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EARLY RETIREMENT INCENTIVES AND
THE AGE DISCRIMINATION IN
EMPLOYMENT ACT

Richard G. Kass*

I. INTRODUCTION

Early retirement¹ can be an attractive way for employers to structure a workforce while providing benefits to the employee. Through early retirement, an employer can reduce the workforce without inflicting the pain of mass layoffs, make room for affirmative action programs or provide promotion opportunities for the young. The employee can bring a frustrating worklife to a dignified ending, make a career change without sacrificing financial security or enjoy a life of leisure while still healthy. For these reasons, early retirement is becoming increasingly common,² and is occurring earlier and earlier.³


¹ Early retirement is retirement before the mandatory retirement age, usually with actuarially reduced retirement benefits. Most retirement plans allow voluntary retirement at age 55, provided the employee has fulfilled minimum service requirements. 2 Collective Bargaining Negotiations and Contracts (BNA) 48:3. The Age Discrimination in Employment Act, as amended in 1978, prohibited mandatory retirement for virtually all employees before the age of 70. See 29 U.S.C. § 623(a)(1)(1982) (prohibiting age discrimination); 29 U.S.C. § 631(a)(limiting protection to those “at least 40 years of age but less than 70 years of age”); 29 U.S.C. § 623(f)(2)(prohibiting mandatory retirement age before 70 under a bona fide retirement plan). The most recent amendment to the ADEA eliminated the age limitation of 70 years and prohibits age discrimination against all persons forty years of age and older. Pub. L. No. 99-592, ___ Stat. ___, October 31, 1986.


³ Mandatory Retirement, supra note 2, at 9.
Prior to 1978, it was common for employers to impose early retirement plans by mandating the early retirement of certain employees. However, in 1978, Congress amended the Age Discrimination in Employment Act (hereinafter the ADEA) to explicitly outlaw this practice. Under present law, early retirement must be voluntary.

Despite the 1978 amendments to the ADEA, employers have been continuing to use early retirement for their workforce-structuring needs by offering certain employees early retirement incentives. For the purposes of this article, an early retirement incentive is a one-time lump-sum bonus of a substantial amount of money which is paid to an employee if she agrees to retire early. Typically, $10,000 is paid to any employee who has reached the age of 55, has at least ten years of service, and agrees to retire immediately. After age 55 the incentive is typically withdrawn or substantially reduced. Such

6. A standard early retirement clause, from a teachers collective bargaining contract in Long Island, New York, follows:

"Teachers shall be eligible for a $10,000 retirement incentive provided they meet the following conditions:

A. The Teacher has been in the employ of the District for ten (10) years or more.

B. The teacher retires on the July 1st following his/her 55th birthday.

C. Written notice is given to the Superintendent by March 15 of the year of retirement.

D. Payments hereunder shall be made no later than the first payroll period in July."

The following variation appears in the Minnesota Statutes Annotated:

"Subdivision 1. Criteria. For purposes of this section, 'teacher' means a teacher. . .who:

(b) either

(1)(i) has not less than 15 total years of full time teaching service in elementary, secondary and area vocational-technical schools, and

(ii) has or will have attained the age of 55 years but less than 65 years as of the June 30 in the school year during which an application for an early retirement incentive is made, or

(2) has not less than 30 total years of full time teaching service in elementary, secondary and area vocational-technical schools.

Subd. 7. A teacher whose early retirement pursuant to this section has been approved by the commissioner of education shall be offered a contract for termination of services in the employing district, withdrawal from active teaching service, and payment of an early retirement incentive by the employing school district. An offer may be accepted by the teacher by submitting a written resignation to the school board of the employing district.

Subd. 8. Payment; reduction. An eligible teacher shall receive an early retirement incentive in the amount of $10,000. This amount shall be reduced by $500 for each year that a teacher is over the age of 55 years to a maximum age of 60 years and by
Early Retirement Incentives encourage early retirement without seeming "involuntary" within the meaning of the ADEA. Early retirement incentives are most common among public employers, especially school systems, but their appeal to employers as a "painless" way to restructure work forces, and their appeal to employees as a valuable fringe benefit make it likely that they will spread into other areas of the economy as well.

Recently, there have been challenges to early retirement incentives as being in violation of the ADEA and corresponding state age discrimination laws. Employees who are either too old or too young to receive the incentives have claimed that their civil rights have been violated. So far, early retirement incentive plans have been

an additional $1500 for each year that a teacher is over the age of 60 years. The age of the teacher shall be determined as of the June 30 in the school year during which the application for the early retirement incentive is made.

Subd. 9. Desegregation districts. Notwithstanding the provisions of subdivision 8, an eligible teacher who is employed by a school district which is implementing a desegregation plan ordered by federal court or approved by the state board, and who is offered and accepts an early retirement incentive contract pursuant to subdivision 7, shall receive an early retirement incentive in the amount of $15,000. This amount shall be reduced by $750 for each year that a teacher is over the age of 55 years to a maximum age of 60 years and by an additional $2250 for each year that a teacher is over the age of 60 years. The age of the teacher shall be determined as of the June 30 in the school year during which the application for the early retirement incentive is made.

MINN. STAT. ANN. § 125.611 (West 1984).

These two examples are of ongoing early retirement plans. Early retirement incentives can also be offered on a one-time-only basis, usually during a reduction in work force. These examples also happen to be open to all employees who meet the plan's age and service requirements. Early retirement incentives can also be offered to selected individuals only. This latter type of early retirement incentive would not present any age discrimination problems unless the employees were selected on the basis of their age.

In a sense, any retirement plan which gives larger-than-expected benefits to early retirees contains an incentive for early retirement. An example would be a plan which gives early retirees the same annual pension benefits as 70-year-old retirees, without any actuarial reduction. But such an incentive is extremely subtle compared to the lottery-like $10,000 payment involved in the above examples. For simplicity's sake, this paper will reserve the term "early retirement incentive" for the types of incentives described in the text, although the subtler types of incentives may be vulnerable to an ADEA attack as well.


Many retirement incentives for teachers tie the amount of the incentive payment to the amount of unused sick leave accumulated by the teacher (e.g. $100 for each unused sick day), thus encouraging good attendance as well as early retirement.

8. See CLARK & BARKER, supra note 2, at 57, which states that early retirement incentives are becoming more and more common. It is unclear, however, if the type of "incentive" alluded to by CLARK & BARKER is the same as that discussed in this paper. See supra note 6.

consistently upheld against such attacks.\textsuperscript{10} The law, however, is by no means settled. The attacks on early retirement incentives have been on unnecessarily narrow grounds and the best arguments against their legality have not yet been made in court. The opinions which have been written on the subject have been badly reasoned, or at best, incompletely reasoned. This article will discuss several possible theories under which early retirement incentives can be attacked under the ADEA. The article will conclude that in order to achieve the worthy policy goals which underlie the ADEA, at least some attacks against certain types of early retirement incentives should succeed.

Briefly, the theories against early retirement incentives are as follows. First, early retirement incentives arguably violate the ADEA because they harm older people as a group and society as a whole. Although they may benefit the individuals who receive them, they foster ageist stereotypes and reduce participation of older people in the workforce. Second, by making early retirement artificially attractive, the early retirement incentive is arguably a wolf in sheep's clothing—it may seem like a lovely fringe benefit at first, but ultimately it may harm the individuals who accept it by diminishing the length and quality of their lives. Third, early retirement incentives are arguably a mere disguise for mandatory retirement. No decision to accept an early retirement incentive is entirely voluntary and uncoerced, because of the power of the incentives and the contexts in which they arise. Fourth, early retirement incentives may discriminate against those employees too young to take advantage of them. If the incentives are indeed valuable benefits, then it would seem to be unfair to deny them to 54-year-olds simply because of their age. Fifth, they may discriminate against those too old to take advantage of them. It would appear to be classic age discrimination to deny a 65-year-old a $10,000 bonus to which her coworkers are entitled precisely because she is too old.

If any of these theories is recognized by a court, the employer may raise several defenses under the ADEA. The employer can argue that any prima facie discrimination is excused by being part of a

\textsuperscript{10} Id.
bona fide employee benefit plan,\textsuperscript{11} or by being based upon a reasonable factor other than age.\textsuperscript{12} The employer can also argue that the granting of early retirement benefits is necessary to make room in a workforce for women and minorities and thus avoid Title VII liability. This article will consider these possible defenses as well, and conclude that none of them convincingly excuse otherwise unlawful early retirement incentives, either as a matter of policy or as a matter of statutory construction.

The legality of early retirement incentives under the ADEA is a confusing question to ponder. At one extreme, early retirement incentives would appear to be entirely unobjectionable. The offer of a $10,000 windfall is a very desirable thing indeed to any employee who is lucky enough to receive it. Any employee who disagrees that it is desirable is free to pass up the incentive. An early retirement incentive certainly seems more humane than the apparent alternative in a reduction-in-force situation, namely laying off young people who have no pensions to fall back on. And it only makes sense that incentives are offered to only those employees who are of a certain age. Younger employees may appear to be entitled to them no more than they are entitled to pensions or gold watches. And to give them to older employees would neutralize their value as incentives.

At the other extreme, early retirement incentives appear to be just as clearly discriminatory, especially to one accustomed to thinking in terms of discrimination law principles. They foster the ageist stereotype that older people are only fit to be put out to pasture. They reward only those who conform to that stereotype. To use an analogy to Title VII, it would be difficult to imagine a court permitting an employer to pay black employees $10,000 to conform to that group's demeaning stereotypes. Early retirement incentives also drive members of a protected group out of the workplace. A court would hardly permit an employer to pay $10,000 to women or blacks as an incentive to quit their jobs. Finally, they rely entirely upon age classifications, and perform no function which cannot be performed just as well without doing so. When considering early retirement incentives, it is difficult not to jump back and forth between these two extremes of finding them to be clearly unobjectionable and just as clearly discriminatory.

This confusion about early retirement incentives reflects a general confusion in the whole concept of age discrimination. Is the

\begin{itemize}
  \item \textsuperscript{11} 29 U.S.C. § 623(f)(2)(1982).
  \item \textsuperscript{12} 29 U.S.C. § 623(f)(1)(1982).
\end{itemize}
ADEA's purpose to protect individuals, older workers as a group, or society as a whole? Can age classifications be benevolent, or are only those classifications specifically protected by exceptions to the statute legal? Is the ADEA directly analogous to the Civil Rights Act of 1964 or is it unfair to compare the two? Is the ADEA meant to prohibit all discrimination on the basis of age, or just discrimination against older people? Should the courts protect people from their own misguided choices, or should they reject such a paternalistic role? Should they take at face value a claim that a decision was voluntary, or should they inquire into the complexities of individual psychology?

Twenty years after the passage of the ADEA, these tensions are still unresolved. Indeed, they are hardly discussed. This is partly because the ADEA, unlike Title VII, did not grow out of any broad social movement which can guide a court to the proper interpretation of the statute. It is also partly because the courts have not yet been forced to deal with these issues head-on.

The issue of whether early retirement incentives violate the ADEA forces one to deal with these fundamental tensions in the law. Difficult cases may make bad law, but they also illuminate underlying principles. Just as the difficult question of affirmative action makes one better understand the essence of Title VII, so does the difficult question of early retirement incentives make one better understand the essence of the ADEA. Examining the implications of a choice between the conflicting arguments and positions on the legality of early retirement incentives can shed light on which of these basic policy choices is best.

II. WHY EARLY RETIREMENT INCENTIVES ARE PRIMA FACIE DISCRIMINATORY

A. The ADEA Protects Society as a Whole and Older People as a Group

Early retirement may be good for individual employees and their employers, but it has adverse effects on the economy as a whole and on older people as a group. It deprives society of valuable experience and expertise and it fosters ageist stereotypes. When Congress passed the ADEA, it was concerned with the rights of individuals, the effects nonemployment of older people had on the economy, and the effects of ageism on all older people. Early retirement incentives, which increase the incidence of early retirement, are therefore con-
trary to at least some of the worthy policies which underlie the ADEA and should be prohibited by the courts.

