Policy Analysis

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Clint Bolick

Clint Bolick is an attorney for the U.S. Department of Justice, Civil Rights Division, Appellate Section. He is working on a book entitled *Changing Course: Civil Rights at the Crossroads.* The views expressed in this article are solely those of the author; they are not intended, and should not be construed, to reflect the views of the Department of Justice or any other federal agency.

Executive Summary

For the past two decades, those who would use the coercive power of the state to remold our society and redistribute its wealth have frequently invoked the civil rights laws to attain their ends, with considerable success. By distorting the principle of equal opportunity that inspired such laws, these social engineers have reallocated burdens and benefits on the basis of such immutable factors as race and gender, laying waste along the way to free-market processes and the vital freedoms they protect.

Much attention and energy has been directed--for good reason and with some progress--toward resisting such departures from the principle of equal opportunity as racial quotas and comparable worth. However, little note has been taken of the systematic effort in the courts to transform the federal law prohibiting arbitrary age discrimination into a mandate for preferential treatment for workers over 40. Yet, in terms of both the economy and individual freedom, there are very widespread ramifications of this unheralded transformation from equal opportunity to compulsory favoritism.

The stakes involved are substantial, as illustrated by the Senate Labor and Human Resources Committee's rejection in April 1986 of Jeffrey I. Zuckerman, President Reagan's nominee for general counsel of the Equal Employment Opportunity Commission (EEOC). Although Zuckerman was vilified by much of the civil rights establishment for his antiquota views, it was his resistance to an overly expansive interpretation of the Age Discrimination in Employment Act (ADEA)[1] that tipped the balance to produce a highly unusual rejection of a nominee for an executive position on solely ideological grounds.

Zuckerman's offense was his challenging the prevailing orthodoxy surrounding the ADEA and urging an interpretation consistent with the explicit intent and language of the law. For this offense, his commitment to enforcing the law was called into question. Indeed, no one challenged Zuckerman's qualifications. As Sen. Paul Simon (D-Ill.) conceded, "There is no question about your ability, . . . about your integrity. The question is commitment."[2]

The opposition was spearheaded by a potent coalition that, as expressed in a letter from Rep. Claude Pepper (D-Fla.), objected to the nomination "because of its possible detrimental effect on the continued vigorous enforcement of the Age Discrimination in Employment Act."[3] Among the organizations opposing Zuckerman because of his views on the ADEA were the American Association of Retired Persons, Gray Panthers, National Education Association,

American Nurses' Association, Older Women's League, and Leadership Council of Aging Organizations, a 30-group coalition that condemned Zuckerman's unwillingness "to use all existing legal precedents" and a "hostility toward aggressive enforcement" of the ADEA.[4] Although some groups such as the Anti-Defamation League and the Cuban American National Foundation supported Zuckerman, Sen. Howard M. Metzenbaum (D-Ohio) could charge that "all the senior citizens groups" were opposed and that the nomination had elicited "more opposition than I recollect in connection with almost anybody who has been up for confirmation in a long time."[5] With Zuckerman's defeat, a potentially significant obstacle to the age lobby's political agenda was removed from the scene.

A Recipe for Mischief

The evolution of the ADEA has followed a pattern that has become all too familiar in the civil rights area. Laws are passed expressing the consensus of a majority of Americans and embracing the basic tenet of equal opportunity under the law. Whereupon, so-called public-interest groups, whose existence depends upon an ever-expanding interpretation of those laws, press novel theories in the courts, frequently acting in concert with the agencies charged with enforcing those laws and always invoking the shibboleth that civil rights laws are to be broadly construed. The defendants in these cases, typically businesses, are in turn unwilling, or lack the ability, to mount a credible, principled defense. As a consequence, the laws are perverted in ways that would never win assent from a majority of Americans and that are profoundly antithetical to the traditional understanding of civil rights embodied in those laws.

This problem is compounded in the ADEA area because no natural constituency exists to challenge reverse discrimination in favor of older workers. With racial quotas, those who are excluded--presumably, although not always, the majority--obviously can perceive a vested interest in resisting reverse discrimination against themselves. Similarly, in terms of the issue of comparable worth, the natural opposition includes most men, along with women who have successfully defied societal stereotypes and who desire to enjoy the fruits of their efforts, and anyone with a scintilla of economic common sense.

