</sup> However, social science research can be especially helpful in understanding the human decision-making process and the influences on a particular decision.<sup>240</sup>

Legal decision-making is disjointed from typical decision-making because few problems in life present themselves in such an orderly fashion. Decision-making must be done under crisis, risk, certainty, stress, knowledge, ignorance, long-term deadlines, short-term deadlines, or convergence of any of these factors.<sup>241</sup> To add to the complexity, though decision makers make decisions in the moment, the decision is not isolated in time.<sup>242</sup> Instead, the decision is the product of years of stimuli.<sup>243</sup> Because of their complexity, it is too difficult to isolate any one decision in time or in logical connectivity.<sup>244</sup> One researcher analogized the decision-making process to the manufacturing of goods.<sup>245</sup> Each mini or sub-decision is the building block of the next until the

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236. Ellsworth, *supra* note 230, at 700.

237. *Id.* at 699.

238. For example, logical reasoning presumes that eliminating emotion in decision-making promotes justice. Uffelman, *supra* note 235, at 1773. However, a judge's use of emotion in such decisions may allow him or her to more fully understand the intricacies of the situation and create the necessary social change, which achieves justice. *Id.*

239. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2358–59 (Breyer, J., dissenting).

240. Ellsworth, *supra* note 230, at 699.

241. Decision-making theory is comprised of multiple theories. Though no one decision-making model can fit exactly the decision at hand to be made, different models lend themselves to different situations. HOY & TARTER, *supra* note 69, at 86–89. Professors Hoy and Tarter discuss these decision-making models: Classical, Administrative, Mixed Scanning, Incremental, Garbage Can and Political. *Id.* at 90. Whereas William Souder discusses decision-making along more traditional models: Economic, Strategies, Satisfying, and Behavioral theories. SOUDER, *supra* note 226, at 62.

242. Henry Mintzber et al., *The Structure of "Unstructured" Decision Processes*, 21 ADMIN. SCI. Q. 246, 252 (1976).

243. *Id.*

244. STAFFORD BEER, *PLATFORM FOR CHANGE* 294 (1975). Complex and innovative decision-making is not evaluated in decisive phases but in constant relationship to information gathering, development, and evaluation of alternatives throughout the process. Everhard Witte, *Field Research on Complex Decision-Making Processes—The Phase Theorem*, 72 INT'L STUD. MGMT. & ORG. 156, 180 (1972).

245. Witte, *supra* note 244, at 157.

final decision is reached. Thus, decisions and their outcomes should not be, and likely cannot be, considered simple creatures.<sup>246</sup>

Due to the complexity of the process, a decision maker has several barriers to making unbiased decisions. During the process, he or she is likely to jump to a conclusion, prematurely evaluate the criteria, over rely on experience, prematurely commit to possible conclusions, confuse the decision's problems and symptoms, or not diversify the alternatives.<sup>247</sup> Cognitive dissonance is a common way a decision maker distorts the process. Decision makers are uncomfortable when their beliefs are not supported by newly acquired knowledge, so decision makers will avoid cognitive dissonance whenever possible.<sup>248</sup>

The decision maker also distorts the process with confirmation bias, which is focusing on ways to affirm a conclusion.<sup>249</sup> The decision maker disregards or effectively explains away unsupportive information.<sup>250</sup> Decision makers will sacrifice the quality of the information or simply limit the quantity of research in order to avoid finding their conclusion is wrong.<sup>251</sup>

In addition, primacy also distorts the decision-making process. A decision maker is likely to place a disproportionate influence on information discovered early in a process, making how a problem begins indicative of how the decision maker will resolve it.<sup>252</sup> The primacy of the initial information distorts how the decision maker comprehends new information, especially inconsistent information.<sup>253</sup> For example, in hiring decisions, the initial screening interview impressions heavily influence the post-interview hiring decision.<sup>254</sup>

Finally, issue presentation and personal experience distort the decision-making process because they affect how the decision maker solves the problem. How the problem is framed or presented will affect how the decision

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246. See Kurt Ronn, *Rethinking Talent Acquisition*, BUS. WK. ONLINE, March 6, 2007, at 10.

247. SOUDER, *supra* note 226, at 24–25.

248. MULLER & ROTH, *supra* note 220, at 33.

249. Daniel C. Molden & E. Tory Higgins, *Motivated Thinking*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 230, at 296–97.

