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THE SCOURGE OF AGE DISCRIMINATION IN THE WORKPLACE: FIGHTING BACK WITH A LIBERALIZED CLASS ACTION VEHICLE AND NOTICE PROVISION

The Age Discrimination in Employment Act's current statutory framework calls for plaintiffs affirmatively to opt into a class action, while providing no notice provision to alert them of the existence of such a class. This approach differs markedly from the Rule 23 class action applicable to Title VII litigation. The legislative history of the ADEA as well as the statutory evolution of the Rule 23 mechanism suggest that the inclusion of the opt-in element and the exclusion of any notice provision are due more to accident than to Congressional intent. The author concludes that courts should relax their strict interpretation of the ADEA, and Congress should incorporate Rule 23's procedure directly into the Act, so that the statutory intent to remedy pervasive age discrimination, which afflicts the workplace, may be realized.

INTRODUCTION

*The best is yet to be
The last of life, for which the first was made.¹*

I have lived some thirty years on this planet, and I have yet to hear the first syllable of valuable or even earnest advice from my seniors. They have told me nothing and probably cannot tell me anything to the purpose.²

AMERICA ALWAYS HAS had a dichotomous view of its older citizens. On the one hand is the romanticized portrait of a grandfather with his grandchildren flocked around him, eager to hear some story of the past, better times, or of the elderly king, sought out for his wisdom and compassion. A darker, lurking image, however, is of the decrepit, venile man who meddles in other peoples' affairs.

These conflicting portraits confuse the relation between "aging" and "chronological aging," especially in the employment sector.³

1. R. Browning, "Rabbi Ben Ezra" st. I (1864).

2. H.D. THOREAU, WALDEN 9 (J. Shanley ed. 1971).

3. Chronological aging, or "years elapsed since birth," is to be distinguished from functional, social, and reverse chronological aging. "Functional aging" refers to "rates of aging, retention of skills, ability to learn and adapt . . . and retention of stamina." "Social aging" is the coined term for benefits like seniority rights. Finally, "reverse chronological aging" succinctly states that "[t]he further an individual moves from the year of his birth, the less significant is that fact for the purposes of gauging functional capacity." Cain, *Age Distinctions and Their Social Functions: A Critique of the Age Discrimination Act of 1975*, 57 CHI.-[KENT L. REV. 827, 829-30 (1981).

"Aging refers to the regular changes that occur in mature genetically representative organisms living under representative environmental conditions as they advance in chronological age."⁴ Yet, employers often establish arbitrary hiring and termination policies based on *chronological age* without recognizing that aging is an individual process. This misconception belies the fact that:

Workers between 60 and 75 years of age are not only proving to be capable of working in many occupations; they actually [exceed their younger counterparts] because of their superior judgement, experience, and safety performance. Advances in technology that have taken away much of the physical stress of work tend in many instance [*sic*] to place a premium on the abilities that many older workers possess.⁵

While the Civil Rights Act of 1964⁶ banned discrimination on the basis of race, religion, sex, and national origin, it made no mention of age. Consequently, to combat widespread age discrimination in employment, Congress enacted the Age Discrimination in Employment Act ("ADEA")⁷ in 1967. The ADEA provides for a private cause of action for age discrimination.⁸ Although the ADEA claims the same overall purpose as Title VII, it implements a very different procedural framework with respect to class actions because it was derived from the Fair Labor Standards Act of 1938 ("FLSA").⁹ While Rule 23(b)(3) class actions commonly used in

4. Birren & Renner, *Research on the Psychology of Aging: Principles and Experimentation*, in 3 HANDBOOK OF THE PSYCHOLOGY OF AGING 4 (1977).

5. AMERICAN MEDICAL ASS'N, EMPLOYMENT OF OLDER PEOPLE 10 (n.d.) (pamphlet published by AMA Committee on Aging), quoted in Eglit, *Of Age and the Constitution*, 57 CHI.-[] KENT L. REV. 859, 886 n.142 (1981). In fact, much literature exists refuting the theory that "ability declines with age." See *id.* at 887.

6. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1983), 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-6 (1983)). Title VII of the Civil Rights Act of 1964 makes employment discrimination unlawful. Among other things:

It shall be an unlawful employment practice for an employer—(1) to fail to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin [].

Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-16 (1983)).

7. The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 1-16, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (1983)).

8. The ADEA provides, in relevant part, that "[a]ny person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of [the ADEA]." *Id.* § 633a(c).

9. The Fair Labor Standards Act of 1938, ch. 676, §§ 1-19, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-19 (1983)).

Title VII litigation permit opt-out and notice provisions,¹⁰ ADEA class actions instead require opt-in filings without accommodating the right to, or means for, notice of the pending suit.¹¹ Furthermore, a litigant must fulfill complicated preliminary requirements before pursuing an ADEA class action. As a result, class actions tend to be very burdensome, as evidenced by the fact that approximately "two-thirds to one-half" of all ADEA lawsuits filed were dismissed on procedural grounds during the first ten years of the ADEA.¹² The lack of prejudgment notice is especially harmful, for in many cases employees are unaware not only of the existence of a pending ADEA class action, but also of their substantive rights to join the litigation. Such ignorance undermines the ADEA goal of reducing arbitrary employment-related age discrimination.¹³

This Note has several aims. First, Title VII and the ADEA will be compared. Second, relevant aspects of the ADEA will be evaluated in light of Rule 23's requirements, legislative history, statutory evolution, and judicial interpretation. Third, the harmful effect of age discrimination in the private sector will be analyzed, giving rise to legislation and judicial proposals to ease the procedural pitfalls of the ADEA enforcement mechanism.¹⁴

10. In Title VII litigation the alleged violator must be provided written notice, especially when charges are filed against the government, a governmental agency, or a political subdivision. If the EEOC fails to secure a conciliation agreement, it may file a civil action with aggrieved parties having the right to intervene. The EEOC must send notice to the claimant. If the EEOC dismisses the claim or fails to enter a conciliation, the injured party, or any party harmed by the filing, may bring a civil action. Because employment discrimination outlawed by Title VII is a federal action, the Federal Rules of Civil Procedure generally, and Rule 23 particularly, are applicable. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1983); see *infra* notes 21-36 and accompanying text.