1. Early Retirement Incentives Violate the ADEA’s Policy of Keeping Older People Employed

Senator Javits, a primary supporter and framer of the ADEA, stated that one of the primary purposes of the statute was to meet “the danger of [a] tragic waste of one of our most precious resources—the talent and experience accumulated by our older workers over the course of decades.” The 1965 report of the Secretary of Labor to Congress which preempted the enactment of the ADEA noted that age discrimination has an adverse effect on “the economic system as a whole” because it wastes “a wealth of human resources.” Each time the ADEA has been amended, Congress has reaffirmed this goal of benefitting the economy by keeping older people in the labor force. In 1974, when the ADEA was expanded to include government employees, Congress quoted, approvingly, President Nixon’s statement that age discrimination “denies the Nation the contribution [older people] could make if they were working.” In 1977, when Congress was considering the 1978 amendments which banned mandatory early retirement, the Select Committee on Aging issued a report which stressed the harm on the economy of early retirement. If the trend toward early retirement continues, the Committee feared, “we will not be able to afford, culturally, psychologically, or financially, to continue supporting large dependent populations without serious changes.”

14. 113 CONG. REC. 31254 (1967)[remarks of Senator Yarborough, floor manager of the ADEA). Senator Javits also helped frame New York’s age discrimination law. Id. at 31253. Every year since 1951 Senator Javits had introduced an age discrimination bill in Congress. Id.

15. S. REP. NO. 732, 90th Cong., 1st Sess. 4(1967)(individual views of Mr. Javits). See also EEOC v. Curtiss-Wright 34 Empl. Prac. Dec. (CCH) ¶ 34,483 at 34,051 (D.N.J. 1982) (oral opinion) (“The thesis [sic] of the ADEA was to encourage the hiring of older workers”). But cf. Senator Yarborough’s comment that “[i]t is not the purpose of this bill to extend the normal working life of our citizens.” 113 CONG. REC. 31252 (1967). These interpretations are not necessarily inconsistent, since the word “normal” was probably used by Senator Yarborough in the sense of “unabbreviated,” not in the sense of “statistical average.”

16. The Older American Worker: Age Discrimination in Employment: Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964 2,5(1965) [hereinafter The Older American Worker]. The report noted that the goals of helping the economy and of protecting individuals may sometimes conflict. Id. at 2.


18. Mandatory Retirement, supra note 2, at 23.

19. Id.
“[e]ach year as thousands of people are encouraged or forced to retire, their skills, knowledge and wisdom are lost and their opportunities to instruct, teach, consult or advise, listen and reflect, as well as to work, are cut off.”

As the 1977 study of the Committee on Aging suggests, the economic advantage of encouraging the employment rather than the retirement of older people is no mere makeweight argument in favor of the ADEA or its constitutionality. Independent studies have concluded that this policy is crucial to the health of the national economy. "Older persons withdrawing from the labor force decrease the number of taxpayers and increase the number of beneficiaries," thus straining the already-strained federal budget and the economy. As retirement ages go down, the public cost of supporting the retired increases dramatically. The early retirement trend threatens to completely exhaust the nation’s retirement resources, and so the government should encourage later, not earlier retirement.

Although it is undeniable that early retirement is a drain on the economy, the argument is sometimes made that it is preferable to the unemployment of younger workers. The economy has a limited number of jobs, and unemployed younger people are just as much of a drain on the economy as are retired older people. In as much as younger people have fewer financial resources—they don’t receive

20. Id. quoting from R. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 65 (1975) [hereinafter BUTLER]. Note how Congress understands that whether early retirement is forced or “encouraged,” the economic effects are the same.

In a related context, Congress has noted that “noninvolvement [of workers in society] deprives society of the unique contributions it is possible for older persons to make.” H.R. REP. No. 67, 94th Cong., 1st Sess. 15(1975)(supporting the Age Discrimination Act of 1975). The Committee went on to note that it “wishes to encourage the employment of older workers” in all federal programs. Id. at 17.

The statutory statement of purpose, though hopelessly ambiguous, is consistent with the aforementioned legislative history. 29 U.S.C. § 621(b) states that it is Congress’ intent to promote the employment of older persons based on their ability rather than age.” The clause “based on their ability rather than age” can be read either as qualifying the whole sentence, stressing the individual rights aspect of the statute, or it can be read as an additional concern, stressing the goal of promoting the employment of all older people.


22. Id. at 1-8.

23. Id. at 5.


25. CLARK & BARKER, supra note 2, at 7, 63.

26. Id. at 6-8.
pensions, for example—there is a certain logic in placing the burden of unemployment on older people, who supposedly can retire with relative security and dignity. The flaw in this argument is that it sets up an unnecessary dichotomy between older and younger workers. Instead of using age classifications as the only way of determining who should leave the workforce, less discriminatory alternatives should be used. 27 It would be fairer if wealthy or incompetent employees were chosen as the group to bear the brunt of unemployment. Such solutions would not involve age discrimination, would not deprive the economy of its most experienced workers, and would also avoid unfairness to the young. 28

If the words of the statute allow, the ADEA should be read in such a way as to prohibit early retirement incentives. Early retirement incentives are harmful to the economy and antithetical to the statute’s purpose of keeping older people in the workforce. 29

2. Early Retirement Incentives Violate the ADEA’s Policy of Defeating Ageism

The ADEA does not just protect individuals and the national economy; it also protects older people as a group. One of the purposes of the statute is to do away with ageist stereotypes. 30 “The

27. If less discriminatory alternatives can be found to achieve the same goals as a discriminatory policy, they should be pursued. Age discrimination should be avoided if at all possible. Abermarle Paper Co. v. Moody 422 U.S. 405, 425 (1975); EEOC v. Chrysler Corp., 733 F.2d 1183, 1185-86 (6th Cir.), rehearing en banc denied, 738 F.2d 167 (6th Cir. 1984); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 393-415 (1976).

28. See infra text accompanying notes 163-176 for a discussion of less discriminatory alternatives in relation to the “reasonable factors other than age” defense.

29. It should be observed that if the trends toward earlier retirements, an older population, and an expanding economy continue, labor shortages may eclipse unemployment as an economic problem.

30. See Leftwich v. Harris-Stowe State College, 702 F.2d 686, 692 (8th Cir. 1983); Drzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (7th Cir. 1983); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 234 (5th Cir. 1976).
ADEA is designed to eradicate both conscious and unconscious stereotypes about the abilities of older workers."31 This is in line with Congress' policy to "combat ageism,"32 and with the statute's explicit purpose of promoting the "employment of older persons."33 Early retirement incentives should be suspect under the ADEA because they run counter to its underlying policies of combatting ageist stereotypes and of promoting the employment of older people. They are a product of the ageist stereotypes that older people are competent to do nothing but retire. There is little other explanation for why older employees, rather than highly-paid, incompetent, wealthy, or junior employees, are chosen for the incentives. Early retirement incentives also foster ageist stereotypes, by driving older people out of the mainstream of economic life. These ageist effects of early retirement harm all older people, even if they may benefit the individuals who actually receive the incentives.

Despite these ageist overtones, early retirement incentives are often viewed as being clearly unobjectionable.34 Given that they are based entirely on age classifications, foster ageist stereotypes, and do not properly come under any of the exceptions to the ADEA,35 this can only be explained by the fact that American society is profoundly ageist. Despite twenty years of federal age discrimination law, Americans still tend to take age classifications for granted.36 An

34. See, e.g., Rock v. Westinghouse, 1 Mass. DISCRIMINATION L. RPTR. 1262, 1281 (Mass. Comm. Against Discrimination, 1981), aff'd sub nom., Rock v. Mass Comm. Against Discrimination, 384 Mass. 198, 424 N.E. 2d 244 (1981)(considering early retirement incentives so plainly legal that the Commission uses them as the foil of a reductio ad absurdum argument: if the plaintiffs were to prevail, then early retirement incentives would also be struck down; and that would clearly be wrong); J. FINGER, AGE DISCRIMINATION PROBLEMS IN THE CONTEXT OF A REDUCTION IN WORKFORCE 18 (1983)(suggesting early retirement incentives as a way of avoiding ADEA problems).
35. See infra notes 123-180 and accompanying text.
36. Of course, some age classifications are unavoidable. In order to draw a bright line between children and adults, age classifications are justifiable in determining who may drive, drink, sign contracts, vote and get drafted. Such classifications really cannot be called ageist, since they do not affect older people. Age classifications which do not just distinguish children from adults are less justifiable, since they do foster ageist thinking. This latter type of age classification, exemplified by social security laws, should be rethought, or at least not taken for granted. They should be viewed as necessary evils—if they are indeed necessary—and not as common sense solutions. Compare the attention that sex classifications in insurance contracts are currently receiving in City of Los Angeles v. Manhart, 435 U.S. 702 (1978); Note, Strategies for the Elimination of Sex Discrimination in Private Insurance, 20 HARV. C.R.-C.L. L.
analogy to race and sex discrimination makes the insidiousness of early retirement incentives clearer.

Although there are no reported cases on the issue, it is difficult to imagine a court countenancing a plan under which women or Blacks were paid $10,000 as an incentive to leave their jobs. Despite the arguable benefits to the individual recipients of the incentives, such a plan would be seen as being repugnant to the social goals of the Civil Rights Act of 1964.37 Similarly, no court would allow an employer to give incentives to women or Blacks to conform to their groups' demeaning stereotypes, and an employer who paid women factory workers $10,000 to act in a submissive and sexually titillating way would rightly be considered the worst kind of sexist.38

Why is it that when the same option of conforming to demeaning stereotypes is offered to older people, this is not also considered intuitively to be wrong?

One explanation for why early retirement incentives seem acceptable for older people but not for Blacks or women is that retirement and old age are intimately related concepts. Retirement was invented precisely for older people, and is defined in terms of them, and so it is rational to encourage older people to retire in a way that does not apply to Blacks and women. This argument makes some logical sense. But from a purely legal point of view, the ADEA specifically deals with the relation between retirement and old age, and it defines that relation extremely narrowly.39

The only other plausible explanation for why early retirement incentives should be acceptable even though they foster ageist stereotypes and drive older people out of the workforce is that age discrimination is somehow fundamentally different from sex or race discrimination, and need not be remedied in analogous ways. According to this view, as long as the individual recipient of the incentive is not harmed, there is little reason to worry about the negative effects on older people as a group.

Several authorities have made a case for this point of view. The

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It is probably true that an employer may pay employees to conform to their protected groups' demeaning stereotypes if such behavior is a bona fide occupational qualification for the job. Thus, Playboy "bunnies" may be paid to perpetuate sexist stereotypes. 42 U.S.C. § 2000e(2)(1982).

Secretary of Labor, in the 1965 report to Congress which inspired the ADEA, asserted that to treat age discrimination as race, religion or sex discrimination "would be easy—and wrong. . . . [T]here is an essential difference."\textsuperscript{40} This difference, according to the Secretary, is that unlike other forms of illegal discrimination, age discrimination is based not on hate, but rather on ignorance.\textsuperscript{41} People do not despise or have intolerance for older people; instead, they merely harbor false assumptions about their ability to work.\textsuperscript{42} Moreover, older people are not a physically isolated group.\textsuperscript{43} They do not live in ghettos, and everyone is familiar with them. Further, everyone who lives long enough will become old, therefore, there is little reward in stigmatizing older people.\textsuperscript{44} Finally, when older people are treated differently, it is often to their advantage.\textsuperscript{45} In the equal protection case of \textit{Massachusetts Board of Retirement v. Murgia},\textsuperscript{46} the United States Supreme Court reached similar conclusions.

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [O]ld age does not define a "discrete and insular" group . . . in need of "extraordinary protection from the majoritarian process." Instead, it marks a stage that each of us will reach if we live out our normal span.\textsuperscript{47}

It is not difficult to refute these reasons for treating age discrimination differently from race and sex discrimination. First, some of their factual assumptions are highly questionable. Ageism is not just based on condescension and ignorance; it is also based on hate and stigmatization. The term "old fogey" is a common term of opprobrium, and popular comedians get laughs by stereotyping and

\textsuperscript{40.} \textit{The Older American Worker}, supra note 16, at 1.
\textsuperscript{41.} \textit{Id.} at 2.
\textsuperscript{42.} \textit{Id.} at 2, 5, 6.
\textsuperscript{43.} \textit{Id.} at 6.
\textsuperscript{44.} \textit{Id.}
\textsuperscript{45.} \textit{Id.} For example, people may be especially solicitous of older people's feelings, and act more respectfully towards them.
\textsuperscript{46.} 427 U.S. 307 (1976).
ridiculing older people. The abuse of older people in nursing homes is a national scandal, and civic groups strenuously object when homes for the aged are to be built in their neighborhoods. To the extent that older people are concentrated in particular neighborhoods and in nursing homes, they are a discrete and insular group. The fact that everyone will eventually become old actually fosters stigmatization, since "[o]ur youth culture brings with it a commitment to deny aging . . . . [T]he elderly are an affront to our pretenses of youth. They are what we deny we are becoming." Even though the young hope to someday be old, it is difficult for them realistically to imagine themselves as the objects of discrimination and thus to empathize with them.