However, the same is not true in the case of reverse discrimination on the basis of age. Not everyone, of course, is over 40; but everyone who is not does aspire to be in the future. Acceding to preferential treatment is thus akin to an individual retirement account--a sacrifice today for benefits tomorrow. Moreover, everyone under 40 knows, and cares deeply about, some individual who might benefit from preferential treatment for older workers; young people are remarkably paternalistic about their parents. Hence, the irony that in a nation doctrinally committed to individual liberty, we are quite tolerant of coercive government action that benefits people whose faces we recognize.

Modest Origins

Many of the modern civil rights laws interfere with the competitive market. Such interference is often counterproductive because the market is the only mechanism that can accurately assign the costs of irrational discrimination to the discriminator. Consequently, the best approach toward these laws is to resist overly expansive, market-distorting interpretations while vigorously invoking them to challenge the main source of discriminatory influences--government itself.

The ADEA constitutes a modest interference with the market. Indeed, the act is grounded in the recognition that the market should remain free to the maximum possible extent. It is narrowly framed to remove a perceived blemish from the market system while leaving the system's processes otherwise intact.

The ADEA was the last of three employment civil rights laws passed during the 1960s. It was preceded by Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, national origin, sex, or religion, and by the Equal Pay Act.[6] The ADEA has its origin in section 715 of Title VII, which instructed the secretary of labor to conduct a study with recommendations for "legislation to prevent arbitrary discrimination in employment because of age."

The resulting report by Secretary W. Willard Wirtz in 1965 reached some commonsense conclusions, recognizing important differences between age and other types of discrimination. Wirtz testified that "discrimination" was almost a misnomer in the age area because "there is no antagonism on anyone's part toward an older person."[7] Moreover, the Wirtz report recognized that unlike race, "not all discrimination in this area is arbitrary."[8] Rather, it found that the

most common form of discrimination against older workers "involves their rejection because of the assumptions about the effect of age on their ability to do a job when there is in fact no basis for those assumptions. It is this which Congress refers to . . . as 'arbitrary discrimination.'"[9]

Thus, the Wirtz report recommended not the sweeping prohibitions applicable to race discrimination, but legislation tailored to eradicating discrimination based upon stereotypes, particularly in the form of arbitrary age ceilings in hiring.[10]

The resulting legislation, enacted in 1967, embodied this report's rationale and objectives. Sen. Jacob K. Javits (R-N.Y.), the ADEA's principal sponsor, emphasized the act's narrow scope. "We in America pride ourselves on our free enterprise system," he declared, "particularly on the market as the only really objective test for the acceptance or rejection of the worth of goods and services." The ADEA, he explained, was designed not to displace market mechanisms but to counter the "widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs."[11] Accordingly, section 2 of the ADEA establishes that "the purpose of this Act [is] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in the employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

Apart from the ADEA's narrower objectives, two crucial characteristics distinguish this act from Title VII. First, unlike Title VII, which provides equal protection from discrimination for men and women, blacks and whites, and so on, the ADEA extends only to individuals over the age of 40. The creation of a "protected age group" could be taken to imply a requirement of preferential treatment, were the contrary intent and language of the act not so explicit on this point. As the U.S. Court of Appeals for the Fifth Circuit has observed, the ADEA's clear mandate is that age be accorded a "neutral status." As the court explained, the act requires an employer to "reach employment decisions without regard to age, but it does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group."[12] Moreover, Alfred Blumrosen, a law professor at Rutgers and an ally of the civil rights establishment with regard to Title VII issues, notes that any application of the ADEA that provides preferential treatment to older workers at the expense of new labor-market participants invariably limits equal employment opportunities for minorities and women.[13]