250. MULLER & ROTH, *supra* note 220, at 36; Molden & Higgins, *supra* note 249, at 296–97; Peter H. Ditto et al., *Motivated Sensitivity to Preference-Inconsistency Information*, 75 J. PERSONALITY & SOC. PSYCHOL. 53, 64 (1998) (finding that when study participants faced unfavorable feedback, the participants questioned the quality of the information; but when other participants faced favorable feedback, they accepted the feedback as true without criticizing it even though the information was also of questionable quality).

251. Molden & Higgins, *supra* note 249, at 299.

252. Samuel D. Bond et al., *Information Distortion in the Evaluation of a Single Option*, 102 ORG. BEHAV. & HUM. DECISION PROCESS 240, 240 (2007).

253. *Id.* at 250.

254. Daniel M. Cable & Tom Gilovich, *Looked Over or Overlooked?: Prescreening Decisions and Postinterview Evaluations*, 83 J. APPLIED PSYCHOL. 501, 505 (1998).

maker understands and seeks to solve it.<sup>255</sup> Generally, a decision maker will not try to look at a problem in a new light or even recognize it can be conceptualized differently.<sup>256</sup> Similarly, habits, experience, knowledge, preconceived beliefs, and preferences all affect the context in which the decision maker understands the issues.<sup>257</sup> Even how a decision maker evaluates the alternatives can be affected by the order in which he or she learned of them.<sup>258</sup> Therefore, an alternative decision will not necessarily be chosen for its strengths.

Not surprisingly, decision makers have a hard time recalling the reasons for their decisions. Our beliefs are important to us, but, even with firmly held beliefs, we quickly forget the belief's origin.<sup>259</sup> So, what a decision maker does recall is distorted. For example, prejudice unconsciously distorts decision recall. In a study, while participants displayed no overt bias in hiring minority candidates, a week later the participants could not accurately recall the candidates.<sup>260</sup> Though the candidates had identical responses, participants recalled the minority candidates answered the questions less intelligently than majority candidates did.<sup>261</sup> Decision makers may not be able to identify that they cannot accurately recall reasons for their decision.

Recall is also distorted by the decision maker's actual actions as well as his or her knowledge of what happened.<sup>262</sup> If the decision maker believes the decision is favorable, hindsight bias is greater, and the decision maker's

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255. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 457 (1981).

256. *Id.* at 457–58 (“Individuals who face a decision problem and have a definite preference (i) might have a different preference in a different framing of the same problem, (ii) are normally unaware of alternative frames and of the potential effects on the relative attractiveness of options, (iii) would wish their preferences to be independent of frame, but (iv) are often uncertain how to resolve detected inconsistencies.”).

257. SOUDER, *supra* note 226, at 16; Robyn A. LeBoeuf & Eldar B. Shafir, *Decision Making*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 230, at 244.

258. JEAN-CHARLES POMEROL & SERGIO BARBA-ROMERO, MULTICRITERION DECISION IN MANAGEMENT: PRINCIPALS AND PRACTICE 91–92 (2000).

259. MICHAEL S. GAZZANIGA, THE ETHICAL BRAIN 161 (2005).

260. Ricardo A. Frazer & Uco J. Wiersma, *Prejudice versus Discrimination in the Employment Interview: We May Hire Equally, but Our Memories Harbor Prejudice*, 54 HUM. REL. 173, 186 (2001).

261. *Id.* at 186.

262. Rik Pieters et al., *Biased Memory For Prior Decision Making: Evidence from a Longitudinal Field Study*, 99 ORG. BEHAV. & HUM. DECISION PROCESS 34, 45 (2006). For example, before Y2K, study participants predicted something big would happen and underwent preparations for such an event. *Id.* at 45. No big event was associated with Y2K. Thus, participants incorrectly remembered they knew all along nothing would happen and, therefore, did little preparation. *Id.*

memory of the decision is more supportive of it.<sup>263</sup> For example, if a decision maker receives positive feedback from discharging an employee, he or she is likely to remember, *in hindsight*, the supportive factors and fewer of the unsupportive factors. In short, decision makers overestimate the accuracy of their judgment.<sup>264</sup> Decision recall will not accurately reflect the considerations that made the decision.