Second, it is difficult to understand why groups that are merely condescended to should not be as protected as groups that are actively hated. Condescension is arguably even more stigmatizing than out-and-out hate, since it allows the discriminator to feel good about himself and hides the nature of the discrimination.

Third, and most telling, most of the arguments for why older people are not really oppressed would also apply to women. Like older people, women are not so much hated as condescended to. Like older people, women live and work among the rest of society. Few would argue that for these reasons sexism is to be less vigorously combatted in employment discrimination law than racism is. The belittling of the grievances of older people is too similar to the traditional sexist belittling of the grievances of women to take at face value.

48. Tim Conway's portrayal of old people as incompetent and infirm objects of ridicule on CBS' "Carol Burnett Show" is one example of the scorn accorded to the aged in popular humor.


53. These reasons have been used to justify the intermediate standard of scrutiny applied to gender based discrimination under the Equal Protection clause. Frontiero v. Richardson, 444 U.S. 677 (1973). But under Title VII, women and minorities are similarly protected.

54. Id.

55. Id.

56. One argument for treating ageism differently from sexism is little used by legal authorities, but may lie at the heart of many people's willingness to tolerate age classifications. This argument is that age discrimination, at least in the early retirement incentive context,
Congress has clearly expressed its intent that age discrimination be treated analogously to sex and race discrimination. The Select Committee on Aging, in the report which led to the 1978 ADEA amendments, concluded that age "should be as protected a classification as race and sex. The argument that everyone ages and no particular group is singled out for discrimination ignores the fact that discrimination solely on the basis of age is wrong." When considering the Age Discrimination Act of 1975, the House Committee on Education and Labor declared, "Our nation is involved in programs designed to combat racism and sexism. This Committee believes that it is equally important for the nation to combat ageism." Congress also displayed its intent to treat age discrimination on a par with sex and race discrimination by wording the prohibitions of the ADEA almost identically to those of Title VII. The only reason why age discrimination was not simply added to Title VII itself was a fear of overburdening the EEOC.

If the ADEA is interpreted analogously with Title VII, then early retirement incentives should be held to be illegal under the theory that they harm older people as a group by fostering ageism. There is little objective reason not to treat the ADEA in the same way as Title VII, and Congress intended them to be treated alike. Therefore, early retirement incentives should be struck down under the ADEA.

only affects relatively well-off workers—i.e. those who are eligible for pensions. These workers are usually either unionized or in management and do not need the full protection of the law. Although there is some truth in this, it should be noted that even if victims of ageism are not the poorest of the poor, they are not excessively wealthy either. Early retirement incentives are most prevalent in the public sector, where salaries are moderate. The wealthier an employee, the less likely she is to be swayed by a $10,000 incentive. Moreover, the ban against involuntary early retirements does not apply to certain highly-compensated employees who are at least 65 years of age, so that some of the very wealthiest employees are not protected by this part of the ADEA. 29 U.S.C. § 631(c)(1982).

Ageism may not be as pressing a problem as sexism or racism, but it is not qualitatively different from them in any decisive way. Since there is ordinarily no conflict between these concerns, ageism should be treated the same way under the law.

57. Mandatory Retirement, supra note 2, at 38.

58. H.R. REP. NO. 67, 94th Cong., 1st Sess. 15 (1975). See also the remarks of Congressperson Stephen Solarz on the floor of the House: "Clearly, there is no more room for discrimination on the basis of age than there is for religious, racial, sexual or ethnic discrimination." 121 CONG. REC. 9231(1975).


60. 113 CONG. REC. 31254(1967)(statement of Senator Javits). Since 1979, the EEOC has had jurisdiction over the ADEA.

61. See supra notes 30-60 and accompanying text.
B. Early Retirement Incentives as Adverse Actions Towards the Recipients

It is usually taken for granted that early retirement incentives benefit the individuals who receive them. As long as the incentive is taken “voluntarily,” it seems intuitively obvious that someone who receives a $10,000 windfall is benefitted, not harmed. If this is true, then at least from the viewpoint of that individual, there is no violation of the ADEA.

This intuitive assumption may be challenged in two ways. First, it can be argued that although early retirement incentives seem like valuable benefits at first, their long-term effect on the “beneficiary” is actually adverse. Secondly, early retirement incentives are never really taken “voluntarily” in the truest sense of the word, and they are therefore a form of coerced retirement. These arguments, however, may do more to further ageism than to abolish it.

1. Early Retirement Incentives as Long-Term Detriments

It is a commonly held notion, shared by Congress, that retirement is bad for one’s physical and mental health. If this is true, early retirement incentives are a wolf in sheep’s clothing. They appear to benefit the recipients, but in the long run they inflict harm to them. It is an adverse action to give older workers an incentive that will likely shorten and worsen their lives.

Despite Congress’ views on the subject, most authorities agree that the “retirement syndrome” is a myth. Retirement may even have a beneficial effect on health, especially for those workers who do physical labor. Most early retirees enjoy retirement at least as

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62. “Noninvolvement in our society on the part of older persons leads rapidly to their physical and mental deterioration.” H.R. REP. NO. 67, 94th Cong. 1st Sess. 15 (1975) (supporting the Age Discrimination Act of 1975). Mandatory Retirement, supra note 2, at 22. “Work is important for an individual’s physical and psychological well-being.” Id. Butler, supra note 20, at 72; quoted approvingly by the Select Committee on Aging in Mandatory Retirement, supra note 2, at 22. “Men and women who are otherwise perfectly healthy sometimes develop headaches, gastrointestinal symptoms, oversleeping, irritability, nervousness and lethargy in connection with retirement.” Id. at 22.

63. R. Atchley, THE SOCIOLOGY OF RETIREMENT 108 (1976). Even Butler, supra note 20, at 72 agrees that most retirees do not suffer from “retirement syndrome.” Id. “On balance, it would appear that the negative effects of retirement have been widely exaggerated.” R. Atchley, THE SOCIOLOGY OF RETIREMENT 108 (1976). The expectation that retirement will be unpleasant and unhealthy may itself be a product of ageism.

64. R. Atchley, supra note 63, at 87. The evidence is not unmixed. There may be a positive correlation between mental illness and retirement, even if physical health improves, but this has never been proven. Id. at 107. Early retirees do have a higher mortality rate than workers of the same age, but this phenomenon can be explained by the fact that bad health often motivates early retirement. J. Gordus, LEAVING EARLY 55 (1980). There are no studies
much as they enjoyed working.\textsuperscript{66} It is indisputable that retirement leaves one more time for leisure, hobbies, the development of new interests, and family life.\textsuperscript{66} Retirement may also reduce stress and give one a greater feeling of personal autonomy. Most workers look forward to their retirements, and are happy to retire when they are financially able to do so.\textsuperscript{67}

Nevertheless, there does appear to be a correlation between unplanned early retirement and later unhappiness.\textsuperscript{68} A happy and healthy retirement evidently requires good planning, and time for mental adjustment to the idea.\textsuperscript{69} A truly free choice to retire has also been linked to happiness and good health in retirement.\textsuperscript{70} A distinction should therefore be made between early retirement incentive plans which remain constant over a long period of time, so that employees can factor them into their long-range planning, and those which come suddenly—e.g. in connection with a one-time reduction in force—and take employees by surprise. The former type of incentive may not be harmful to employees. But when employees are unexpectedly offered $10,000 to retire at the age of 55, the sudden windfall may be so tempting, plans for retirement so nonexistent, and crucial information so unavailable that the incentive will be to the employees’ ultimate detriment. The incentive will be a Siren song that tempts the employee to disaster.

Although there may be some truth to this theory, the paucity of scientific authority for it and its unabashed paternalism make it a difficult argument on which to win an age discrimination case. Moreover, the paternalistic standpoint is counterproductive to the larger battle against age discrimination. The idea that older people’s decisions need to be reviewed by the courts for their reasonableness plays into the ageist notion that older people are mental incompetents who

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on the health and happiness of recipients of early retirement incentives, as opposed to early retirees in general.

\begin{thebibliography}{9}
\bibitem{a} D. Morse, A. Dutka, & S. Gray, \textit{Life After Early Retirement} xii, 8 (1983); A. Foner & K. Schwab, \textit{Aging and Retirement} 9 (1981); D. Morse \& S. Gray, \textit{Early Retirement—Boon or Bane?} 65, 80, 85 (1980). The two Morse and Gray studies rely upon direct inquiry of retirees about how happy they are. Cognitive dissonance and the desire not to be pitied may help explain why they answered so positively, but these factors alone cannot fully explain the lopsided results of these studies.

\bibitem{b} Morse \& Gray, \textit{supra} note 2, at 4, 18.

\bibitem{c} Id.

\bibitem{d} J. Gordus, \textit{supra} note 64, at 50, 72. There is also a correlation between retirement that is not fully voluntary and unhappiness. Id. at 4. \textit{See infra} text accompanying notes 71-90.

\bibitem{e} D. Morse, A. Dutka, \& S. Gray, \textit{supra} note 65, at 135.

\bibitem{f} J. Gordus, \textit{supra} note 64, at 56. \textit{See infra} notes 71-90 and accompanying text for a discussion of the voluntariness of early retirement incentive choices.
\end{thebibliography}
should be treated as children.

An alternative theory is that the very offering of the early retirement incentive itself constitutes an adverse action against those employees who refuse it and thus fail to conform to ageist stereotypes. Those employees who refuse the incentive are worse off than they were before in a very real psychological sense. Such an employee must live with the knowledge that she has passed up a very large sum of money, and will very possibly experience times of regret about this important decision. The employee can never return to the conditions which existed before this tempting choice was set before her—she must either retire, or continue working with the knowledge that she gave up $10,000. The original pre-incentive state of innocence can never be regained. In this way, too, early retirement incentives are not benefits but detriments. This argument also has the flaw of treating older people as children who cannot live with the consequences of their own decisions.

In summary, there are ways in which early retirement incentives can be thought of as detriments rather than as benefits to those to whom they are individually offered. But the paternalism of these arguments is dangerously close to the paternalism of ageism itself. The use of such arguments would therefore be counterproductive in the fight against ageism.

2. Early Retirement Incentives As Not Fully Voluntary

Under the 1978 amendments to the ADEA, the “involuntary retirement” on the basis of age of employees between the ages of 40 and 70 is illegal, unless youth is a bona fide occupational qualification for the job. If retirement pursuant to an early retirement incentive is not truly voluntary, then it is in violation of the ADEA.

On first glance, the acceptance of early retirement incentives does not appear to raise any problems of voluntariness. No coercion is involved, and the employee is free to decide either to accept the incentive and retire early, or to refuse it and continue working. In economic jargon, the decision to accept an early retirement incentive is a Pareto gain—the employee has decided that the $10,000 is worth more than continuing in the job, and the employer has decided


72. The most recent amendment to the ADEA eliminated the ceiling of 70 years of age and prohibits age discrimination for all persons forty years of age or older. Pub. L. No. 99-592, 100 Stat. 3576, October 31, 1986.

73. A pareto gain is a transaction in which each party is better off than before. M. THOMPSON, BENEFIT-COST ANALYSIS FOR PROGRAM EVALUATION 43 (1980).
that the early retirement of an employee is worth more to it than $10,000. Each party to the transaction is better off than before, so there is no reason to suspect that the transaction was not entered into voluntarily. According to this line of reasoning, encouraging retirement with incentives is qualitatively and fundamentally different from forcing retirement through coercion. A carrot is not the same as a stick. 74

However, there are several ways in which the decision to accept an early retirement incentive can be seen to be not fully voluntary, and hence the product of an ADEA violation. 75 First is the easy case in which the employer exerts coercive pressure on the employee to accept the “incentive.” In such a case, the early retirement incentive plan does not stand on its own; it is accompanied by a clearly illegal adverse action by the employer. “[T]he underlying atmosphere is like the army joke—volunteer or else.” 76 When this is the case, there should be no doubt that the ADEA has been violated. 77 Not only employers, but unions and peer pressure may also coerce employees into accepting early retirement. 78 The implication inherent in an

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74. This conclusion is often taken for granted. In Coburn v. Pan American World Airways, 711 F.2d 339, 344 (D.C. Cir.), cert. denied, 104 S. Ct. 488 (1983), the court declared that early retirement incentives are “a humane practice well accepted by both employers and employees,” and would seem to support “not a hint of age discrimination.” In EEOC v. Chrysler Corp., 546 F. Supp. 54, 76 (E.D. Mich. 1982), aff’d, 733 F.2d 1183 (6th Cir.), reh’g denied, 738 F.2d 167 (1984), the court stated without any discussion that if the defendant’s policy of encouraging early retirement through increased fringe benefits had been “followed to the letter, no discrimination occurred.” The court in Zinger v. Blanchette, 549 F.2d 901, 905 (3d Cir.), cert. denied, 434 U.S. 1008 (1977)(result reversed by 1978 amendments to ADEA), declared that “[w]hile discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor.” Accord Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982). One commentator suggests the use of early retirement incentives precisely because they are “truly voluntary,” without discussing why. See J. FINGER, supra note 34, at 19.