The second crucial distinction is that whereas Title VII prohibits employment decisions in which race plays any role (except, of course, to the extent that courts have interpreted Title VII to tolerate race-conscious "affirmative action"), the ADEA, in the words of Sen. Ralph W. Yarborough (D-Tex.), one of its prime sponsors, is "not directed to all instances of differentiation on the basis of age," and thus permits "reasonable differentiations not based on age alone."[14] Thus, the act contains a number of defenses for employer actions that are not based solely on age, such as when age is a bona fide occupational qualification or a legitimate factor in a seniority or benefit system. Most significant, however, is the defense provided by section 4(f)(1), which allows employers to "take any action otherwise prohibited" that is "based on reasonable factors other than age." This provision flows logically from the purpose of the act as proscribing only arbitrary age discrimination; when the distinction is reasonable, not arbitrary, it is lawful. As the Department of Labor (which had ADEA enforcement authority until 1979, when it was transferred to the EEOC) would later instruct, whether distinctions are reasonable should "be determined on an individual, case by case basis."[15]

Despite the ADEA's carefully limited parameters, the potential impact of the act is enormous. The provisions of the act extend to all public and private employers having 20 or more employees. The protected age group--initially from ages 40 to 70 but expanded in 1986 to prohibit mandatory retirement at any age--includes 41.3 million workers, or 39 percent of the labor force.[16] Furthermore, lawyers are lured to the ADEA since, unlike Title VII, it provides for liquidated damages for "willful" violations, which can double the amount of damage awards. Given the size of the protected age group and the potential for lucrative returns, it is understandable that age is now the most popular category of employment discrimination law; and that in only two decades, the ADEA has been distorted to such an extent that as presently interpreted, it poses a grave threat to the ability of employers to make rational employment decisions.

Cost is No Object

The major development in the transformation of the ADEA from equal opportunity to preferential treatment is the steady erosion of the "reasonable factor other than age" (RFOA) defense. Ignoring the act's express language and unequivocal legislative history, the courts have encouraged this evolution by eliminating as a defense the most rational possible factor in employment decisions--cost.

Employers often assign a high value to such employee attributes as experience, seniority, and loyalty. Increasing age increases the potential to attain these attributes, and employers frequently reward them when they can afford to do so. But when hard times come, employers may in certain circumstances reasonably conclude that such premiums are no longer cost-effective. Such a determination is related to age only insofar as length of service was a factor in higher salary or benefits in the first place. Thus, as long as the ultimate decisions are actually based on cost, they clearly fit within the plain meaning of the RFOA defense.

This reasoning was implicit in the Department of Labor's explanation of when cost is not a defense; that is, when it is based upon "a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group."[17] The ADEA, like all civil rights laws, protects individual rights, and group-based cost generalizations are clearly unlawful. But individual cost assessments are the essence of objective, nondiscriminatory decision-making. As Alfred Blumrosen has argued, such decisions should not run afoul of the ADEA because "the employer is not operating on a stereotyped assumption about higher costs of longer service employees, but upon a reality which is applicable to the particular employees in question."[18] Thus, an employer cannot decide "I will fire all of my older employees because they tend to cost more money"; but he should be able to decide that "I will fire all my most expensive employees," even if many of them are over the age of 40.

Some courts have agreed with this analysis. In Mastie v. Great Lakes Steel Corp., for instance, the trial court held that an employer may compare salary and fringe benefits in determining whom to select for a reduction in force (RIF), provided the decision is "predicated upon an individual as opposed to a general assessment."[19] Noting that the "Act does not conteplate that an employer must ignore employment costs,"[20] the court declared that

the ADEA was never intended as an all encompassing cure for the employment ills of the nation's aged population. To the extent that the Age Act does not reach sufficiently the important and significant problems by the aged, further Congressional action in this area may be desirable. However, it is not this or any court's duty or function to distort the intention and meaning of a Congressional statute. . . .[21]

Most courts confronting the issue, however, have engaged in logical acrobatics to reach the opposite result. In Dace v. ACF Industries, Inc., for instance, a company faced with an imminent shutdown demoted a 53-year-old in favor of a 40-year-old to save money. The district court dismissed the claim, observing that the plaintiff was attempting to prove his case merely by showing that the company's decision was based on his greater seniority, and therefore that "cost was the primary factor leading to the adverse action. . . . From this, plaintiff would have the jury infer that age was the true motivation. This would require an inference upon an inference, and one the Court believes does not logically follow of necessity."[22] The Eighth Circuit, however, reversed this decision, finding "the close link between seniority and age" sufficient to establish a claim of age discrimination.[23]