11. See *infra* notes 60-62 and accompanying text.

12. Reed, *The First Ten Years of the Age Discrimination in Employment Act*, 4 OHIO N.U.L. REV. 748, 759 (1977). Frequently, cases will be decided according to whether the litigants have complied with the notice and timing provisions of the ADEA. The courts are also likely to judge the sufficiency of the evidence. Finally, many courts will defer to the authority of state "conciliatory" agencies. See *id.*; see also *infra* notes 46-53 and accompanying text.

13. See Note, *Notice to Class Members Under the Fair Labor Standards Act Representative Action Provision*, 17 U. MICH. J.L. REF. 25, 37 (1983-84) [hereinafter *Class Notice*].

14. One leading age discrimination commentator has ruefully invoked the wisdom of the mythical experienced litigator's advice to the novice:

If the law is against you, argue the facts. If the facts are against you, argue congressional intent. If congressional intent is against you, argue dissenting opinions in state court decisions, speeches inserted in the *Congressional Record* by a single member of the House, or authorities that no longer exist. If these, too, are unavailing, write law review articles.

Schuck, *Age Discrimination Revisited*, 57 CHI.-[.]KENT L. REV. 1029, 1029 (1981).

I. OVERVIEW

A. *The Civil Rights Act: Title VII*

The Civil Rights Act of 1870¹⁵ guarantees blacks the right to contract and to possess and convey property, while the Civil Rights Act of 1871¹⁶ assures freedom from racial discrimination. By 1960, however, Congress recognized that these Acts were not effectively eliminating discrimination.¹⁷ Hence, Congress enacted the Civil Rights Act of 1964,¹⁸ which outlaws discrimination based on race, religion, sex, and national origin. Title VII of the 1964 Act was specifically targeted to alleviate employment discrimination.¹⁹

Enforcement of Title VII primarily proceeds through private civil suits recommended by the Equal Employment Opportunity Commission (EEOC) to the Attorney General.²⁰ This use of representative actions has increasingly become a crucial vehicle to counteract the formidable power and resources of corporate and government defendants. Unfortunately, Title VII does not explicitly sanction class actions as an enforcement mechanism.²¹ Indeed,

15. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 1144 (codified as amended at 42 U.S.C. § 1981 (1983)).

16. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1983)). Congress sought to reach conspiracies with the Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985 (1983)). Moreover, the Supreme Court has interpreted § 1985(3)'s proscription against conspiracies to include those against solely private parties. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

17. Reported the House Judiciary Committee: "[Notwithstanding some progress], in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious." 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2393. See also U.S. COMM'N ON CIVIL RIGHTS, EMPLOYMENT 1961 REPORT 103 (1961).

18. See *supra* note 6 and accompanying text.

19. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-18, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1983)) [hereinafter Title VII]. See also 42 U.S.C. §§ 2000e-2, 2000e-3 (1983) (establishing unlawful employment practices).

20. 42 U.S.C. §§ 2000e-5, 2000e-6(a) (1983). In enacting Title VII, Congress considered establishing a body similar to the National Labor Relations Board to investigate and prosecute discriminatory practices. Although the EEOC is empowered "to prevent any person from engaging in any unlawful employment practice," it seems that Congress envisioned the use of conciliatory actions to curb discriminatory practices. 42 U.S.C. §§ 2000e-5(a), (b). The legislative history indicates that Congress was fearful of giving overly broad enforcement powers to the EEOC. See 110 CONG. REC. 1518, 1521 (1964) (statement of Rep. Celler); Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 436-37 (1966); see also Comment, *Title VII Class Actions: A New Era?*, 62 NEB. L. REV. 130, 133-35 (1983) [hereinafter *Title VII Class Actions*]. Thus, by default, privately initiated litigation is the principal vehicle for Title VII enforcement.

21. Professor Rutherglen suggests that:

Class actions escaped congressional notice in part because they did not attain prominence until the 1966 revision of Rule 23, but more significantly, because Con-

a House amendment of Title VII in 1971 tried to prohibit class actions.²² The final report of the Senate Labor and Public Welfare Committee, nonetheless, rejected the House's class action prohibition, thereby agreeing "with the courts that Title VII actions are by their very nature class complaints, and that any restrictions on such actions would greatly undermine the effectiveness of Title VII."²³ When the Equal Employment Opportunity Act of 1972²⁴ gave the EEOC power to sue and extended Title VII coverage, it neither mentioned class actions nor restricted their use.²⁵

Courts have been more supportive of the use of class actions to enforce Title VII. For example, in *Hall v. Werthan Bag Corp.*,²⁶ the court extended the customary judicial doctrine, which allowed class actions to challenge facially discriminatory employer practices, to include complaints where the action is not pursuant to an established policy of discrimination.²⁷ The court explicitly held that "racial discrimination is by definition class discrimination. If it exists, it applies through the class."²⁸ The various circuit courts have since expanded the limits of the *Hall* doctrine.²⁹ Given this legislative deference and judicial pastorship, Rule 23 of the Federal Rules

gress expressly dealt with the issue of classwide litigation by granting authority to the Attorney General to bring pattern-or-practice actions. Congress also denied authority to private persons to file administrative charges on behalf of others, suggesting that, far from endorsing class action, it intended at that time to preclude private authority to litigate on behalf of others.

Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 692-96 (1980) (footnotes omitted). See *Title VII Class Actions*, *supra* note 20, at 134.

22. H.R. 1746, 92d Cong., 1st Sess. § (e) (1971).

23. S. REP. NO. 415, 92d Cong., 1st Sess. 27 (1972), reprinted in SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 92d Cong., 2d Sess. 436 (1972).

24. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 1-7, 86 Stat. 103 (1972) (amending 42 U.S.C. §§ 2000e to 2000e-17 (1983)).

25. Explained Senator Harrison Williams:

[I]t is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. . . . [L]eading cases in this area to date have recognized that Title VII claims are necessary class action complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief.