75. See the EEOC’s interpretations of the ADEA, which fails to deal head-on with the issue of early retirement incentives: “Neither section 4(f)(2) nor any other provision of the [ADEA] makes it unlawful for a plan to allow individuals to elect early retirement at a specified age at their own option.” 29 C.F.R. § 1625.9(f).

76. BUTLER, supra note 20, at 70.

77. See, e.g., EEOC v. Chrysler, 546 F. Supp. 54, 69 (E.D. Mich. 1982), aff’d, 733 F.2d 1183 (6th Cir.), opinion on rehearing, 738 F.2d 167 (1984); Toussaint v. Ford Motor Co., 581 F.2d 812 (10th Cir. 1978); FINGER, supra note 34, at 103; B. SCHLIE & P. GROSSMAN, Employment Discrimination Law 519 (1983) (“If pressure, subtle or otherwise, is used to encourage ‘voluntary’ retirement, liability may result”). See also Tribble v. Westinghouse Electric Corp., 669 F.2d 1193, 1195 (8th Cir. 1982), cert. denied, 460 U.S. 1080 (1983)(early retirement taken “under protest” is not voluntary).

78. BUTLER, supra note 20, at 73 (one employee “feels that his retirement was forced but it was ostensibly voluntary; i.e. he wanted ‘to give younger men a chance.’ Now he regrets his decision.”).
early retirement incentive offer that the targeted employee is not really needed or wanted is a coercive element present in every early retirement incentive, especially when it is offered to an employee, individually, rather than as part of an ongoing plan.

When an employee does not have a reasonable expectation of job security, the effect is similar to the "volunteer or else" situation. In a reduction in force, for instance, the employee may see her choice as either accepting the incentive and retiring early, or being laid off anyway without any bonus payment. In such cases, it is irrelevant whether or not the employer has made explicit coercive threats about the consequences of not agreeing to retire early. The situation itself is coercive enough.

Even in situations where there is no hint of coercion from either the employer or the situation, the voluntariness of early retirement incentives may still be doubtful. "[D]ifferences in treatment might make early retirement so attractive, or continued employment past [an early] retirement date so onerous in comparison, as to generate the real world equivalent of mandatory retirement at that [early] date." A tempting carrot can compromise voluntariness just as

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79. See E. Heidbreder, Cancelled Careers: The Impact of Reduction-In-Force Policies of Middle-Aged Federal Employees: A Report to the Senate Special Committee on Aging 15, 31 (1972) (discussing an early retirement plan that did not contain any special incentive). In Tribble, 669 F.2d at 1195, the court held that early retirement is not taken voluntarily when the only other choice seems to be a discharge without any benefits at all. This situation should be distinguished from the situation in which an employee has already been individually chosen for a discharge on grounds other than age, and is then offered generous early retirement terms. In such a situation, the voluntariness of the early retirement is irrelevant, since the termination decision is not based on age. Sutton v. Atlantic Richfield Co., 646 F.2d 407, 410 n.4 (9th Cir. 1981); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 68 (6th Cir. 1982)(also relying on plaintiff's admission in a deposition that his choice to accept a generous early retirement plan was made "of his own free will").

80. Monroe v. United Airlines, 569 F. Supp. 645, 649 n.5 (N.D. Ill. 1983)(dictum). The court went on to say that "[i]t is clear that, in order to find a waiver of statutory protection, the court must find that the employee was free to choose between the two plans." Id. The Monroe court was discussing the setting of early "normal" retirement dates, but the same logic holds, even more strongly, to early retirement incentives. See also Sutton v. Atlantic Richfield Co., 646 F.2d 407, 410 n.4 (9th Cir. 1981), where the plaintiff argued that early retirement incentive "carrots" worked hand-in-hand with coercive "sticks." The Sutton court did not reach this argument.

In the words of another court, "[r]ealistically, an employee's decision whether or not to forego lucrative benefits funded in part by employer contributions he would not otherwise receive, is not 'voluntary' in the sense we think it would have to be in order to find a waiver of statutory protection." McMann v. United Air Lines, 542 F.2d 217 (4th Cir. 1976). Although this decision was reversed, on other grounds, in 434 U.S. 192 (1978), Congress vindicated the Fourth Circuit's decision by enacting the 1978 ADEA amendments. See also Campbell v. Connelle, 542 F. Supp. 275 (N.D.N.Y. 1982)(employee who "freely" chose a retirement plan that offered greater benefits but forced retirement at age 55 over a plan that offered lesser benefits but allowed retirement at age 70 has not waived his ADEA right not to be retired.
much as can a threatening stick. No one would argue that a school-teacher had a realistic choice to refuse the offer of a million-dollar early retirement incentive, and no one would argue that a high-paid executive had no choice but to accept a hundred-dollar one. The question is where to draw the line, and the courts are competent to make such a determination. If a reasonable person in the employee’s position would not be able to resist a $10,000 windfall, then that early retirement incentive should be considered to be involuntary, and in violation of the ADEA.

It is not just the size of the incentive which determines its voluntariness; the nature of the job is also crucial. A relatively smaller incentive might be irresistible if the job is especially unpleasant, and a relatively larger incentive might be easy to turn down if the job is a highly desirable one. Employees who accept an early retirement incentive in part because of “job dissatisfaction [and] a perceived lack of employment-related rewards” do not make a truly voluntary decision. The employer has just as much power over the relative attractiveness of continued employment as it has over the relative attractiveness of the monetary incentive. The attractiveness of continued employment should be factored into any analysis of whether an early retirement incentive is too good to voluntarily refuse.

The most significant evidence in any such determination will be what percentage of the employees pass up the incentive. If even one employee refuses the incentive, that will be powerful evidence that there was no real-world equivalent of mandatory retirement. On the other hand, if every single employee of a large sample accepts the

early, where the choice was made before the ADEA covered that employee). Contra, Bouffier v. Frank, 389 F. Supp. 502, 505 (E.D.N.Y. 1975) (decided before the 1978 ADEA amendments). The 1978 amendments to the ADEA prohibit mandatory early retirement pursuant to a pension plan even though most pension plans are entered into in an ostensibly voluntary way.

An incentive need not be “the real-world equivalent of mandatory retirement” for it to be in violation of 29 U.S.C. § 623(f)(2) (1982). This section forbids “involuntary retirement” (emphasis added) which might be construed to mean any retirement which is not fully voluntary in the narrowest sense of the word. Thus, the strict requirements for the doctrine of constructive discharge need not be met for a retirement to be illegally involuntary. See, B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 611 (1983) for a discussion of the constructive discharge doctrine.

82. Id.
83. J. Gordus, supra note 64, at 4. These employees were also less likely to enjoy their retirement.
84. Id. at 34.
85. See supra note 70 and accompanying text. One of the conditions of continued employment will always be the unpleasant nagging knowledge that a valuable financial opportunity has been passed up.
incentive, that will be evidence that the incentive was for all practical purposes impossible to refuse. It should be remembered, however, that the statute does not just ban “mandatory” retirements, but all “involuntary” retirements. Some retirements may be “involuntary” even if they are not quite mandatory.

Although this argument is couched in terms of the voluntariness of the recipient’s decision, it is not really concerned with the recipient’s rights. From the recipient’s point of view, the more generous the incentive is, the better it is. But from the point of view of the voluntariness argument, the more generous the incentive is, the worse it is. The argument that early retirement incentives are not truly voluntary if they are overly attractive thus boils down to a doctrinal, statutory means to accomplish the independently-valid policy goal of abolishing early retirement incentives. The real policy concern is not whether the recipients’ free will is impaired, but whether early retirement incentives foster ageism, or hurt the economy, or discriminate against those who are ineligible to receive the incentive.

If early retirement incentives were held to be illegal because involuntary, it would not be the first time in the law that incentives were recognized as being inherently coercive. There are many instances where courts have equated the carrot with the stick. Under the National Labor Relations Act, it has been held that an employer who promises a shorter workweek and higher wages if the union loses the certification election is unfairly coercing its employees. Any time the law imposes a limit upon the workings of a “free” market, it is forbidding a seeming Pareto gain, either because one party is really being disadvantaged or because the public interest is being harmed. One person’s “incentive” is another person’s “bribe,” and the law constantly distinguishes between the two. The intent of an employer who offers an early retirement incentive is to reduce the number of older workers, and since this goal is contrary to Con-

87. Darby Cadillac, 169 N.L.R.B. 315 (1968). Cf. NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964)(granting benefits to employees shortly before a certification election is a "fist inside the velvet glove" which impinges upon the employees' freedom of choice, since there is always an implied threat that the employer will not be so generous if the union wins).
88. See supra note 38 and accompanying text. Similarly, an employer would be barred from giving an “incentive” to female employees who agree “voluntarily” to submit to sexual relations, even if there is no implied threat of any adverse action if the employee refuses. 29 C.F.R. § 1604.11(a)(1985). It is true that part of the reason for this rule is to avoid the risk of an obnoxiously sexist work atmosphere. But early retirement incentives analogously raise the risk of an obnoxiously ageist work atmosphere (though the analogy is admittedly inexact.)
89. If this were not the employer’s intent, less discriminatory means of achieving its goals would always be available. See infra notes 164-187 and accompanying text.
gress' intent in enacting the ADEA, early retirement incentives should be treated more like bribes to circumvent the law than like incentives to do a harmless thing.

Even if by any of the above arguments early retirement incentives are seen to be not fully voluntary, it does not necessarily follow, by sheer logic alone, that they should be prohibited. It is in the very nature of free will that all choice is structured to a greater or lesser extent. All decisions are made in the context of a real world which makes some choices more attractive than others. Despite the language of the statute, the question is not whether early retirement incentive decisions are completely and utterly "free" in some abstract sense; rather, the question is whether these decisions are free enough. Courts have broad leeway to answer this question, and their judgment will be made on the basis of intuitive feelings about the meaning of the ADEA, and the facts of the particular case.90

As with the question of whether early retirement is really a benefit or a detriment to the employee, the problem arises of whether the courts should decide whether or not an older person's decision is truly voluntary. This paternalism smacks of the very ageism sought to be eliminated. Although there may be some merit in the argument that early retirement incentives can never be truly voluntary, the paternalism involved in this view, and the strange way in which more attractive incentives are treated as being somehow worse for the recipients, make it a problematical point of view on which to rely.

C. Early Retirement Incentives As Adverse Actions Towards Younger Employees

The ADEA protects all employees aged 40 and above.91 If an early retirement incentive is offered only to those employees who are 55 years old, and if an early retirement incentive is indeed a benefit,92 then employees who are between the ages of 40 and 55 may have a cause of action, since they are being denied a benefit solely on the basis of their age.93

90. Insofar as a court holds that an early retirement incentive is involuntary within the meaning of 29 U.S.C. § 623(f)(2)(1982), the exception contained in 29 U.S.C. § 631(c)(1982) may apply. That section permits the compulsory retirement of 65-year-olds who are bona fide executives or high policymakers and who are entitled to pensions of at least $27,000.


92. See supra notes 62-69 and accompanying text.

93. Employees under the age of 40 are similarly aggrieved, but they have no cause of action under the ADEA or any other federal statute. About half the states have statutes which protect employees under the age of 40 as well. 8A LABOR REL. REP. (BNA)(Fair Employment Practices Manual) 451:102-451:104. However, insofar as the early retirement incentive is part
Such an action may seem counterintuitive at first. The ADEA’s purpose is to “promote the employment of older workers .... 1194 It seems strange to allow people to sue under this statute because they are too young to receive a particular benefit, even if they are within the age group protected by the statute.