Similarly, in Marshall v. Arlene Knitwear, the trial court found that the plaintiff was selected for termination, among other reasons, "because of her higher salary, which she had attained as a result of raises given her during her many years of work."[24] The court conceded these may be valid business reasons,"[25] but held that "since such economic factors are directly related to age, [the company's] reliance on them . . . constitutes age discrimination."[26] Cases such as Marshall thus turn on a central fiction--that salaries are in the first instance determined by age. The reality, of course, is that in almost every business, salary and age are independent factors. Indeed, the Marshall court acknowledged as much, ascribing the plaintiff's higher salary to her "ability and value to the company."[27] Yet, that court--like many others--would deny employers the ability to make cost-based decisions by equating them with age discrimination.

The problem is exacerbated by employers who fail to tenaciously defend their rights under the market system. Alfred Blumrosen has observed that "strangely, the 'cost defense' has been asserted in relatively few cases."[28] The most troubling scenario occurs when a company makes an obvious cost-based decision but defends its action on other

grounds, thereby undercutting the viability of the cost defense, as well as the company's own credibility. In Duffy v. Wheeling Pittsburgh Steel Corp. the Third Circuit affirmed a judgment in favor of a 59-year-old who lost his job during a RIF in which four of the five oldest and highest paid salesmen were terminated while younger salesmen with arguably poorer track records were retained. Rather than mounting a cost defense, the company argued that the terminated employees had inferior performance, which the court rejected as a "contrived story created by Wheeling-Pittsburgh after the fact."[29] In a case that could have provided an opportunity to make a strong argument for the cost defense, the battle was lost without a fight.

The result is that the legitimacy of a rational and objective criterion--the very criterion on which most businesses must make their decisions--is being destroyed by the courts. Indeed, the Eighth Circuit has flatly declared that "economic savings . . . cannot serve as a legitimate justification under the ADEA for an employment selection criterion."[30] Such a doctrine is likely to have serious ramifications. For instance, must an employer hire an older applicant irrespective of the salary demanded? And not all the implications are necessarily beneficial to older workers; the present legal trends may discourage employers from rewarding experience and seniority if they thereby expose themselves to liability for employment decisions later made on the basis of those rewards.

Surely, most Americans favor an employment market free from arbitrary discrimination and in which older individuals have an equal opportunity. But the elimination of cost as a defense far exceeds that consensus, and it poses a very real threat to the economic freedom the ADEA was supposedly designed to enhance.

Proportional Representation?

When the age lobby talks about using every possible legal tool to achieve its ends, it is talking primarily about a legal theory known as "adverse impact"--a theory that would effectively destroy the safety valves designed by the ADEA's architects to preserve employer discretion over basic employment decisions.

Adverse impact is one of the three ways, as recognized by the courts, in which to establish a claim of employment discrimination. The most persuasive way is to furnish direct evidence of discriminatory intent, such as remarks that an employee is "too old." A second way is to show "disparate treatment"; that is, when two employees who are similarly situated are treated differently, giving rise to an inference that the difference is on account of race, sex, age, or some other impermissible factor. The employer may rebut that inference merely by articulating a nondiscriminatory reason for the action; whereupon the plaintiff may prevail only by showing that the employer's defense is a pretext for discrimination. The Dace and Duffy cases discussed earlier are classic examples of successful disparate treatment cases.

Under the third way, adverse impact, the plaintiff need only identify a facially neutral employment criterion that disproportionately affects a certain group. Adverse impact is a judicially created theory that grew out of race discrimination claims challenging such so-called barriers as standardized tests or diploma requirements. The theory is grounded in the assumption that when discrimination is absent, racial groups will generally be represented in the work force in rough proportion to their labor-market availability. Thus, if an employment device eliminates a disproportionate percentage of a particular group, a claim of discrimination is established.