The “but for” causation standard is incompatible with human decision-making. The decision-making process is a complex process, with a multitude of criteria and influences. The law is disingenuous when it requires complex decisions be boiled down to one defining factor. Also, because decision makers act in complex environments, it is unlikely a decision had a “but for” cause and the “but for” cause can be identified.<sup>265</sup> When the law asks an employer why it acted, the employer cannot accurately recall the decision’s factors. Instead, motives are ascribed after the fact when it is difficult, if not impossible, to determine the influence each factor had on the decision.<sup>266</sup> If an employer cannot accurately recall his motivation and what he or she does remember is distorted, the law should not require a sole reason. A mixed motive accounts for the shortcomings of knowing what motivated a decision and/or distortion in decision recall. Thus, a mixed motive theory is necessary for the ADEA to fulfill its purpose.<sup>267</sup>

## 2. Ageism is Harmful

As a society, we should be concerned about ageism and its discriminatory effects because a substantial portion of the population is covered by the ADEA. The Baby Boomer generation alone is over seventy million strong, all over age forty, and all covered by the ADEA.<sup>268</sup> This generation accounted for roughly half of the workforce in 2006.<sup>269</sup> Americans over 65, those more vulnerable to discrimination, belong to the fastest growing segment of the working population in the 1990s at 20%.<sup>270</sup> “Starting on Jan. 1, [2011,] our 79-million-strong baby boom generation will be turning 65 at the rate of one every eight seconds. That means more than 10,000 people per day, or more than four million per year, for the next 19 years . . . .”<sup>271</sup> In June 2008, more

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263. Therese A. Louie et al., *Tackling the Monday-Morning Quarterback: Application of Hindsight Bias in Decision-Making*, 25 SOC. COGNITION 32, 35 (2007).

264. ROBERT J. STERNBERG & TALIA BEN-ZEEV, *COMPLEX COGNITION: THE PSYCHOLOGY OF HUMAN THOUGHT* 191 (2001).

265. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2358–59 (Breyer, J., dissenting).

266. *Id.* at 2358.

267. 29 U.S.C. § 621(b) (2006).

268. HEDGE ET AL., *supra* note 131, at 37–38.

269. *Id.*

270. *Id.* at 38.

271. Sandra Day O’Connor et al., *The Age of Alzheimer’s*, N.Y. TIMES, Oct. 28, 2010, at A33.

than 2 million workers age 55 and over were unemployed and seeking work.<sup>272</sup> These unemployed workers likely faced difficulties in finding new employment.<sup>273</sup>

If age discrimination is left unchecked,<sup>274</sup> more older workers will be forced out of the workforce entirely or into lower skilled jobs. Forced retirement or underemployment is harmful because many people derive satisfaction and identity from their jobs.<sup>275</sup> Social roles such as worker, parent, or spouse form the basis of self-identity, so performance and assessment in one of these roles correlates to how a person perceives his or her self-worth.<sup>276</sup> A worker may have negative self-worth if he or she is un- or underemployed. Job loss adversely affects personal relationships, physical health, and mental health.<sup>277</sup> Forced un- or underemployment has negative repercussions on self-identity and mental health.

Older workers also need to remain in the work place to remain fiscally healthy. Growth of employer-based pension plans has stagnated with only roughly half of all private-sector workers covered by pension plans.<sup>278</sup> Retirees must rely on savings, investments, and government assistance to replace pension plan funds.<sup>279</sup> Health care costs are also rising. Retirees are now responsible for bearing a larger burden of higher health care costs, which

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272. Liz Wolgemuth, *When Age Bias Hinders the Job Hunt*, U.S. NEWS & WORLD REP., Sep. 30, 2009, at 72.

273.

The Labor Department studied re-employment rates in January 2004 for workers who had been let go between January 2001 and December 2003 from jobs they had held at least three years. The data show that most workers ages 20 to 54 had landed new jobs (rates in that group varied from 65 to 69 percent). In contrast, just 56 percent of workers ages 55 to 64 and a slim 24 percent of those 65 and older had found re-employment. Many older, displaced workers had dropped out of the workforce by the time they were surveyed.

*Id.*

274. Some scholars argue the market itself will correct work place ageism as the pool of potential younger workers decreases. Sara E. Rix, *The Aging of the American Workforce*, 81 CHI.-KENT L. REV. 593, 610 (2006). Falling fertility rates and a leveling of women joining the work force have already caused the older worker segment to compromise a larger segment of the labor pool. U.S. GOV'T ACCOUNTABILITY OFFICE, *OLDER WORKERS: LABOR CAN HELP EMPLOYERS AND EMPLOYEES PLAN BETTER FOR THE FUTURE* 6 (2005), available at <http://www.gao.gov/new.items/d0680.pdf>. In addition, employers will be compelled to retain older workers, who have experience and institutional knowledge, in order transfer the knowledge and skills to younger workers. *Id.* at 14.