Rock v. Massachusetts Commission Against Discrimination95 is the only reported case that squarely faces this issue. In Rock, an employer offered extracontractual early retirement benefits to former employees who had been over the age of 55 when their plant was closed. The employer did not offer such benefits to similarly situated employees who were between the ages of 40 and 55. The court held that this did not violate age discrimination law.96 The court reasoned that the purpose of age discrimination law is to help older workers who are “being discarded for younger, more vigorous men and women,” not the other way around, and called its interpretation of the law “common sense and practical.”97 The agency decision which the Rock court upheld summarized this doctrine nicely. Once past the age of 40, reasoned the Massachusetts Commission Against Discrimination,

a person is protected from disparate treatment that favors younger workers. One is not, however, . . . entitled to benefits or privileges equal to those afforded older workers. Expressed in the vernacular, the statutory scheme is a “one-way street” that protects older workers from discrimination in favor of younger ones, but not vice-versa.98

96. The court was interpreting Massachusetts age discrimination law (MASS. GEN. LAWS ANN. ch. 151B § 4(1)), but this statute is directly analogous to the ADEA in all relevant respects. 424 N.E.2d at 244 (1981).
97. 424 N.E.2d at 246-47. The court also relied on three other reasons for its holding, none of which are very convincing. First, it held that no harm was done to the younger employees just because a gratuitous gift was given to some older employees. Id. at 247. But any favorable treatment denied only to members of a protected class can be excused in this way. Second, the court held that since it is a violation of the law for 55-year-olds to be replaced by 40-year-olds, 40-year-olds are not as protected under the law as 55-year-olds are. Id. at 248. The logic of this reasoning is difficult to discern, since whether the hiring of 40-year-olds can be a part of a 55-year-old’s grievance is a totally separate issue from whether 40-year-olds can have grievances of their own. Finally, the court holds that the employer’s action was based on the legitimate, nondiscriminatory purpose of pleasing the union. Id. But any discriminatory action which favors workers whom the union also happens to favor would be excused by this reasoning.

Portions of the legislative history of the ADEA support the proposition that the statutory scheme is a “one-way street.” The Secretary of Labor’s 1965 report to Congress described the age discrimination problem entirely in terms of misconceptions about the abilities of older workers, not in terms of the evils of age classifications per se.99 When President Johnson recommended the ADEA to Congress, he stressed the obvious fact that age discrimination intensifies as employees grow older.100 Such concerns lead to the conclusion that favoring the old over the young is not the equivalent of favoring the young over the old.

The ADEA itself permits an employer to “observe the terms of a bona fide seniority system,” which by its nature favors older workers over younger ones.101 Seniority systems are based upon years of service rather than on age per se, and so early retirement incentives do not fall within this provision. The seniority system exception does, however, show some Congressional willingness to allow older employees to be treated more favorably than younger ones.

Congress’ willingness to allow retirement benefits to vest only after an employee has several years of service102 is further evidence

Rock v. MCAD, supra note 95. Three Wage and Hour Opinion Letters support the Massachusetts Commission Against Discrimination position. The Department of Labor had jurisdiction over the ADEA before 1979, when jurisdiction was transferred to the EEOC. When the Department of Labor had jurisdiction, interpretive opinions were issued by the Wage-Hour Administrator. Opinion letter 451 advises that a severance pay plan under which employees with equal years of service received different amounts of severance pay depending on their age at termination did not violate the ADEA as long as the older workers received greater, not lesser, payments. “The purpose of the ADEA is to protect the older worker from employment practices which discriminate against him [sic] in favor of younger workers,” not the other way around. Wage & Hour Opinion Letter (BNA(WH-451)(1978), abstracted in EPD (CCH) para. 618.82, quoted in Rock, supra note 98, at 1280 ["[sic] added by Rock]. Opinion Letter 389 advises that it is permissible for older employees to be placed in preferred classifications, as long as the classifications are reasonable and the older employees are not forced into those classifications against their will. The law “is designed to preclude adverse treatment based on age, and not some additional benefit which will subsequently be available to all other workers when they reach the age of 55.” Wage & Hour Opinion Letter (BNA)(WH-389)(1976), abstracted in EPD (CCH) para. 496.141, as quoted in Rock, supra note 98, at 1280 (misciting the letter as WH-339). Letter 419 advises that it is permissible to excuse employees above a specified age from certain undesirable work assignments if they so desire. Wage & Hour Opinion Letter (BNA) (WH-419)(1977), abstracted in EPD (CCH) para. 496.14, cited in Rock, supra 98, at 1281.

99. The Older American Worker, supra note 16.
100. Lyndon B. Johnson, Pub Papers, Book 1 at 37 (1967).
102. 29 U.S.C. § 1053(1982). Although ERISA is subject to the ADEA, 29 U.S.C. § 1144(d)(1982), these aspects of ERISA have never been challenged under that statute.
of its intent to allow older employees to enjoy retirement-related benefits for which younger employees must wait.\textsuperscript{103}

Despite the above arguments, there are also some powerful arguments for the position that the ADEA is a "two-way street" in which 40-year-olds do have a cause of action if they are denied the early retirement incentives offered to 55-year-olds. The EEOC's official interpretations of the ADEA, following the Department of Labor's old regulations, strongly support the "two-way street" position. The EEOC declares that "if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down \textit{either one} on the basis of age, but must make such decision on the basis of some other factor."\textsuperscript{104} The EEOC also would forbid employers from advertising for employees "over 65" or "retired," since this would "discriminate against others within the protected group."\textsuperscript{105} Although there are no cases where the court has turned to these interpretations, they make sense and are entitled to deference by the courts.\textsuperscript{106}

There is legislative history in support of the EEOC interpretations. Senator Yarborough, the floor manager of the ADEA in the Senate, stated that if a 42-year-old and a 55-year-old were applying for the same job, neither one could be turned down on the basis of age.\textsuperscript{107} One district court case, in dictum, also supports the EEOC.

\begin{itemize}
\item \textsuperscript{103} Several courts, without being faced with this issue, have implicitly assumed that the ADEA only protects employees from discriminatory actions taken against them because they are too old, not because they are too young. In Loeb v. Texton, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979), the First Circuit admits that an employee who is replaced by an older person may have an ADEA action, but only because "[t]he older replacement could have been hired...[merely] to ward off a threatened discrimination suit." It does not occur to the court that replacement by an older person on the basis of age is in itself a cause of action. Smith v. World Book-Childcraft Int'l., 502 F. Supp. 96 (N.D. Ill., 1980) is a similar case. \textit{See also} Moore v. Sears, Roebuck and Co., 464 F. Supp. 357 (N.D. Ca. 1979)(plaintiff has a cause of action if replacement is younger than plaintiff).
\item \textsuperscript{104} 29 C.F.R. § 1625.2(a)(1986)(emphasis added); \textit{accord} 29 C.F.R. § 860.91(b) (1985).
\item \textsuperscript{105} 29 C.F.R. § 1625.4(a)(1986).
\item \textsuperscript{107} 113 CONG. REC. 31,255 (1967).
\end{itemize}
In *Hays v. Republic Steel Corp.*,\(^{108}\) in dictum, the court stated that “there can be [illegal] discrimination if you favor a fifty-three year old over a forty-four year old, if based on age.” In a 1969 opinion, the Acting Wage-Hour Administrator advised that a specification in a want ad for applicants over the age of 50 was illegal, since the ADEA prohibits “discrimination against anyone within the protected group.”\(^{109}\) In a 1971 opinion, the Administrator ruled that an employment agency may not refuse to help people below the age of 55, since it is unfair to give preference to “one group of ‘older’ workers over another group which is equally entitled to the protection of the law.”\(^{110}\)

An analogy to Title VII also supports the EEOC’s “two-way street” interpretation of the ADEA. An employer would not be able to favor darker skinned Blacks over lighter skinned Blacks, even though the former may be more subject to discrimination than the latter. Similarly, an employer should not be able to favor older over-40-year-olds over younger over-40-year-olds simply because the former are more a part of the protected group than the latter, and suffer more severe discrimination. Admittedly, this analogy is inexact. Lighter-skinned Blacks do not become darker-skinned Blacks and 40-year-olds become 55-year-olds. Unlike race, age is a progressive condition, and so it makes sense to treat age on a sliding scale in a way that does not make sense for race. Those who do not receive incentives because they are too young need only to wait a few years. Nevertheless, unless an early retirement incentive is part of an ongo-

\(^{108}\) 12 Fair Empl. Prac. Case (BNA) 1640, 1647 (N.D. Ala.1974), aff'd in part and rev'd in part on other grounds, 531 F.2d 1307 (5th Cir. 1978). The count went on to note, however, that the fact that a younger person is not being favored over an older person is evidence that age was not the motivating factor behind the employer's decision. *Id.* at 1647.


\(^{110}\) Wage & Hour Opinion Letter (WH-113), Jan. 19, 1971, reprinted in 8 Lab. Rel. Rep. (BNA) 401:5232.(Date). These opinion letters antedate the ones cited for the contrary position in *supra* note 98. Two State law cases also implicitly subscribe to the “two-way street” model. In McLean Trucking Co. v. State Human Rights Appeal Board, 80 A.D.2d 809, 437 N.Y.S.2d 309 (1st Dept. 1981), *appeal dismissed*, 53 N.Y.2d 103, 425 N.E.2d 885, 442 N.Y.S.2d 29 (1981), the court upheld the claim of a 23-year-old who was not hired because he was below the minimum age of 24, without explaining why this constitutes a claim or discussing the merits of this aspect of the case. In Ogdens DBA Lucille's Hair Care v. Bureau of Labor; 68 Or. App. 235, 682 P.2d 802, 37 CCH EPD ¶35, 405 (1984), *aff'd*, 229 Or. 98, 699 P.2d (Or. 1985), 37 CCH EPD ¶35, 40 (1985), the court held that under the plain language of Oregon's antidiscrimination statute it is illegal to discriminate against an applicant because she is too young for the job. This issue was not litigated on appeal. Both the New York and Oregon statutes protect all those between the ages of 18 and 40, in addition to those 40 and older.
ing plan, and unless there is substantial job security, there is no reason to think that younger workers will eventually receive the benefit if they are only willing to wait long enough. If the incentive is offered as part of a one-time reduction in force, or if there is substantial employee turnover at the relevant ages, the progressivity of age does the 40-year-old employee little good.

The most convincing reason to support the two-way street theory is that it makes it possible to eliminate all unnecessary age classifications from unemployment decisions, regardless of who appears to be benefitted by them. The elimination of unnecessary age classifications would help eliminate ageist ways of thinking and the discrimination which results from such thinking. It would also foster individualized, merit-based employment decisions, rather than group decisions based on arbitrary classifications.111

Even though the EEOC does subscribe to the “two-way street” interpretation of the ADEA, that agency leaves a loophole which may allow for favoritism towards older workers in many situations. In an interpretation that has not yet been cited by any court, the EEOC states, under the heading “discrimination between individuals protected by the [ADEA],”112

the extension of additional benefits, such as increased severance pay, to older employees within the protected age bracket may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination.113

Since age discrimination worsens as the individual grows older,114 favored treatment to departing older workers can often be justified by this rationale of counteracting problems related to age discrimination, despite the two-way street rule.115 But this loophole for favor-
itism towards older employees does not apply to early retirement incentives. Fifty-five-year-olds are not offered early retirement incentives in order to counteract problems related to age discrimination; they are offered incentives so that they will leave their jobs. It is only because they will leave their jobs that any problems related to age discrimination may arise for these employees (i.e. if they try to find work elsewhere). Early retirement benefits create age discrimination problems; they don't counteract them. The EEOC regulations allow special benefits for older employees who are leaving their job for some independent reason. It has no relevance to the situation where additional benefits are given to older employees precisely in order to encourage them to retire. Despite the regulations, the EEOC's vision of the ADEA has no room for early retirement incentives which are not offered to protected employees because they are too young.

It is impossible to choose between the one-way street and the two-way street approaches in an a priori way. The fundamental nature of the ADEA must be examined, and basic policy choices must be made. If the ADEA is essentially a way of helping older people vis-a-vis younger people, then the one-way street theory of Rock v. MCAD should prevail, and early retirement incentives should withstand attack from those whose grievance is that they are too young to receive them. If on the other hand the ADEA has the broader purpose of fostering merit-based employment decisions by eliminating age as a legitimate classification, then the EEOC's two-way street theory should prevail, and all early retirement incentives which are not offered to forty-year-olds should be struck down. Which vision of the ADEA is most in tune with Congressional intent and which would be most beneficial to older people and for society are debatable issues. It is largely a matter of choosing either the short-term protection of older individuals, or the long-term elimination of ageist thinking from the world of employment. The debate cannot be avoided if early retirement incentives are vigorously challenged in the courts.

appears to contemplate a case-by-case analysis of whether the extra benefits to older employees will counteract age discrimination. For example, an employer would probably not be justified in giving additional severance pay to 60-year-olds if those 60-year-olds had valuable skills that were in such demand in the marketplace that age discrimination would be less likely to hinder their search for substitute employment. Because of its case-by-case, functional approach, 29 C.F.R. § 1625.2(b)(1983) does not adopt the “one-way street” theory, even in its practical effect.