Two features peculiar to adverse impact claims make them particularly troublesome for an employer. First, such claims do not require the plaintiff to prove discriminatory intent, only "underrepresentation." Second, the employer may defend its employment criterion only by proving its "business necessity"--a standard that as applied by the courts is nearly impossible to satisfy. Thus, legitimate screening devices such as tests or conviction records are enjoined, and quotas are often imposed (or adopted).

Adverse impact theory has no appropriate place in ADEA litigation. Whatever the validity in a race context of the notion that all groups will be proportionately represented absent discrimination, that proposition clearly does not hold for different age groups--by reason of varying experience, qualifications, and training, not to mention volitional choices. Moreover, unlike Title VII, the ADEA does contain a RFOA defense. That a neutral employment criterion can at once constitute both a defense and a basis of liability is patently illogical. What many courts have done is to disregard RFOA defense and incorporate adverse impact theory so as to invalidate any decisional criterion that adversely impacts workers over 40. Thus, not only are criteria such as cost no longer a defense but their mere

application may constitute a source of liability.

This alarming prospect is illustrated by Geller v. Markham, arguably the worst and most devastating ADEA decision to date. In Geller, the U.S. Court of Appeals for the Second Circuit struck down a school board's policy of hiring only teachers with less than five years' experience, so as to reduce the costs necessitated by the requirement of paying premium salaries for experienced teachers. Undoubtedly, the same teachers who lobbied for an inflexible, experience-based pay system were now objecting to its use as a screening device. The experience criterion was age neutral and affected applicants of all ages. However, because it affected a higher percentage of older than younger employees, the court struck it down as a violation of the ADEA. "The high correlation between experience and membership in the protected age group," the court ruled, renders the practice "discriminatory as a matter of law."[31]

In this particular case, the U.S. Supreme Court, which to date has declined to review many of the judicial innovations under the ADEA, was rebuked in its failure to do so by Justice William H. Rehnquist, who found the decision not to review the case "inconsistent with the express provisions of the ADEA" and unsupported "by any prior decision of this Court."[32] Rehnquist noted that the policy was nondiscriminatory on its face and as applied, and that "this Court has never held that proof of discriminatory impact can establish a violation of the ADEA." Yet, "of greater importance," he declared, "is the rationale employed by the Court of Appeals in rejecting the Board's 'cost' justification."[33] Rehnquist's observation that adverse impact could result in the invalidation of any employment criterion with a statistically different impact on employees over 40 (or, of course, any subset of that group), underscores the theory's tenuous logical underpinnings--and also its potential for disastrous economic consequences.

Another case that rivals Geller in its fragile logic is Leftwich v. Harris-Stowe State College, in which the Eighth Circuit invalidated a state college system's plan to reduce costs by eliminating a number of teaching positions. Despite the fact that the board of regents cut both tenured and non- tenured positions--and that the average age of the instructors remained the same after the RIF--the court ruled that the elimination of some tenured slots had an unlawful adverse impact on older faculty members. The average age of tenured and nontenured teachers was 45.8 and 34.3, respectively. The court explained that

here, the defendants' selection plan was based on tenure status rather than explicitly on age. Nonetheless, because of the close relationship between tenure status and age, the plain intent and effect of the defendants' practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.[34]

The effect of Leftwich, of course, is that the employer would be compelled to discharge only younger, nontenured faculty members rather than distributing the RIF burden proportionally-- a result the framers of the ADEA surely did not intend.

The irony of decisions such as Geller and Leftwich, as Alfred Blumrosen has observed, is that they "penalize the employer whose wage policies favor experienced workers,"[36] even though the existence of such policies negates any contention that the employer harbors discriminatory animus against older workers.

Yet another misapplication of adverse impact arises in the context of plant shutdowns and large-scale RIFs. In such situations, many employers seek to minimize the impact on the hardest- hit employees in one of two ways. Either they lay off employees who are immediately eligible for pensions, or they provide severance pay to assist those not eligible for pensions. Pension eligibility is an "age-plus" factor--that is, age is a necessary precondition to eligibility--but once eligibility is earned, it constitutes a new, independent status on the basis of which rational decisions may be made. Of course, any use of pension eligibility as a selection criterion is susceptible to adverse impact analysis.