275. HEDGE ET AL., *supra* note 131, at 165.

276. Michael R. Frone & Marcia Russell, *Job Stressors, Job Involvement and Employee Health: A Test of Identity Theory*, 68 J. OF OCCUPATIONAL & ORG. PSYCHOL. 1, 12 (1998).

277. RICHARD H. PRICE ET AL., *Job Loss: Hard Times and Eroded Identity*, in PERSPECTIVES ON LOSS: A SOURCEBOOK 308-09 (J.H. Harvey ed., 1998).

278. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 274, at 10.

279. *Id.*



result from increasing costs, decreasing treatment coverage, and plan eligibility restrictions.<sup>280</sup> A retiree must handle these increased financial responsibilities even after the economy has taken a toll on their personal savings. From September 2007 to 2008, retirement accounts lost roughly eighteen percent of their value.<sup>281</sup> As a result of market conditions' effect on retirement savings in 2000, twenty percent of potential retirees pushed back retirement in order to build up their retirement savings.<sup>282</sup> So, given the current state of economic welfare, the longer an individual is employed, the less likely he or she will outlive his or her savings.<sup>283</sup> Older workers need the law to protect them and keep them employable in order to cope with all of their financial responsibilities. Accordingly, the ADEA must take steps, such as including the mixed motive theory, to better protect older workers.

Finally, as a society, it is to our advantage to keep older workers employed because it keeps our economy healthy. If older workers remain employed, they can remain self-sufficient instead of relying on public welfare programs.<sup>284</sup> Large numbers of citizens using public welfare programs puts a huge fiscal strain on public financing.<sup>285</sup> In addition, older people are productive, talented workers.<sup>286</sup> Removing them from the workforce reduces the talent pool. By removing older workers from the workforce, the economy is squeezed in two ways: by increasing public funding to welfare programs and by losing out on a talented labor force.

#### CONCLUSION

Age discrimination is harmful. Older workers who are discriminated against suffer mental and financial hardships.<sup>287</sup> The effects can be devastating. Thus, the law needs to afford proper protection.

In order to do this, the ADEA needs the mixed motive theory. Recall from the introduction, Gregory, who produced evidence his employer thought he was too old to work, could not prove a viable claim under "but for" causation. It is precisely because of situations such as Gregory's the mixed motives theory should be reintroduced. The law can reasonably interpret a mixed motive theory from 1) the text and purpose of the ADEA, 2) Congressional

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280. *Id.* at 11.

281. RICHARD W. JOHNSON ET AL., HOW IS THE ECONOMIC TURMOIL AFFECTING OLDER AMERICANS? 2 (2008).

282. Rix, *supra* note 274, at 601.

283. HEDGE ET AL., *supra* note 131, at 165–66.

284. GREGORY, *supra* note 8, at 17; DEP'T. OF LABOR, *supra* note 14, at 97–104; Matt Sedensky, *Forced to Retire, Some Take Social Security Early*, ASSOCIATED PRESS, Aug. 8, 2010, available at <http://abcnews.go.com/US/wireStory?id=11352830>.

285. GREGORY, *supra* note 8, at 17; DEP'T. OF LABOR, *supra* note 14, at 97–104.

286. GREGORY, *supra* note 8, at 17; DEP'T. OF LABOR, *supra* note 14, at 16.

287. *See supra* Part IV.B.2.

intent and the CRA of 1991, or 3) the *Price Waterhouse*'s articulation of mixed motives. Because a mixed motive theory better conforms to the decision-making process, it can more effectively deter discrimination.

The "but for" theory is inadequate because decision makers distort factors while forming the decision and when attempting to recall what happened.<sup>288</sup> This distortion reduces the chance motive will be adequately ascribed.<sup>289</sup> The mixed motive theory, however, recognizes these shortcomings and attaches liability when it is known an illegal factor had a motivating influence on the decision.<sup>290</sup>

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288. *See supra* Part IV.B.1.

289. *Gross v. FBL Fin. Serv.*, 129 S. Ct. 2343, 2358–59 (2009) (Breyer, J, dissenting).

290. *Id.* at 2359.

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