118 CONG. REC. 4942 (1972) (explaining S. 2515, 92d Cong., 1st Sess. (1971), which authorized private individuals to file a discrimination complaint for an injured person). See *Title VII Class Actions*, *supra* note 20, at 135. The EEOC's power has been severely curtailed.

26. 251 F. Supp. 184 (M.D. Tenn. 1966). See *infra* note 68.

27. *Hall*, 251 F. Supp. at 186.

28. *Id.* See *Title VII Class Actions*, *supra* note 20, at 137.

29. See *infra* note 68 and accompanying text.

of Civil Procedure³⁰ has become the primary weapon for fighting race and sex discrimination in the workplace.

To maintain a class action under the Federal Rules, the class must be certified, meaning that several prerequisites must first be fulfilled before it may be maintained. First, the plaintiffs seeking representation in the class must be too numerous to sustain multiple individual actions.³¹ Second, there must be common questions of law and fact within the class.³² Third, the representative's cause of action must be typical of the class' complaint.³³ Finally, the representative must have the best interests of the class in mind, and the ability to represent fairly the class members' grievances.³⁴ Courts will go to great lengths to ensure that this final criterion is met, because a judgement under Rule 23 binds all class members.

Once these prerequisites are met, the class must fit into one of three categories. Rule 23(b)(1) and 23(b)(2) classes cover situations

30.

Rule 23. Class Actions.

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(a) & (b).

31. *Id.* 23(a).

32. *Id.*

33. *Id.*

34. *Id.*

where individual suits might create inconsistent judgments, or the defendant has limited financial resources, or injunctive or declaratory relief is sought.³⁵ The 23(b)(3) class action (the workhorse of Title VII suits) is appropriate when questions of law and fact concerning the class predominate over those concerning individuals, and the class action is the superior method of adjudication.³⁶ Potential party plaintiffs start out as members of the Rule 23 class; however, the rule allows eligible members to opt out and sue individually without the burden of *res judicata* being applied from the class suit's outcome.

B. ADEA Procedural Requirements

The ADEA theoretically encourages employment of older Americans based on their abilities. This goal is promoted by providing education and information to resolve employment problems. The information also dispels unfounded beliefs underlying age discrimination. Furthermore, the ADEA provides remedial procedures to rectify ongoing discrimination, resulting from failures of the ADEA provisions.³⁷ The ADEA applies to employers engaged in interstate commerce with at least twenty employees,³⁸ employment agencies,³⁹ and labor unions.⁴⁰ It protects workers between forty and seventy years of age.⁴¹ Under the ADEA, an employer may not, among other things, fail or refuse to hire, or discharge an employee due to age,⁴² reduce his wages and benefits due to age,⁴³ or state an age preference in classified advertisements.⁴⁴

An integral premise of the ADEA was Congress' naive notion that age discrimination in employment, unlike other forms of discrimination, is due to a lack of information rather than malicious intent.⁴⁵ Congress believed that if the ADEA successfully "educated" employers about older workers' competence, discrimination would be eliminated. To hasten the elimination of employment age discrimination, Congress specified a series of procedures for the em-

35. *Id.* 23(b)(1) & (b)(2).

36. *Id.* 23(b)(3).

37. S. REP. NO. 723, 90th Cong., 1st Sess. 1 (1967).

38. 29 U.S.C. §§ 623(a), 630(b) (1983).

39. *Id.* § 623(b).

40. *Id.* § 623(c).

41. *Id.* § 631(a).

42. *Id.* § 623(a)(1).

43. *Id.* § 623(a)(3).

44. *Id.* § 623(e).

45. 113 CONG. REC. 34,742 (1967) (statement of Rep. Burke).

ployee to follow for redress. First, the aggrieved employee must file a charge with the EEOC within 180 days of the alleged discriminatory incident. Private litigation may not commence until 60 days after a charge has been filed. During this 60-day period, the Labor Department is required to approach the defendant-employer and attempt to eliminate any alleged unlawful practice by "informal methods of conciliation, conference, and persuasion."⁴⁶ A second requirement is that the litigant must bring suit within the two-year statute of limitations period.⁴⁷ The statute of limitations will be tolled for up to one year during the conciliation process.⁴⁸ However, if the EEOC decides to file its own suit, any private right to sue terminates.⁴⁹

Unfortunately, these procedures provide pitfalls for the unwary employee.⁵⁰ The most onerous requirement has been the 180-day filing requirement.⁵¹ The one-year tolling of the statute of limitations is additionally burdensome for litigants because the Labor Department's conciliation process may take longer.⁵² These complexities have resulted in dismissal of up to fifty percent of all ADEA lawsuits.⁵³

The employee's case is further complicated by the many statutory defenses that the employer may plead. Under section 623(f), the employer is exempt from suit if the employment practices are

46. 29 U.S.C. § 626(d) (1983).

47. *Id.* § 255(a).

48. *Id.* § 626(e). For willful violations, the statute of limitations is increased to three years. *Id.* § 255(a).

49. *Id.* § 626(c)(1).

50. See Sheeder, *Procedural Complexity of the Age Discrimination in Employment Act: An Age-Old Problem*, 18 DUQ. L. REV. 241 (1980); see also Comment, *Procedural Aspects of the Age Discrimination In Employment Act of 1967*, 36 U. PITT. L. REV. 914 (1975) [hereinafter *Procedural Aspects*] (generally discussing ADEA procedural requirements, and specifically discussing the filing and notice provisions).

51. The old adage that "at some point age is correlative with ability" cuts two ways. Often it is hard in the larger, impersonal work setting for a laid-off employee to realize that he is a victim of age discrimination. Of course, an individual who is refused a job may never find out the employer's true motivation, at least not until after the 180 days have passed. Indeed, during the 1978 amendment process, the Senate committee suggested a removal of this 180 day filing requirement. Unfortunately, the House bill carried no comparable provision. Act of April 6, 1978, Pub. L. No. 95-256, 1978 U.S. CODE CONG. & ADMIN. NEWS 189. Note that some commentators interpret the filing requirement as procedural rather than as jurisdictional to get around this problem. See Note, *Age Discrimination and the Over Sixty-Five Worker*, 3 CUM.-SAM. L. REV. 333-45 (1972) [hereinafter *Over Sixty-Five*].