D. Early Retirement Incentives As Adverse Actions Towards Older Employees

The most obvious way in which early retirement incentives violate the ADEA is that they are offered to 55-year-olds but not to 65-year-olds. Some people are not offered incentives precisely because they are too old. Just as an employer would not be allowed to deny 65-year-old employees a ten thousand dollar bonus that younger employees receive as a bonus for their youth, an employer should not be allowed to deny 65-year-old employees a $10,000 early retirement incentive simply because they are too old.

This argument is especially compelling when the early retirement incentive is offered by the employer only once, as a one-time method of reducing the size of a workforce. In such cases, the employee who is too old to receive the incentive never had an opportunity to receive one. The terms and conditions of the older worker's employment are thus clearly inferior to the terms and conditions of a younger worker's employment.

The argument is more difficult to make, however, when the employer has a continuing early retirement incentive plan which is offered each year to all employees who turn 55 years old in that year. When this is the case, the employer may quite convincingly argue that those employees who are too old to receive the incentive have already had their opportunity to receive one, but have freely chosen to pass it up. All employees have the same terms and conditions of employment—they may choose to retire at age 55 with $10,000 extra, or they may choose to work longer without any such bonus. Older workers in such a situation are not being discriminated against because of their age per se, but rather because of their voluntary decisions to pass up an opportunity. Far from being discrimination, it is simple fairness to make an employee adhere to the consequences of her own fully-informed choice. The ADEA is not meant to, and should not, protect employees from the fact that time passes and cannot be recaptured. There is no law against making decisions

117. See supra note 6 and accompanying excerpts of the early retirement incentive plans.
118. 29 U.S.C. § 623(a)(1)(1983) states that "[i]t shall be unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."
119. Another way of expressing this thought is to say that all older employees are not harmed by their inability to receive early retirement incentives; only those employees who want to reverse their previous decisions are harmed.
irreversible\textsuperscript{120} and to say that older people should not be bound by their previous choices smacks of the ageist assumption that older people are mentally incompetent and must be treated as children. Age discrimination law should be used in such a way as to eliminate such stereotypes, not to further them.\textsuperscript{121}

It may be concluded that those employees who have passed up the offer of an early retirement incentive should not be heard to complain of age discrimination when they no longer have the opportunity to receive the incentive. However, any employee who never had such an opportunity has a very strong claim of age discrimination if she is not eligible to receive one because of age.\textsuperscript{122}

III. Affirmative Defenses Under the ADEA

Once a court decides, on the basis of one or more of the theories discussed above, that an early retirement incentive plan is a prima facie violation of the ADEA, the employer may raise one or more affirmative defenses. If any defense is successful, the early retirement incentive will be upheld.

There are three defenses which may be applicable to early retirement incentives. The employer may argue that it is only following a bona fide employee benefit plan, and so it is protected by the statutory exception of section 623(f)(2) of the ADEA. The employer may argue that its decision was based on a reasonable factor other than age, and so it is protected by section 623(f)(1) of the ADEA. Lastly, he may claim that the granting of early retirement incentives is necessary to make room for women and minorities to avoid Title VII liability. As the following discussion will suggest, these defenses cannot justify early retirement incentives.

A. Early Retirement Incentives Are Not Bona Fide Employee

\textsuperscript{120} See EEOC v. Air Line Pilots' Assoc., 661 F.2d 90 (8th Cir. 1981) (discrimination in favor of early retirees in regard to vacation benefits is legal, as long as all employees had the chance to retire early with the same terms). See infra note 165 and accompanying text for a refutation of the argument that discrimination against people who are too old to be eligible for the incentive is justified by the employer's desire to create an incentive to retire quickly.

\textsuperscript{121} See supra text accompanying notes 62-70.

\textsuperscript{122} Even if an employer has offered early retirement incentives for the past hundred years, an employee may still complain of age discrimination if she was hired when she was too old to ever receive one. But one court has held that even those employees who never had an opportunity to receive an incentive do not have a valid claim of age discrimination. Patterson v. Independent School Dist., 742 F.2d 465, 468 (8th Cir. 1984). See also Cipriano v. Bd. of Educ., 785 F.2d 51 (2d Cir. 1986), 40 Fair Empl. Prac. Cas. (BNA) 355,356 n.2 (1986). However, this holding relies upon the case's chief holding, criticized infra text accompanying notes 144-161, that early retirement incentives are exempt from the ADEA.
Benefit Plans

Section 623(f)(2) of the ADEA states that “[i]t shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act.” The only reported cases which deal directly with the legality of early retirement incentives under the ADEA hold that such incentives fall under this exception to ADEA coverage, and are therefore legal. These holdings display a fundamental misunderstanding of the bona fide employee benefit plan exception.

1. The Purpose and Mechanics of the Exception

In order to understand why the bona fide employee benefit plan exception should not apply to early retirement incentives, one must first understand what that exception was meant to accomplish. Section 623(f)(2) was not meant to weaken the ADEA’s policy of encouraging the employment of older people; rather, it was meant to strengthen it. There is no good reason to interpret this section in such a way as to allow employers to rid themselves of older workers.

Congress’ intent in passing the bona fide employee plan exception was to prevent the employment of older workers from becoming prohibitively expensive, and thus to foster the broader goal of keeping older people in the work force. The House Committee on Education and Labor stated, “this exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans.” Senator Javits agreed that the exception prevents employers from being “discouraged from hiring older workers because of the increased costs involved in providing certain types of

123. 29 U.S.C. § 623(f)(2)(1982). This section concludes, “except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . plan shall require or permit the involuntary retirement of any individual [between 40 and 70 year of age].”
124. See Golden v. N.Y. State Employees’ Retirement System, N.Y. State Div. of Human Rights Case No. 5A-E-A-83-88907A (August 3, 1983)(unreported decision), and Phelps-Clifton Springs Faculty Assoc. v. Phelps-Clifton Springs CSD, unreported declaratory opinion of General Counsel of N.Y. State Div. of Human Rights. See also Patterson, 742 F.2d at 465; Cipriano 785 F.2d at 51. Cipriano, leaves open the possibility that early retirement leaves may be unlawful if the employer is unable to show that they are not subterfuges to evade the purposes of ADEA.
benefits to them."\textsuperscript{127}

For example, section 623(f)(2) was meant to allow employers to offer lesser (or more expensive) medical insurance plans to older employees, since these plans cost much more to provide to such employees. To give another example, the exception should be interpreted to allow employers to give smaller pensions to workers who were hired at an older age, since employers have less time to set aside money for pensions for such workers. But by no means should the bona fide employee benefit plan exception be interpreted so as to allow employers to discourage the employment of older workers by providing them with expensive incentives to retire which the employer does not give to younger workers. This is just the opposite of what Congress wanted to do—to encourage the employment of older workers by allowing employers to give them lesser benefits than younger workers receive. Such an interpretation would subvert Congress’ intent, and more importantly, it would undermine the worthy policy goals of the ADEA.\textsuperscript{128} An early retirement incentive is an employee benefit which is **"a subterfuge to evade the purposes of [the ADEA],"** and not **"bona fide."**\textsuperscript{129}

Despite Congress’ clear intent that section 623(f)(2) be used to further the broader purposes of the ADEA rather than to undermine them, the United States Supreme Court, in United Air Lines v. McMann,\textsuperscript{130} held that this section allowed the involuntary early retirement of employees pursuant to a pension plan. Congress promptly overrode the Supreme Court’s misinterpretation of the exception by passing the 1978 amendments to the ADEA.\textsuperscript{131} Once again, the legislative history makes clear that the exception’s sole purpose is to keep older people in the work force, not to guide them out of it.\textsuperscript{132}

Of course, the employee benefit plan exception does not allow employers to reduce **all** the benefits of older workers. Even though reducing all fringe benefits to older employees would serve the pur-

\begin{itemize}
\item \textsuperscript{127} S. REP. No. 723, 90th Cong., 1st Sess. 14 (1967) (individual views of Mr. Javits); see also 113 CONG. REC. 31255 (1967) (remarks of Sen. Javits).
\item \textsuperscript{128} See supra notes 48-52 for a discussion on why the ADEA’s policies deserve broad and vigorous enforcement.
\item \textsuperscript{129} 29 U.S.C. § 623(f)(2)(1982).
\item \textsuperscript{130} 434 U.S. 192(1977).
\item \textsuperscript{131} Act of April 6, 1978, Pub. L. No. 95-256, 92 Stat. 189, Sec. 2(a). Section 4(f)(2) of the [ADEA] is amended by inserting after “individual” a comma and the following: “and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual. . . because of the age of such individual.”
\end{itemize}
pose of encouraging employers to employ older people, it would negate the basic anti-discrimination principle which forbids discrimination against "any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." It would be "a subterfuge to evade the purposes of [the ADEA]." An employer cannot give lesser benefits to older people just because of their age. Some correlation between age and the cost of the benefit must be shown to qualify for the exemption. If the benefit, for example, medical insurance, costs more to provide to older people than to younger people, then it is fair to allow the employer to give less of that benefit to older people. Otherwise, older workers would be more expensive to employ than similarly situated younger workers. This is the situation that the employee benefit plan exception is meant to handle. But if the benefit, for example, a fixed lump-sum payment, costs the same whether it is provided to older people or to younger people, then it would be rank discrimination, and a subterfuge of the ADEA, to allow the employer to give it only to younger workers. Any construction of the exception which would allow all discriminatory employment benefits to be considered "bona fide employment benefit plans," regardless of the cost basis of their discriminatory effects, would swallow up the antidiscriminatory essence of the ADEA. Employers would, for example, be permitted to cut older workers' wages, or to increase younger employees' wages, thus subverting the entire statute.

Congress, the Department of Labor, and the courts have all recognized that in order to give content to the anti-subterfuge clause of section 623(f)(2), actuarial cost data must underlie any application of the employee benefit plan exception. Congressperson Hawkins stated that the exception "encourage[s] the employment of older workers by permitting age-based variations in benefits where the cost of providing the benefits to older workers is substantially higher." Congressperson Pepper noted that any reduction in employee benefits under the exception must have "full economic justification."

The Department of Labor's interpretations state:

[The legislative history [of section 623(f)(2)] indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considera-

tions. Accordingly, section [623](f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section [623](f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.¹³⁷

The Ninth Circuit Court has chosen to follow these regulations, noting that “Congress . . . meant to encourage the hiring of older workers by relieving employers of the duty to provide them with equal benefits—where equal benefits would be more costly for older workers.”¹³⁸ Since “severance pay costs no more for a newly hired older worker than for his or her younger counterpart,” the court held that this benefit cannot be denied to older workers.¹³⁹

Some courts have interpreted the word “plan” in the phrase “employee benefit plan” as meaning something like the complex, heavily-regulated plans which many employers have for pension and insurance purposes. Anything short of this is merely an ordinary fringe benefit, which must be given equally to all employees regardless of age. This interpretation is supported by the statute itself, which gives the examples of “retirement, pension, or insurance plan[s].”¹⁴⁰ Since such plans all base any age discrimination upon actuarial cost considerations, this amounts to another way of phrasing the requirement that the bona fide employee benefit plan exception only be used to counterbalance higher costs for older workers. The Fifth Circuit Court, evidently with pension plans in mind, has held that only those fringe benefits which are part of “a specific and established ‘benefit plan’ are covered” by the exception.¹⁴¹ For this

¹³⁷. 29 C.F.R. § 860.120(a)(1)(1983).
¹³⁸. EEOC v. Borden’s, Inc., 724 F.2d 1390, 1396 (9th Cir. 1984). See also Cowlishaw v. Armstrong Rubber Co., 450 F. Supp. 148, 153 (E.D.N.Y. 1978) (§ 623(f)(2) is not meant to allow employers to cut payroll costs at older workers’ expense without actuarial justification).
¹³⁹. EEOC v. Borden’s Inc., 724 F.2d at 1396. For a discussion of the Second Circuit’s interpretation of these regulations in Cipriano, see infra notes 144-161 and accompanying text.
reason, it struck down an employer’s policy of paying accrued sick leave benefits only to those employees hired before the age of 50. This “simple fringe benefit,” which would not have cost the employer any more to give to older-hired workers than to younger-hired workers, could not be administered in a discriminatory way under the ADEA. Similarly, the Third Circuit Court has held that lump-sum severance pay which lacks an “age-based cost factor” is “functionally independent” from a retirement plan, and so it may not be denied to older workers under section 623(f)(2).