Jeffrey Zuckerman was excoriated for his view that when an employer attempts to lessen "what is clearly going to be a disastrous effect upon the workforce" by "laying off those who are . . . assured, right from the outset of some means of support," that distinction constitutes "a reasonable factor other than age, and . . . not the arbitrary age discrimination that the statute . . . is intended to eradicate."[36] However, the courts to date have unanimously rejected retirement eligibility as a RFOA, in the context of both selection for layoffs and allocation of severance benefits.[37] By applying

adverse impact to the ADEA, courts are thus preventing employers from acting in ways that are not only rational but manifestly fair as well.

Beyond this there is an even more ominous cloud on the horizon. In the Title VII area, some courts have applied adverse impact not only to specific, discrete employment selection criteria but also to general hiring practices.[38] In other words, an employer's overall employment processes are deemed discriminatory if any group is "underrepresented" in the work force as a whole or in a particular job category or rank. The only fail- proof defense--and logically, the only remedy--for such a theory of liability is proportional representation. Eventually, the issue of whether adverse impact is applicable to subjective hiring practices or to the ADEA will have to be resolved by the Supreme Court. However, if employers do not immediately begin to mount a principled defense, such theories may well prevail by default.

Not Free to Choose

The value of a right can be determined only by the individual who owns it. Under the ADEA, the value of protected status grows every day. But if the age lobby has its way, those who hold such rights will be prohibited from using them to bargain for even higher values--in effect, rendering such rights worthless to their holders.

This situation arises most frequently in plant closings or other situations in which RIFs are necessary. Given the costly liability to which employers are exposed under the ADEA and to which they are particularly vulnerable (but can ill-afford) when shutting down plants, many employers understandably prefer to make a clean break and not take any risks. Such employers frequently offer generous severance pay--usually $20,000 to $40,000--in return for a waiver of the right to sue for past acts under the ADEA (and other laws). Similarly, many employees have no reason or desire to sue and would freely accept the bargain if allowed to do so; that is, they value the money more than rights that probably have never been violated.

Under Title VII, such agreements are valid if the employees execute them knowingly, intelligently, and in exchange for valuable consideration. Typically, the employer provides a prepared agreement that clearly sets forth the nature of the release, allows a cooling-off period, and advises consultation with an attorney. The court will still set the agreement aside if the employer made misrepresentations or applied coercion. In most situations, though, both parties perceive a benefit.

Under the ADEA, however, despite the act's explicit objective of encouraging voluntary resolution of problems, it is not clear whether employees may waive their rights without the express approval of the EEOC.[39] In Runyan v. NCR Corp., a labor lawyer who signed an agreement waiving claims against his employer in return for a contract extension and substantially increased compensation filed an ADEA lawsuit after the contract expired. The district court dismissed his claim, refusing to provide relief for a plaintiff who "chose to accept the consideration offered to him, to execute the release and, apparently, to gamble on this Court's willingness to find the release void."[40] Nonetheless, a panel of the U.S. Court of Appeals for the Sixth Circuit reversed, ruling that waivers unsupervised by the EEOC are impermissible under the ADEA. Although this decision was vacated on review by the full court,[41] other courts are free to limit the ability of employees to bargain over their ADEA rights.

Seeking to settle the question, the EEOC proposed a rule allowing individuals to waive their ADEA rights under the same standards applicable to Title VII.[42] Although the advocacy groups for older workers might reasonably be expected to strongly support a rule that expands freedom of choice, most strongly condemned it. Arguing that waivers should not be enforced because "the employee has inherently unequal bargaining power," the American Association of Retired Persons paternalistically claimed that older workers labor under a special "vulnerability" and that most "could never execute a knowing and voluntary waiver."[43] In seeking to prevent voluntary agreements between employers and employees, the association thus portrayed older workers as helpless and incompetent to act in their own self-interest--precisely the type of unsupportable stereotype that inspired passage of the ADEA. Notwithstanding broad public support for the proposed EEOC rule, the age lobby has successfully executed a campaign of misinformation to stall the rule's final approval--and along with that, a greater degree of independence for its purported beneficiaries.