52. Indeed, in extreme cases, courts have ruled that failure by the department adequately to promote conciliation is grounds for dismissal of the employee's private suit. *Procedural Aspects*, *supra* note 50, at 928-29.

53. See Reed, *supra* note 12.

based on reasonable factors other than age,⁵⁴ bona fide occupational qualifications (BFOQ),⁵⁵ bona fide seniority systems, and employee benefit plans.⁵⁶ Moreover, there is a "good faith" exception for employers who rely on regulations, administrative practices, or enforcement policies later "modified, rescinded, or determined to be invalid."⁵⁷ Should the employee manage to comply with these procedures, he may receive back pay, front pay, liquidated damages (perhaps including punitive damages),⁵⁸ and attorneys' fees. However, any damage award must be mitigated by the employee.⁵⁹

The most imposing procedural obstacle is the ADEA's specific adoption of the FLSA's enforcement mechanism for maintenance of class actions.⁶⁰ Under the FLSA, a class action may be brought by one or more employees on behalf of himself or themselves and all other employees similarly situated. However, no employee may be a party plaintiff in the class action unless he files his written consent to join the class in the specific court hearing the suit.⁶¹ This is commonly called the 'opt-in' requirement. Unlike Rule 23 classes sharing common questions of law and fact, the ADEA class action can only remedy the age discrimination felt by those who know of the

54. Governmental regulations have defined four narrow examples of reasonable factors other than age: (1) physical fitness requirements which are reasonably required by the specific work to be performed; (2) evaluation factors such as production quantity or quality, or educational level having a valid relation to the specific job; (3) the employer's conditions as to the number or schedule of hours; and (4) a policy against nepotism. 29 C.F.R. § 860 (1985). See Note, *Age Discrimination in Employment Under Federal Law*, 9 GA. ST. B. J. 114, 122 (1972).

55. Bona fide occupational qualifications recognize that age is, to some degree, related to occupational qualifications. Examples include age limitations for the safety and convenience of the public (e.g., airline pilots), and special, individual occupational circumstances (e.g., actors needed because of their youthful or elderly appearance). 29 C.F.R. § 860.102(d) (1985). But in typical situations, it is preferable to utilize individual testing than to attribute an arbitrary age limit to a BFOQ. See Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 407 (1976) [hereinafter Harvard Note].

56. While a seniority system may be qualified by such factors as merit, capacity, or ability, length of service must be the primary criterion. 29 C.F.R. § 860.105(a) (1985). In pension plans, the employer must expend the same amount of money on all its employees, although younger workers may realize larger benefits due to rate structures. *Id.* § 860.120(a).

57. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. § 258 (1983); H.R. REP. NO. 723, 90th Cong., 1st Sess. (1967), reported in 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2218.

58. *Trans-World Airlines, Inc. v. Thuston*, 105 S. Ct. 613 (1985) (holding that Congress intended liquidated damages to be punitive in nature).

59. No circuit has granted compensation for pain and suffering. See *Nosler & Wing, Remedies Under the Federal Age Discrimination in Employment Act*, 62 DEN. U.L. REV. 469-84 (1985).

60. 29 U.S.C. § 626(b) (1983).

61. *Id.* § 216(b).

class' existence and affirmatively join the litigation. This is a much more restrictive approach than that adopted by Rule 23 class actions.⁶²

62. This Note will but momentarily dwell upon a nonprocedural problem of the ADEA: the acceptance of mandatory retirement policies. The Labor Department, in 1965, found that companies hired negligible numbers of older workers. Indeed, only 6.9% of the hiring needs of companies with maximum age limits went to employees age 45 and over, compared with 13% for those firms with no age limit. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 7 (1965) [hereinafter SECRETARY'S REPORT]. Even some county governments administering public service employment programs had mandatory retirement ages of 65. This, of course, also hurt those approaching the age 65 limit. U.S. COMM'N ON CIVIL RIGHTS, THE AGE DISCRIMINATION STUDY 65 (1977) [hereinafter CIVIL RIGHTS COMM'N].

The 1967 version of ADEA only protected employees up to the age of 65. The origin of 65 as a retirement age is the old age insurance legislation of Otto Von Bismarck, enacted when the average life expectancy in Germany was only 35 years. Agatstein, *The Age Discrimination in Employment Act of 1967: A Critique*, 19 N.Y.L. FORUM 309, 322 (1973-74). But, current life expectancy has reached 73.2 years, and people reaching age 65 can expect to live another 16.3 years. As of 1980, 11% (24 million people) of the American population was age 65 or older; by the year 2030, the same figure will reach 20% (55 million). *How Old is "Old?" The Effects of Aging on Learning and Working: Hearings Before the Senate Subcomm. on Aging*, 96th Cong., 2d Sess. 2 (1980) (statement of Sen. Glenn).

No profession, industry, business, craft, or trade organization before 1860 required people to leave the labor force because they had reached a predetermined, chronological age. W.A. ACHENBAUM, OLD AGE IN THE NEW LAND 22 (1978) [hereinafter OLD AGE]. Yet, there were exceptions in the public sector. The New York Constitution, for example, required judges to retire at age 60. This constitutional requirement forced Chancellor James Kent to resign in 1823 amid great uproar. Three years later, he began to publish his famous *Commentaries on American Law* (1826-1830), establishing himself as the American Blackstone. Kent did not become infirm until a few months before his death at age 84. OLD AGE, *supra*, at 21. Such an example shows the hazards and unfairness of using chronological age to denote merit.