In sum, the bona fide employee plan exception is meant to encourage the employment of older workers, not to discourage it, and it only protects those plans which are based on age-related cost factors. This section cannot be read to embrace early retirement incentive plans, which discourage the employment of older workers by offering them extra money, without undermining the whole ADEA. An early retirement incentive plan is no more of a bona fide benefit plan than would be a plan which mandated different wage scales for older people.

2. The Patterson and Cipriano Decisions

With this understanding of the applicability of a bona fide employee benefit plan exception, it is now possible to examine the two reported decisions which apply this exception to an early retirement incentive plan. Patterson v. Independent School District #709142 is the only reported case which reaches a conclusion regarding the legality of early retirement incentives under the ADEA. Through a combination of self-contradiction, confused reasoning, and reliance on irrelevant case law, the Eighth Circuit Court holds that early retirement incentives do fall under the section 623(f)(2) exception to the ADEA.143 Cipriano v. Board of Education, though perhaps better reasoned, holds that early retirement incentives are bona fide retirement plans, but does not reach the crucial question of whether they are a subterfuge to avoid the purposes of the ADEA.

The Patterson court does not deny that the bona fide employee

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142. Id. at 1271-72.
144. 742 F.2d 465 (8th Cir. 1984).
145. Id. at 468-69.
146. 785 F.2d 51, 40 Fair Empl. Prac. Cas. (BNA) 355 (2d Cir. 1986).
benefit plan exception is limited to cases in which "consideration of age is an actuarial necessity in order to attain fairness in computing benefits;" in fact, it seems to affirm this basic principle. Nor does the Patterson court dispute the proposition that a "separate and independent fringe benefit . . . is not exempt as part of an unrelated retirement or pension plan;" in fact, it defends the Fifth Circuit Court holding discussed above. Instead of disputing the established law on section 623(f)(2), the court restates it on one page and then completely forgets it on the next, thus arriving at a contradictory conclusion. After stating the rules, the court neglects to apply them one way or another. Only through such neglect of the actuarial necessity principle is the court able to hold that early retirement incentives are exempted from the ADEA by the employee benefit plan exception.

The only support which the court gives for its holding is a citation to the McMann case, which Congress overrode, and a discussion of an irrelevant Fifth Circuit Court case, Mason v. Lister. In Mason, the plaintiff challenged a federal retirement plan which allowed early retirement without any incentives during a reduction in force. No benefit outside of the basic retirement plan was involved, and the court upheld the plan. It is difficult to see how the Patterson court considered Mason to support the legality of early retirement incentives, which are a benefit independent of the basic retirement plan.

147. Id. at 467 (qualifying this statement with an unexplained "perhaps").
148. Id. In a footnote, (n.3, at 467), the court champions Alford, supra note 141 but criticizes Borden's, (supra note 138). The court distinguishes these two cases from each other by noting that in Alford the fringe benefit was granted to those eligible for retirement, and in Borden's it was granted to those ineligible for retirement. The court reasoned that the Borden's benefit may be interpreted as an "integrated feature" of a retirement plan, compensating ineligible employees for missing out on retirement benefits. It is unclear how this makes the benefit more integrated with the pension plan than if the benefit went to the employees who were eligible for retirement. Regardless of how convincing the court's logic is on this point, the early retirement incentive is clearly analogous to the Alford case, since it is paid only to those employees who are already eligible for retirement benefits. Since the court defends Alford, which holds that § 623(f)(2) does not apply, one would think that it would hold that the early retirement incentive is not an integrated part of a retirement plan, and thus not covered by the bona fide employee benefit plan defense.
149. Id. at .
150. See supra notes 130 and 131 and accompanying text.
151. 562 F.2d 343 (5th Cir. 1977).
152. Insofar as the Mason retirement plan allowed early retirement without actuarially reducing pension payments, that plan was admittedly not perfectly based upon cost factors. But no plan is perfectly cost-based in every detail. The point here is that the plan in Mason was basically a conventional retirement plan. Early retirees were paid less per month in pension benefits than older retirees, since they could be expected to live longer. The early retire-
It must be concluded that although Patterson is the only reported case which arrives at a conclusion concerning the legality of early retirement incentives, it should be accorded little precedential value. It is badly reasoned and self-contradictory. There is nothing in the opinion which would distinguish the case from one in which an employer had a “plan” in which all older workers were forced to take a ten percent cut in pay or all younger workers were given a ten percent bonus in pay. If the court had used the tests which it says are to be used, it would have held that early retirement incentives are not protected by the section 623(f)(2) exception, since: (a) the age discrimination which they involve is not based on cost factors, since a lump-sum payment costs the employer the same amount to give to employees of all ages, and (b) they are separate fringe benefits independent of the retirement plan. If the court had been consistent, it would not have come to the perverse result that a plan whose sole purpose is to reduce the number of older workers is excused under an exception meant to encourage the employment of older workers.\[153]\n
Cipriano v. Board of Education is the only other reported case which discusses the applicability of the bona fide retirement plan exception to early retirement incentives.\[154]\n
Cipriano holds that early retirement incentives are bona fide retirement plans within the meaning of section 623(f)(2) of the ADEA, but leaves open the question of whether they are subterfuges to evade the purposes of the ADEA within the meaning of that same section.\[155]\n
Therefore, it does

\[153]\n
Cipriano v. Board of Education is the only other reported case which discusses the applicability of the bona fide retirement plan exception to early retirement incentives.\[154]\n
Cipriano holds that early retirement incentives are bona fide retirement plans within the meaning of section 623(f)(2) of the ADEA, but leaves open the question of whether they are subterfuges to evade the purposes of the ADEA within the meaning of that same section.\[155]\n
Therefore, it does
not reach a definite conclusion as to whether an early retirement incentive plan would in the final analysis be protected from the ADEA under the bona fide retirement plan exception. Since the subterfuge proviso is an integral part of section 623(f)(2), the analysis contained in Cipriano is of limited value, although it does suggest that the court would ultimately lean towards a finding that an incentive plan is not a subterfuge and thus is lawful. 156

The Cipriano court discusses 29 C.F.R. § 860.120(a)(1), but concludes that that interpretation does not require age-based differences in employee benefits to be actuarially based. 157 Instead, it appears to allow benefit levels to vary by age so long as the variations are justified by some reasonable consideration of the employer’s. 158 Thus, since an early retirement incentive will not work unless older employees receive less, the Cipriano court concludes that such an age-based benefit variation is protected by the bona fide retirement plan exception. 159

For the reasons discussed above, such an interpretation of the exception would wholly emasculate the statute. Any discriminatory difference in benefit levels could be justified under this reasoning regardless of its effect upon older workers and their participation in the workforce, since an employer will always have some reason or other to implement the policy that it chooses. Cipriano’s interpretation of the section 623(f)(2) exception is blissfully forgetful of the exception’s intent. Only in this way can the Cipriano court come to the absurd conclusion that the bona fide retirement plan exception, which was always intended to keep older persons in the workforce, can be used to justify an incentive plan which has as its sole purpose the elimination of older persons from the workforce.

To the credit of the Cipriano court, however, the opinion leaves open the question of whether an early retirement incentive plan is a subterfuge of the ADEA and thus not protected. 160 Had the court performed this analysis it would have concluded that for a plan not to be a subterfuge of the ADEA, it must be actuarially based. There will always be a less discriminatory alternative to a benefit plan

156. Id. at 58.
157. Id. See supra note 153 and accompanying text.
158. Id.
159. “An additional incentive for early retirement is generally no more repugnant to the purpose of § 4(f)(2), which is in part to permit employers to offer compensation to older workers who choose to exit the workforce, than any more traditional retirement plan contemplated by that section. . . . The way the plan is structured. . . [does not affect] whether it qualifies generically for the shelter of § 4(f)(2).” 785 F.2d at 55.
160. Id. at 58.
which is not actuarially based. Therefore, an employer will never be able to show business necessity, and hence lack of subterfuge, for such a plan. Cipriano's reasoning is incorrect because it is incomplete.

Despite Patterson and Cipriano, early retirement incentives can not be convincingly defended as bona fide employee benefit plans.

B. Early Retirement Incentives are Not Based Upon Reasonable Factors Other Than Age

Section 623(f)(1) of the ADEA states that “[i]t shall not be unlawful for an employer . . . to take any actions otherwise prohibited under [the ADEA] . . . where the differentiation is based on reasonable factors other than age [RFOA].” Although there are several possible ways that employers can try to use this defense to legitimate early retirement incentives, none of them are very convincing. When a plan is tied to age as explicitly as the typical early retirement incentive plan, it is difficult to argue that it is based upon reasonable factors which are truly “other” than age.

One way that an employer can try to justify early retirement

161. See supra text accompanying notes 125-143. The Cipriano court also reasons that early retirement incentive plans cannot be more repugnant to the ADEA than any ordinary retirement plan, since both serve the identical purposes of encouraging employees to retire. 40 Fair Empl. Prac. Cas. (BNA) at 359-60. This reasoning fails to consider the necessarily narrow scope of the section 623(f)(2) exception. See supra note 153. It also fails to recognize the quantitative difference between an actuarially-based retirement plan and the huge one-time windfall of an early retirement incentive.

162. In an unreported decision, The New York State Division of Human Rights has also held that early retirement incentives are excused as retirement plans. Golden v. N.Y.S. Employees Retirement System, Case No. E-A-88907 (1983); Accord Phelps-Clifton Springs Faculty Assoc. v. Phelps-Clifton Springs, CSD, declaratory opinion of general counsel of N.Y. Div. of Human Rights, July 17, 1984. However, these decisions are based not upon the ADEA's bona fide employee benefit plan exception, but on the more broadly-worded “retirement policy or system” exception of N.Y. Executive Law § 296.3-a (McKinney 1982) (“[N]othing contained in [the N.Y. age discrimination statute] shall be construed. . . to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said [statute]”). Early retirement incentives are more easily considered to be parts of a “retirement policy of system” than “bona fide employee plan[s] such as . . . retirement, pension, or insurance plan[s].” It should also be noted that the New York opinions are totally conclusory, without any real discussion of why the exception should cover early retirement incentives. Of course, the federal case law discussed in supra text accompanying notes 125-143 has no precedential value when interpreting New York State law.

Even though the N.Y. Division of Human Rights opinions are based on a more loosely-worded statute, there is still a strong argument that they are incorrect. Early retirement incentives, whose sole purpose is to cut down on the employment of older workers, are “mere subterfuges to evade the purposes of” age discrimination laws. The telltale sign which shows this is the fact that they are not cost-based. See supra text accompanying notes 125-143.

163. See supra note 6 for an example of a typical early retirement incentive plan.
incentives under the RFOA exception is by arguing that the discrimination is not based upon age per se, but rather upon ability to bear the burden of unemployment. Fifty-five-year-olds are the most logical employees to encourage to retire, not because of their age, but because they are entitled to pension benefits and can better afford to leave their jobs better than younger employees can. Moreover, employees who are older than fifty-five are not barred from receiving the incentives because they are too old, but only because the incentive would not be ineffective in encouraging the retirement of the fifty-five-year-olds unless withdrawn after a short amount of time. Under this line of reasoning, early retirement incentives differentiate not on the basis of age per se, but on the basis of the reasonable factors of ability to afford unemployment and the time dynamics of incentive programs.

This argument is not convincing. If the employer were really interested only in the employees' ability to afford unemployment, it could just as easily offer early retirement incentives to all employees, regardless of age, and allow those employees who can afford to quit with the incentive money to select themselves. There is no reason for employers to assume that only those employees who are eligible for pensions can afford to retire, especially when pension eligibility is so closely linked to age.\(^1\)\(^6\) Similarly, if the employer were really interested in ensuring that the incentives are taken promptly, it could just as easily set a time limit on the incentive offer.\(^1\)\(^6\) There is no nondiscriminatory reason for employers to insist that the incentives be taken at a certain age rather than at a certain date.\(^1\)\(^6\)

\(^{164}\) In EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 105 S. Ct. 92 (1984), the court held that pension eligibility is too closely tied to age to be a "reasonable factor other than age." Id. at 222-23. Of course, employees who are eligible for pensions may very well constitute the bulk of those who choose to take advantage of an age-neutral incentive plan.

\(^{165}\) This would work for one-time reduction-in-force early retirement incentives. If an employer wants to have an ongoing early retirement incentive plan, and wants to ensure that the incentive opportunity will be so short-lived that eligible employees will have to take advantage of it quickly, the employer may, for example, have a rule that retirement incentives may be taken only in years that the employee has been working for the company a multiple of ten years. Less discriminatory alternatives need not be elegant.