An Ominous Trend

The potential economic effects flowing from the vastly enlarged reach of the ADEA cannot be overstated. They are illustrated by the Duffy case, in which the U.S. Court of Appeals for the Third Circuit struck down a company's decision to fire its highest paid salesmen, ostensibly because of poor performance, but more likely to achieve economic savings. As Judge Arlin Adams noted in his dissent, the RIFs were part of an effort to transform the steel industry, which was "facing substantial threats to its survival," into a "leaner, more efficient form"--a painful task that is "better suited to a business executive than to a federal judge." Although "Congress appears to have viewed the ADEA as aimed narrowly at the arbitrary use of age as a proxy for ability," Adams continued, the act was being used in a way that "Congress did not intend"--as "a general remedy for unemployment among older workers." By overlooking such 'critical distinctions,' he warned, "the majority today affirms a misapplication of the ADEA and thereby permits an unwarranted intrusion on the reorganization of an economically battered company."[44]

However, the Duffy case and the general evolution of the ADEA are symptomatic of a greater malady--the failure of the defenders of the competitive market to recognize the threat arising from distortions of the civil rights laws. For better of worse, businesses are at the front lines in protecting the market against assaults in the courts. To date, despite the efforts of such organizations as the Chamber of Commerce, the Association of General Contractors, and the Equal Employment Advisory Council, the results have been abysmal. In the area of racial preferences, many companies have abandoned the principle of equal opportunity for the "safe harbor" of racedeterminative affirmative action. In doing so, they have failed to recognize that they thereby implicitly sanction other departures from that principle and undermine their own credibility on issues such as comparable worth and compulsory preferences based on age. And by failing to mount a principled defense of cost as a nondiscriminatory employment criterion, businesses will lose the discretion that is vital to efficiency and profitability. In short, they are too willing to sacrifice the free-enterprise system for a short-term advantage that will inevitably prove Pyrrhic.

What defenders of the market must do is articulate a long- range vision in the form of a positive civil rights agenda rather than a purely defensive strategy. That vision should be predicated on economic liberty--on the equal opportunity of every individual to freely participate in the economy, bounded only by the limits of ambition, talent, and imagination. The tools are already available, for this is the premise upon which all the nation's civil rights laws are based.

The ADEA has already provided a costly lesson about how the adversaries of the market can define the terms of the debate behind a facade of benevolence. The challenge to the market's defenders is to demonstrate--in every forum, at every opportunity--that every artificial advantage conferred upon one person occurs at the expense of another, at unacceptable costs to individual liberty and to the wealth of society as a whole. Until the business community recognizes the necessity of this task and places its resources behind such an effort, freedom of enterprise will continue to erode.

FOOTNOTES

[1] 29 U.S.C. 621 et seq.

[2] U.S. Senate, Hearings Before the Committee on Labor and Human Resources, United States Senate Ninety-Ninth Congress, on Jeffrey Ira Zuckerman to be General Counsel of the Equal Employment Opportunity Commission, December 10, 1985; March 4 and April 9, 1986 (Washington: U.S. Government Printing Office, 1986), p. 2.

[3] Ibid., p. 142.

[4] Ibid., p. 182.

[5] Ibid., pp. 247-48.

[6] 42 U.S.C. 2000(e) et seq.; 29 U.S.C. 206(d).

[7] Alfred W. Blumrosen, "Interpreting the ADEA: Intent or Impact," in Age Discrimination in Employment Act, ed. Monte B. Lake (Washington: Equal Employment Advisory Council, 1982), p. 82.

[8] "The Older American Worker: Age Discrimination in Employment" (June 1965), in Legislative History of the Age Discrimination in Employment Act (Washington: U.S. Government Printing Office, 1981), p. 19.

[9] Ibid., p. 20 (emphasis in original).

[10] Ibid., pp. 37-38.

[11] Legislative History of ADEA, p. 145; quotation originally in Congressional Record, vol. 113, p. 31254 (November 6, 1967).

[12] Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982).

[13] Blumrosen, p. 106.

[14] Legislative History of ADEA, p. 66; quotation originally in Congressional Record, vol. 113, p. 2467 (February 3, 1967).

[15] Ibid., p. 241; published initially in 29 C.F.R. 860.103(d) (1968).