The trend toward corporate mandatory retirement ages accelerated when President Lyndon Johnson's Social Security system penalized eligible persons who chose to work, and extended coverage to encourage corporate retirement programs integrated with Social Security eligibility. In addition, rising Social Security benefits made retirement more attractive. W.A. ACHENBAUM, SHADES OF GRAY: OLD AGE, AMERICAN VALUES, AND FEDERAL POLICIES SINCE 1920, at 102 (1983) [hereinafter SHADES OF GRAY]. Even though Congress felt that retirement at age 65 would be popular:

[T]here was a growing awareness in the 1960's that encouraging or enforcing leisure for the aged might be deleterious to society in general and to the elderly in particular. Officials were accused of inducing the old to retire or, worse, of reclassifying older unemployed workers as retired in order to alleviate current unemployment problems. By confusing retirement policy with unemployment policy, argued Duke economist Juanita Kreps, Americans were ensuring the creation of a large class of aged poor in the future, men and women who would have to survive on meager private resources and insufficient benefits based on their decision to take early retirement.

Id.

Recent surveys in 1978 and 1981 have indicated that more than half of current retirees and workers approaching retirement wish to continue working after retiring. U.S. DEP'T OF LABOR, A FINAL REPORT TO CONGRESS ON ADEA STUDIES 22 (1982). One way around a mandatory retirement policy is for companies to offer early retirement benefits. A recent

C. Differences Between the ADEA and Title VII

Although Title VII and the ADEA include the same prohibitory language,⁶³ there are statutory differences besides the permissible class action mechanisms. For example, the ADEA has the BFOQ, bona fide seniority or employee benefits plan, and good faith exceptions. Title VII, on the other hand, not only does not include the ADEA's statutory good faith exception, but also imposes greater burdens of proof for the other two exceptions. Furthermore, ADEA actions enjoy jury trials and legal damages, while Title VII litigation does not.⁶⁴ Moreover, courts have declined to shift the burden of proof to ADEA defendants as they would in Title VII cases, forcing the plaintiff to prove his claim of unlawful discharge based on age.⁶⁵ Indeed, the Supreme Court in *Lorillard v. Pons*⁶⁶ specifically recognized significant differences between the two Acts.

study showed that approximately 14% of all older workers either have received or may receive encouragement to retire early. U.S. DEP'T OF LABOR, INTERIM REPORT TO CONGRESS OF ADEA STUDIES 100 (1981) [hereinafter INTERIM REPORT]. More than 55% of employees on average retire by age 62, suggesting a strong trend toward pension acceptance. *Id.* at 95. However voluntary the acceptance of early retirement may be, employees often find out too late that what once appeared to be a nest egg has become an empty nest, for persistent inflation has a devastating impact on the worth of one's retirement assets. For example, at an annual inflation rate of 12%, a pension loses two-thirds of its value in ten years, and 90% after twenty years. "Only those who can depend on inherited wealth, exceptionally shrewd investments, and exceedingly generous compensation from prior employment can count on having funds that will last until a retired worker and his or her spouse die." SHADES OF GRAY, *supra*, at 156.

It is true that the ADEA's upper age limit was increased to 70 in 1978. It is, however, inconsistent that government should argue for an individual to be judged on merit until age 70, while simultaneously accepting the proposition that all individuals over 70 are presumed incapable of remaining on the work force, thereby being denied the ADEA's protection. Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227, 230 (1974). However difficult it may be to determine fitness in individual instances, a "merit" system would be more just than arbitrary mandatory retirement rules. If a young person must wait slightly longer for promotion, then he will in turn be protected as he ages. Self-employed individuals have long shown their productivity in their seventies and beyond. Agatstein, *supra*, at 322. Given the BFOQ and "reasonable factors other than age" defenses, there is no reason to deny employees the Act's protection when they turn 70.

63. Compare 42 U.S.C. § 2000e-2(a)(1) with 29 U.S.C. § 623(a).

64. 29 U.S.C. § 626(c)(2) (1983). See Comment, *Coming of Age: Unique and Independent Treatment of the ADEA*, 7 AM. J. TRIAL ADVOC. 583, 585-86 (1983-84) [hereinafter *Coming of Age*].

65. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (plaintiff must satisfy his burden of production by establishing his class membership and job qualifications); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir. 1975); see also Harvard Note, *supra* note 55, at 388-99. In Title VII cases, much debate surrounds the precise nature of the burden which has shifted to the defendant. Although *Green* may be read as shifting only the burden of production, in general, the federal courts of appeals considering this issue have interpreted *Green* as shifting the entire burden of persuasion. *Id.* at 389. The confusion about whether

The provisions of the ADEA should be examined and analyzed in light of its separate and independent existence from Title VII, avoiding automatic incorporation of Title VII precedents into the ADEA.⁶⁷ However, the differences between the two class action vehicles may be the result of accident rather than congressional intent.⁶⁸

the ADEA adopts the same procedures and burdens of proof as Title VII was unfortunately intensified by *Green*. *Id.* at 390.

66. 434 U.S. 575 (1978).

67. See *Coming of Age*, *supra* note 64, at 588-89; Liddle, *Disparate Treatment Claims Under ADEA: The Negative Impact of McDonnell Douglas v. Green*, 5 EMPL. REL. L.J. 549, 550 (1979); McKenry, *Enforcement of Age Discrimination in Employment Legislation*, 32 HASTINGS L.J. 1157 (1981).

68. Much has been made of the Supreme Court's recent Title VII restrictions on the use of class actions. In the earliest reported decision addressing use of class actions in Title VII litigation, a Tennessee district court established a pair of widely accepted principles. First, an individual who has exhausted his administrative remedies may properly represent a class composed of individuals that have not done so. Second, "racial discrimination is by definition a class discrimination." *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186, 188 (M.D. Tenn. 1966). Given this background, the Fifth Circuit fashioned its "across-the-board rule" in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). In this case, a discharged black worker sought to represent a class that included current black employees. Rejecting the defendant's commonality and typicality objections, the court ruled that the "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class," and that plaintiff's race and allegations of racial discrimination alone assured that his claim was typical of the class' claims. *Id.* at 1124.