\(^{166}\) This discussion illustrates the relationship between the RFOA defense and the concept of the less discriminatory alternative. If a less discriminatory alternative can be found that achieves the employer's stated goals, then it is difficult to show that the employer's solution was really based upon reasonable factors other than age. If age were not a motivating factor for the employer, then it presumably would have chosen the less discriminatory alternative. See EEOC v. Chrysler in which the district court speaks in terms of RFOA, 546 F. Supp. 54, 68 (E.D. Mich. 1982), and the Court of Appeals affirms on an argument of less discriminatory alternatives, without noting any disagreement with the lower court. 733 F.2d 1183,
An employer may also try to argue that its early retirement incentive plan is based upon the reasonable factor other than age, the reduction of salary costs. Older workers tend to earn more money than younger workers, and so it is cheaper to have cutbacks fall on the old rather than on the young. The early retirement of 55-year-olds is in this respect more economically efficient for the employer than the firing of 25-year-olds. Even when the expense of a ten-thousand-dollar incentive is figured into the calculations, an early retirement incentive program may be cost-effective.\(^1\)

This argument is also not convincing. The EEOC's official interpretations of the RFOA exception state that "[a] differentiation based on the average cost of employing older workers as a group is unlawful except with respect to employee benefit plans which qualify for the section [623](f)(2) [bona fide employee benefit plan] exception to the [ADEA]."\(^1\) The courts have agreed that the high cost of employing older workers is not an excuse for discriminating against them.\(^2\) Cost of employment is too closely related to age to be considered to be a reasonable factor other than age. Discriminating on the basis of cost of employment is a mere subterfuge for discriminating on the basis of age.

Finally, an employer may argue that early retirement incentives are based on the reasonable factor other than age of keeping the workforce fresh and vigorous. Early retirement incentives help a company to bring in young blood and ease out dead wood. The problem with this argument is that it boils down to a euphemism for a desire to commit age discrimination. A desire to employ the young is inseparable from a desire to avoid employing the old.\(^3\)

All three of the above RFOA arguments share a common flaw which reveals another reason why they should not be accepted. No matter what factor the employer claims it has relied upon to determine who should be eligible for early retirement incentives, the fact remains that early retirement incentive plans use age as a way of

\(^1\) 1185-86 (6th Cir.), reh'g en banc denied, 738 F.2d 167(1984).

\(^2\) This may even be so when the loss of valuable experience of older workers and the costs of training replacements are taken into account.

\(^3\) 29 C.F.R. § 1625.7(f)(1984).


Similarly, an employer would not be allowed to discriminate against women because it wants a more macho workforce.
differentiating among employees. The employer does not encourage financially-able employees to retire, or the most expensive employees, or the least productive employees, but only 55-year-old employees. The idea that age differentiation can be used as an administratively easier way of reaching these other groups is repugnant to the ADEA’s basic policy of “prohibit[ing] arbitrary age discrimination in employment.” As the Department of Labor has stated,

To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor may be used to justify a differentiation—an assumption plainly contrary to the terms of the [ADEA] and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the [ADEA] is directed.172

For this reason, the EEOC interpretations declare that “[w]hen an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.”173

To sum up, the RFOA defense should not be available to defend early retirement incentives for two reasons: first, the “reasonable factors” which are allegedly the basis of any discrimination are too closely intertwined with age to be considered to be “other than age,” and second, even if these factors were independent of age, there is no justification for the use of age classifications rather than a direct re-

173. 29 C.F.R. § 1625.7(c)(1984). The court in Patterson v. Independent School Dist. No. 709, 742 F.2d 465 (8th Cir. 1984) phrased this rule as follows: “[T]he factors’ rather than the policy or purpose of the plan constitute the statutory touchstone established in § 623(f)(1).” Id. at 466 n.2. For this reason, the court—which is the only court to ever apply the RFOA exception to early retirement incentives—held that the defense was not available. In early retirement incentives, age is the operative “factor,” even if fairness, cost savings, or invigoration of the workforce are the ultimate goals. For a further discussion of Patterson, see supra notes 144-162 and accompanying text.

If the RFOA defense may not be used to excuse age classifications, then § 623(f)(1) has very limited use. The section becomes just another way of saying that actions in which age is not involved are not prohibited by the ADEA. This is not a flaw, but a virtue of this interpretation of the law. Exceptions to the ADEA should be read narrowly. See supra note 153 and 29 C.F.R. § 860.103(e)(1984). (“[I]n accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer. . .which seeks to invoke it”).
C. Early Retirement Incentives Cannot Be Justified As Necessary to Avoid Title VII Liability

Since minorities and women have only recently begun to gain entry into employment areas which had once been the sole preserve of white males, older workers in moderate or high paying positions tend to be disproportionately white and male. If an employer wishes to avoid liability under Title VII of the Civil Rights Act of 1964\(^\text{175}\) by hiring and promoting more women and minority workers, then it may find that an efficient way to make room for these new hires and promotees is to encourage the early retirement of older workers. Similarly, if an employer is reducing its workforce, it may want to place the burden of this reduction on the older workers rather than on the least senior workers in order to avoid returning to an earlier era's racial and sexual workforce makeup.\(^\text{176}\)

In either of these two situations, the employer may claim a good defense to an ADEA challenge to the early retirement incentive plan. The law cannot put an employer in the impossible position of having to violate either Title VII or the ADEA.\(^\text{177}\) If the two statutes conflict, one must give way.\(^\text{178}\)

\(^{174}\) The latter reason would not apply to individual, ad hoc early retirement incentive offers (as opposed to continuing early retirement incentive plans), unless it can be shown that age was a determining factor in choosing to offer the incentive to the individual in question. See B. Schlei & P. Grossman, Employment Discrimination Law 506 (1983) ("The cost of employing an older worker when considered on an individual basis . . . may constitute an RFOA.").


\(^{176}\) See Minnesota's early retirement plan for teachers, supra note 6. Subdivision 9 of the plan offers an especially large retirement incentive in districts where segregation is a problem.

\(^{177}\) Senators Javits and Yarborough stated (albeit glibly) on the floor of the Senate that there is no conflict at all between the ADEA and Title VII. 113 Cong. Rec. 31,255 (1967) (the two statutes will "operate completely independently of each other"). Accord H.R. Rep. 95-527, 90th Cong., 1st Sess. 3 (1977), ("women and minorities also grow old"). But cf. S. Rep. No. 723, 90th Cong., 1st Sess. 16 (1967) (individual views of Mr. Dominick):

What should an employer or labor union do if it receives applications for the same position from a Negro woman 36 years old and a white male who is 46. [sic] If they say they want the younger person, they are open to charges of age discrimination, and if they take the older, they are open to charges of discrimination on the grounds of color and sex.

Senator Dominick's example does not disprove Senators Javits' and Yarborough's assumption that Title VII and the ADEA do not conflict. As long as the employer in Senator Dominick's example chooses on the basis of merit, it is not liable under either statute. It is true, however, that there is no way for the employer to avoid the risk of litigation.

\(^{178}\) See United Steel Workers v. Weber, 443 U.S. 193, 209-11 (1979) (Blackmun, J.,
The situation where the employer is forced to initiate an affirmative action program if it wants to avoid Title VII liability is not uncommon. The burdens which discrimination law places on employers are often very difficult to satisfy, and the best guarantee of safety from litigation may be a policy of race and sex consciousness in hiring and promotion procedures. But it is difficult to imagine a situation in which such an affirmative action program necessarily conflicts with the ADEA. If the policies of Title VII and the ADEA can be pursued simultaneously, then neither statute should be sacrificed.

If an employer wants to make room for an affirmative action program, there will always be less discriminatory means of doing so than using an age-based early retirement incentive. One alternative would be to discharge the least competent employees. Another would be to discharge the wealthiest employees, who would be best able to afford unemployment. Still another would be to adopt some random system of discharging employees, with generous severance pay. Perhaps the best alternative would be to initiate an early "retirement" incentive system which, unlike those discussed in this article, is not based upon age. Such a system would offer a $10,000 bonus to any employee who agreed to resign within the next year, regardless of age. A variant of such a system would restrict the incentive to employees who had a minimum of five years of service. Another variant would offer the incentive to all employees who agreed to take the incentive and resign during any year in which their years of service were a multiple of ten. Any one of these alternatives would make room for an affirmative action program without violating the ADEA or any other law or public policy.

If there were a situation in which the ADEA and Title VII did conflict unavoidably, there would be a convincing argument that the ADEA should be the statute which should step aside. Although, as argued in this article, age discrimination is not qualitatively different from sex and race discrimination, the fact remains that sex and race discrimination have left a much deeper scar on American life than has age discrimination. The broad social movements which inspired Title VII have no parallel in the history of the ADEA. When there is concurring)(the law must allow well-meaning employers to take actions to avoid Title VII liability, even by actions, such as affirmative action, which may in themselves appear to be discriminatory.).

180. See supra note 27.
an unavoidable conflict, the less crucial statutory policy must be the one to be sacrificed, and in this hypothetical situation the less crucial statute would be the ADEA.

But such is not the case. Any conflict between Title VII and the ADEA stems from a lack of the will or imagination which it takes to invent non-age-discriminatory alternatives. Age-based early retirement incentives are never necessary for any legitimate business reason. Therefore, since they are discriminatory, and since they do not fall under any of the statutory defenses to the ADEA, they should not be tolerated, even for employers who use them to make room for affirmative action programs.

IV. CONCLUSION

There are at least five viewpoints to consider when approaching the question of whether early retirement incentives should be tolerated under the ADEA. From society's point of view, early retirement incentives should not be allowed since they deprive the economy of its most experienced workers. From the point of view of older people as a group, early retirement incentives should not be allowed since they perpetuate ageist stereotypes, drive older people from the mainstream of economic life, and unnecessarily use age classifications. These points of view have not yet been used in reported legal challenges to early retirement incentives.

From the point of view of the recipients, however, there is nothing wrong with early retirement incentives as long as they are not accompanied by explicit or implicit coercion. To conclude otherwise would be to risk the condescension towards older people which is to be stopped. Still, the arguments that early retirement incentives are long-term detriments and never fully voluntary may become rhetorical devices to attack the incentives for some other reason than the welfare of the recipients.

From the point of view of employees who are too young to take advantage of early retirement incentives, they should be struck down as discriminatory, unless the employees have complete job security. But it is questionable whether this point of view is valid. The answer to this question depends upon one's opinion on whether the goal of individual, merit-based decisionmaking should take precedence over the goal of allowing favored treatment for the worst victims of age discrimination.

181. See supra notes 4-29 and accompanying text.
182. See supra notes 30-61 and accompanying text.
183. See supra notes 62-90 and accompanying text.
Finally, from the point of view of employees who are too old to take advantage of early retirement incentives, they should be struck down as discriminatory, unless those employees have already passed up an opportunity to receive them. In reaching these conclusions, it is necessary to make basic choices about what the essence of age discrimination policy should be and about what the essence of the ADEA is. These decisions have not already been made, because of Americans' ambivalence toward the concept of age discrimination. But when a difficult problem arises, such as the problem of the legality of early retirement incentives, choices must be made.

This article has concluded that the protection of older workers as a group and of society as a whole are integral and valuable goals of the ADEA, along with the more obvious goal of the protection of individual rights. Age classifications were seen to be evils in themselves which should be avoided if at all possible. The ADEA was also viewed to be essentially analogous to Title VII of the Civil Rights Act of 1964, even if its goals are not quite so urgent. Furthermore, paternalistic uses of age discrimination law were considered to be suspect since they carry a taint of the ageism which the ADEA is to eliminate.

Once the discriminatory nature of age-based early retirement incentives is made clear, the question remains of whether countervailing policies justify them in the end. Since there are always less discriminatory means of achieving any legitimate goal which early retirement incentives may accomplish, their discriminatory effects are never warranted. Moreover, if the exceptions to the ADEA are read in such a way that they do not swallow up the rest of the statute, early retirement incentives do not fall under any of these exceptions.

So far, the courts have considered early retirement incentives only from the point of view of those employees who are too old to receive them. For misguided reasons, and without regard to the all-important consideration of whether those employees ever had an opportunity to receive them, these courts have upheld early retirement incentives.

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184. See supra notes 91-116 and accompanying text.
185. See supra notes 117-122 and accompanying text.
186. See supra notes 162-180 and accompanying text.
187. See supra notes 123-174 and accompanying text.
incentive plans. But if the other possible points of view are considered, especially those of society as a whole and older people as a group, then early retirement incentives should be ruled illegal under the ADEA.