[16] 1980 Census of Population, vol. 1 (Washington: U.S. Department of Commerce, 1981), table 272. By prohibiting mandatory retirement at age 70, Congress added 1.36 million people in the labor force to the protected age group.

[17] Legislative History of ADEA, p. 242; quotation originally in 29 C.F.R. 860.103(h) (1968). This regulation was superseded by the EEOC rule given in 29 C.F.R. 1625.7(f), which contains similar provisions.

[18] Blumrosen, p. 111.

[19] Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1319 (E.D. Mich. 1976). See also La Montagne v. American Convenience Products, Inc., 750 F. 2d 1405, 1410 (7th Cir. 1984); Graefenhain v. Pabst Brewing Co., 620 F. Supp. 696, 702 (D. Wis. 1985).

[20] Mastie, p. 1318.

[21] Id., p. 1322.

[22] Dace v. ACF Industries, Inc., 553 F. Supp. 545, 546 (E.D. Mo. 1982), rev'd, 722 F.2d 374 (8th Cir. 1983).

[23] Dace v. ACF Industries, Inc., 722 F.2d 374, 378 (8th Cir. 1983).

[24] Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D. N.Y. 1978), modified, 608 F.2d 1369 (2d Cir. 1979).

[25] Ibid.

[26] Id., p. 730.

[27] Id., p. 729.

[28] Blumrosen, p. 107, n. 97.

[29] Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1398 (3rd Cir. 1984), cert. denied, 105 S. Ct. 592 (1985).

[30] Leftwich v. Harris-Stowe State College, 702 F.2d 686, 692 (8th Cir. 1983).

[31] Geller v. Markham, 635 F.2d 1027, 1033 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981).

[32] Markham v. Geller, 451 U.S. 945, 947 (1981) (cert. denied) (Rehnquist, J., dissenting).

[33] Id., p. 948.

[34] Leftwich, p. 691.

[35] Blumrosen, p. 107.

[36] U.S. Senate, Hearings Before the Committee on Labor and Human Resources, p. 23.

[37] See, for example, EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984) (severance pay); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir. 1983) (severance pay); EEOC v. City of Altoona, 723 F.2d 4 (3rd Cir.), cert denied, 467 U.S. 1204 (1983) (layoffs); McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980) (Layoffs).

[38] See, for example, EEOC v. Rath Packing Co., 787 F.2d 318, 328 (8th Cir. 1986); Segar v. Smith, 738 F.2d 1249, 1288 n. 34 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 2357 (1985).

[39] There is a lack of clarity on this issue because the ADEA applies the enforcement provisions of the Fair Labor Standards Act (FLSA), which establishes minimum wages and maximum hours. Under the case law interpreting the FLSA, these rights may not be waived in that such bargaining is incompatible with the absolute nature of "minimum" and "maximum.' In this respect, the rights provided by the ADEA are much more analogous to those under Title VII. There is no evidence that Congress realized this potential anomaly when it applied the FLSA enforcement provisions to the ADEA.

The EEOC has no mechanism to approve waivers. Even if it did, such a procedure would invariably delay--possibly for years--the ability of individuals to realize the benefits of their bargain, if the EEOC elected to approve such benefits at all.

[40] Runyan v. NCR Corp., 573 F. Supp. 1454, 1464 (S.D. Ohio 1983), aff'd, 787 F.2d 1039 (6th Cir. 1986) (en banc).

[41] Runyan v. NCR Corp., 787 F.2d 1039 (6th Cir. 1986) (en banc). The vacated decision was reported at 759 F.2d 1253.

[42] Federal Register, vol. 50, p. 40,870 (1985). See, generally, R. Gaull Silberman and Clint Bolick, "The EEOC's Proposed Rule on Releases of Claims under the ADEA," Labor Law Journal 37 (April 1986): 195.

[43] Comments of the American Association of Retired Persons to the Equal Employment Opportunity Commission in Response to NPRM to Promulgate an Administrative Exemption Legalizing Unsupervised Waivers Under the ADEA (October 7, 1985), pp. 3, 13.

[44] Duffy, pp. 1398-99 (Adams, J., dissenting).