Alarmed by the First, Third, Fourth, Sixth, and Eighth Circuits' adoption of this "across-the-board" approach, the Supreme Court tried to slow the momentum behind this class liberalization. In *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395 (1977), the Court denied that plaintiff local driver, who alleged injury by defendant's requirement that a local driver resign from the company and forfeit his seniority right in order to apply for a job as a company intercity driver, could adequately represent a class comprised of all defendant's black and Hispanic local drivers, because he was obviously unqualified for the intercity driver position. "Careful attention to the requirements of [Federal Rule of Civil Procedure 23] remains . . . indispensable." *Id.* at 401, 405. Next, in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), the Court faced a plaintiff alleging discriminatory promotion, who sought to represent all Mexican Americans either currently employed, or who had not been hired by the defendant. The Court struck down the Fifth Circuit's across-the-board approach, refusing to presume satisfaction of the commonality, typicality, and adequacy of representation requirements without a specific showing by plaintiff. *Id.* at 160. The simple axiom that racial discrimination constitutes class discrimination was not enough. See Note, *General Telephone Co. v. Falcon: Cutting Back Class Actions in Title VII Suits*, 34 ALA. L. REV. 317 (1983); *Title VII Class Actions*, *supra* note 20, at 130-56.

While these two Supreme Court decisions may have reduced the settlement values of Title VII class actions, they do not fully restrict Rule 23's use. Instead, the Court merely reiterated the requirements of Rule 23(a). In discrimination cases, there is usually a typical class with a common problem, so plaintiff's attorneys will simply have to make a greater showing in their certification briefs. The Supreme Court's position neither shows disenchantment with the class action for enforcing remedial legislation nor facilitates satisfaction of the ADEA's opt-in requirement.

II. CLASS ACTIONS UNDER RULE 23 AND THE ADEA

Class actions play a myriad of roles in today's society. They deter unfair or illegal business and government practices, recover profits unjustly realized, and compensate victims. Furthermore, the size and scope of relief may vary considerably. For example, an antitrust class action may redress millions of customers, each with a claim of only a few dollars, while an employment discrimination suit may be brought on behalf of fewer than one hundred employees, each having a claim for a considerable amount of back pay and demanding changes in hiring and promotion practices.⁶⁹ The class action mechanism, as used to litigate complex and extensive problems, is a powerful tool and one inherently necessary to combat the institutional evils of age discrimination in the job market.

A. *The Need For Class Actions*

The EEOC receives some 9,100 employment-related age discrimination charges each year;⁷⁰ yet, the ADEA only requires that the EEOC promptly notify putative defendants, and that the parties attempt to settle the dispute through informal and voluntary negotiations. Unlike Title VII cases, the EEOC is not required to investigate the charge.⁷¹ The Commission uses a factfinding process, which combines investigative and settlement techniques, to resolve quickly as many disputes as possible. This system also generates information for determining whether further investigation is appropriate. The EEOC tries to process eighty percent of its ADEA cases in factfinding within 150 days,⁷² with "settlement rates running at approximately 23 percent."⁷³

Factfinding is usually appropriate for cases affecting only a few individuals, which can be finally reconciled through "face-to-face confrontation."⁷⁴ Full investigations, in contrast, are used where there are many alleged victims, extensive relief is sought, or the EEOC has already marked the industry or issue for review.⁷⁵ However, because of limited resources, the EEOC is able to investigate

69. Comment, *Jurisdiction and Notice in Class Actions: "Playing Fair" with National Classes*, 132 U. PA. L. REV. 1487, 1487 (1984) [hereinafter *National Classes*].

70. See EEOC, EEOC ENFORCEMENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT: 1979-1982 (AN INFORMATION PAPER PREPARED FOR THE SENATE SPECIAL COMM. ON AGING) 109, app. XV (1982) [hereinafter *INFORMATION PAPER*].

71. *Id.* at 27.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

fully a mere twenty percent of its ADEA cases.⁷⁶

In 1981 the EEOC filed 89 lawsuits.⁷⁷ In the next three years, the number of suits dropped to 28, 33, and 67 before climbing back to 96 in 1985.⁷⁸ Of the 96 suits in 1985, approximately 65 were class actions.⁷⁹ Because the EEOC can file so few suits,⁸⁰ most employees must pursue their own litigation. The complexity, uncertainty, and litigation costs for unsettled and complicated issues act as a disincentive to private enforcement.⁸¹ Thus, the accessibility of class actions would help the EEOC increase the scale of its operations, and aid employees who must bear high attorneys' fees and discovery costs of any suits which they bring.

To be sure, there are some potential disadvantages to representative actions. Size is one, but the judge may consider this factor before certifying a 23(b)(3) class.⁸² If the legal representation is inadequate, a class member, under Rule 23, may directly or collaterally attack the results, releasing the challenging party from its binding effect.⁸³ Should the intellectual or physical capacity of the class members be so different that adequate representation is impossible, the judgement would not be binding. This is also a certification question for the judge to handle under the Rule 23(a) prerequisites.

76. *Id.* at 28. In part, the Commission has chosen to focus its resources on individual charge resolution as opposed to more extensive investigation of a more limited number of charges. *Id.* at 27-28.

The EEOC also has a procedure called "settlement attempt only," which is used in those cases where it is clear that there is no violation, the grievant absolutely intends to file a private action, and the relief sought is either so excessive or minimal as to be administratively impractical to receive more than minimal EEOC effort. *Id.* This is the minimal level of EEOC action.

77. Telephone Interview with Nancy Fried, Office of Public Affairs, U.S. Dep't of Labor (Jan. 9, 1986).

78. *Id.*

79. *Id.* The fact that two-thirds of this litigation is class oriented is probably due to the EEOC's greater allocation of full investigations to complaints involving large numbers of plaintiffs. A full investigation must occur before the Commission will decide to file a complaint in court. Furthermore, most of these class actions were against public agencies and state and local governments, and no "opt in" is required for actions against the federal government. 29 U.S.C. § 633(a) (1983). See *Moysey v. Andrus*, 481 F. Supp. 850 (D.D.C. 1979). Finally, the 65 class actions have only been filed; they have yet to survive the certification process.

80. The EEOC expected a backlog of over 4,000 cases in 1980, for example. *EEOC Enforcement of the ADEA: Hearing Before the House Select Comm. on Aging*, 96th Cong., 2d Sess. 102 (1980) [hereinafter *EEOC Enforcement*].

81. See INFORMATION PAPER, *supra* note 70, at 54.

82. See FED. R. CIV. P. 23(b)(3)(D).

83. See Kamp, *Civil Procedure in the Class Action Mode*, 19 WAKE FOREST L. REV. 401, 403-04 (1983).

There are clear advantages to using class actions, not only to the parties and judge, but also to society. Class actions are an efficient means of adjudication. By allowing thousands of lawsuits to be handled as a unit, overcrowded dockets will be cleared.⁸⁴ Moreover, they frequently facilitate litigation that otherwise would not be brought.⁸⁵ Not only can plaintiffs pool discovery costs, they can get attorneys' fees under the "common fund doctrine."⁸⁶ This obvious benefit to plaintiffs also aids society's inherent interest in seeing alleged injuries decided on their merits, not on the basis of the plaintiff's financial resources.

Class actions also allow the judge to become an active participant in the proceedings. He is responsible for overseeing settlements, giving discretionary notice, and assuring adequate legal representation.⁸⁷ Such activism promotes the achievement of substantive goals. Furthermore, injunctive and monetary relief in class actions work to enforce substantive policies to a greater degree than individual suits. The aggregation of legal damages, for instance, arguably deters defendants from engaging in illegal activities like age discrimination. Injunctions are also a powerful tool, because of the availability of contempt sanctions.⁸⁸

Title VII discrimination cases have used both pattern-or-practice theory and disparate impact theory to attack employment practices which affect large groups of people.⁸⁹ The EEOC, however, has specifically approved only the use of practice theory in age discrimination cases.⁹⁰ Because a group of plaintiffs is needed, no disparate impact analysis is practical without resort to class actions. Furthermore, it is unlikely that one individual, allegedly victimized by age discrimination and probably also unemployed, could compile and analyze the requisite evidence; consequently, the availability of a class action is essential to spread costs of such litigation, which

84. *Id.* at 409.

85. *Id.*

86. *Id.* at 411-12.

87. *E.g.*, *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

88. *Kamp*, *supra* note 83, at 413-14.

89. Disparate impact cases do not require a showing of discriminatory intent. In pattern-or-practice cases, intent may be inferred from evidence of statistically significant discrepancies in the employment pattern. See Spahn, *Resurrecting the Spurious Class: Opting-in to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 GEO. L.J. 119, 151-52 (1982).

90. Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038, 1052 (1984) [hereinafter *Disparate Impact Analysis*]. The EEOC also utilizes disparate treatment in age discrimination cases. *Id.*

will ultimately be recovered should the class prevail.⁹¹ It is also more difficult for the employer to bring forth evidence to prove either a BFOQ or a "reasonable factor other than age" defense against an employee class than it would be against a single employee.⁹²

Even defendants stand to gain from class actions. Judges may be reluctant to grant injunctive and declaratory relief if a large number of plaintiffs seek reinstatement to positions held by new employees. The upheaval might be too great.⁹³ Moreover, by reducing the probability of multiple suits, the defendant need face fewer unpredictable juries. If a defendant loses one suit, other plaintiffs may be able to assert offensive collateral estoppel to prevail in their own actions.

Thus, the easier availability of class actions would help handle the steady influx of class complaints, and allow a poor, unemployed plaintiff-employee the opportunity to adjudicate his rights. The ADEA's opt-in requirement, however, effectively prevents the use of class actions, enabling employers to frustrate the remedial goals of the ADEA. Because age discrimination is as prevalent and debilitating as race and gender discrimination, older workers deserve access to the Rule 23 class action mode enjoyed by blacks and women under Title VII.⁹⁴ Otherwise, they are receiving unequal treatment in confronting an equally harmful stereotype.

B. *The Opt-In Requirement*

1. *Legislative History*

Presumably Congress had some reason for incorporating the FLSA enforcement procedures into the ADEA, but the legislative history, discerned from both the House and Senate reports, is remarkably silent. Indeed, the most important issue discussed was the need for an age discrimination law; little attention, if any, was focused on the ADEA's statutory scheme.⁹⁵

91. Spahn, *supra* note 89, at 152.

92. Lipschultz, *The Class Action Suit Under the Age Discrimination in Employment Act: Current Status, Controversies, and Suggested Clarification*, 32 HASTINGS L.J. 1377, 1381 (1981).

93. See Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U.L. REV. 597, 597-601 (1983).

94. *But see* Schuck, *Age Discrimination Revisited*, 57 CHI.-[KENT L. REV. 1029 (1981).

95. The retirement age range of 32 to 35 for female flight attendants was also debated, because Congress felt that this limitation was arbitrarily and subjectively based on physical attraction. No other action to protect the attendants was taken for fear of delaying the protection of the 40 million employees between the ages 40 and 65. 113 CONG. REC. 31,253

Various reasons can be suggested for Congress' adoption of the FLSA mechanism. First, Congress may have assumed that there would be little need for private suits. As Senator Yarborough noted:

While the bill includes enforcement procedures which are adopted from the Fair Labor Standards Act, it is the hope of the sponsors of this legislation that such procedures will not be needed very often. Rather, it is the fact that our national policy as declared by this bill will be to stop invidious distinctions in employment because of age. Everyone who testified at our hearings felt that the greatest need in this area was to *educate* employers to the facts—facts which show that older workers are at least as productive as younger workers and that on average they stay with their employers for a longer period of time It will be the major job of the Department of Labor under this bill to *educate* the country to the fact that older workers are just as capable employees as younger workers.⁹⁶

Given the large number of age discrimination complaints since Congress adopted the ADEA, this educational process appears to be ineffective.

Originally the ADEA was to use agency-sponsored enforcement, with hearings before the Secretary of Labor and a right of appeal to the U.S. Court of Appeals. This framework would have required a separate bureaucracy within the Department of Labor. Because the EEOC was overextended handling Title VII claims, Congress decided to have ADEA and Title VII claims separately administered. Consequently, Congress adopted enforcement techniques for the ADEA that were directly analogous to those of the FLSA.⁹⁷ It was felt that such a course would "cause the least anxiety to businessmen, yet provide complete fairness to employees."⁹⁸ Indeed, Senator Javits had already tried to amend a FLSA bill earlier in 1967 to ban age discrimination. The amendment would have utilized the "existing investigative and enforcement machinery of the Wage and Hour Division into which the functions of administration and enforcement of a ban on age discrimination could easily have been integrated."⁹⁹ A similar precedent had already been established for the Equal Pay Amendment to the FLSA, prohibiting

(1967) (statement of Sen. Yarborough). Apparently, concentrating on the plight of female flight attendants suffering demeaning discrimination would be viewed by constituents as a better use of the representatives' time than would a "simple" procedural alteration.

96. *Id.* (emphasis added).

97. See Harvard Note, *supra* note 55, at 381.

98. 113 CONG. REC. 31,254 (1967) (statement of Sen. Javits).

99. S. REP. NO. 723, 90th Cong., 1st Sess. 13-14 (1967) (statement of Sen. Javits).

wage discrimination based on sex. When this amendment failed, it was only natural for Senator Javits to try to install the same provision within the ADEA bill.

If Congress' primary consideration was bureaucratic efficiency, Rule 23 class actions should have been whole-heartedly embraced. Rule 23 class actions were not accepted, but only because Congress wanted to use the existing governmental divisions of the FLSA. Congress' lack of hostile intent towards Rule 23 class actions is further suggested by Congress' belief that private litigation would be unnecessary.¹⁰⁰ However, the FLSA significantly differs from the ADEA in that the FLSA was designed to combat unfair working conditions in the workshop, not employer hiring and dismissal decisions based on age. Workers complaining about unfair working conditions under the FLSA would still be employed, and therefore would have a better opportunity to learn of forthcoming class actions to join.

There is one other possible explanation for Congress' incorporation of the FLSA mechanism. The revised Federal Rules of Civil Procedure of 1966 were written by an advisory committee under the authority of the Supreme Court. Although the Rules were enacted by Congress, they did not necessarily engender much Congressional debate. Prior to the 1966 revision, the Rule 23 class action required all members to opt in; however, the Rules were changed in 1966 to accommodate all potential plaintiffs. Since the ADEA was enacted less than one year after the revision, Congress may not have realized the consequences of incorporating an opt-in requirement into the ADEA. If one accepts that the opt-in adoption was unintentional, and that age discrimination is both as prevalent and as debilitating as other forms of discrimination, a change in the language of ADEA section 216 and in judicial interpretation to grant older workers the advantages of a Rule 23 class action would not only comport with the legislative intent behind the ADEA, but also better effectuate the remedial purposes underlying the ADEA.

2. *Statutory Evolution of the ADEA*

Equally convincing arguments may be made for the proposition that the opt-in requirement's inclusion in the FLSA in the first

100. Ironically, a survey by the Department of Labor of the twenty-four states having age discrimination legislation in 1967 concluded that vigorous enforcement provisions were necessary to eliminate discrimination in supplement to "promotion, education and persuasion." H.R. REP. NO. 805, 90th Cong., 1st Sess. 2-3 (1967).

place was accidental, as contended by one commentator.¹⁰¹ The 1938 version of the FLSA provided for three types of private action. An employee could sue as an individual, on behalf of himself and similarly situated employees, or through an *agent* maintaining the action for all employees similarly situated.¹⁰² This designated agent suit was an innovation.¹⁰³

In contrast to the 1938 version of the FLSA, the 1938 version of Rule 23 contained the "true," "hybrid," and "spurious" categories of class action.¹⁰⁴ The "true" class was inapplicable to the FLSA, because it arose when the character of the right sought to be enforced was joint, common, or secondary, and unless class actions were allowed, joinder of all parties would be necessary.¹⁰⁵ Because FLSA section 216(b) allows individual employees to enforce their rights under the Act, however, joinder would never be necessary.

The "hybrid" class action was also inappropriate for FLSA enforcement because the right sought to be enforced had to be several and relate to specific property.¹⁰⁶ Therefore, if Rule 23 were to govern employee suits arising under the FLSA, such suits had to arise as "spurious" class actions, involving common questions of law or fact affecting the several rights sued upon, and bind those before the court and any voluntary intervenors.¹⁰⁷ The FLSA employee suit,

101. See Spahn, *supra* note 89.

102. See *supra* note 9, § 16(b). Section 16(b) of the FLSA originally provided:

An action to recover [unpaid minimum wages and overtime compensation] may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.

Id.

103. Spahn, *supra* note 89, at 124-25.

104. The original rule read:

(a) *Representation*. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

3B J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 23.01[1.-1] (2d ed. 1985) [hereinafter MOORE].

105. A "true" class judgment was binding on the class. *Id.* at ¶ 23.11[5].

106. A "hybrid" class judgment would bind all parties and privies and all claims, whether presented in the proceedings or not, which might affect specific property. *Id.*

107. *Id.* at ¶ 23.11[3]. Even though nonparties were not bound, judgment still had stare

therefore, was at heart a permissive joinder device.

Problems quickly developed with the FLSA, however. The Act required employers to compensate their employees at least at the minimum wage rate, and to pay overtime for work exceeding forty hours, but it never defined the term "work." Questions arose, particularly with respect to miners: did work commence at the entrance of the mine, or at the actual drilling site deep within the shaft? The Supreme Court ruled for the former in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123*,¹⁰⁸ deciding that the owners must pay employees for the time spent traveling from the "portal" (entrance) of the mine to the "working face" (drilling site) and back again, as well as the time spent at the working face (hence, the term "portal-to-portal").¹⁰⁹

Naturally, this decision was applied to any factory job site. Since there was no statute of limitations in the 1938 FLSA, employees were able to file claims for years of traveling to and from their worksites. Furthermore, wartime production during World War II kept workers busy at inflated regular wages and excessive overtime hours. The combined result of the Court's decision and lack of any statute of limitations was staggering. The number of portal-to-portal cases filed in the United States district courts from July 1, 1946 to January 21, 1947 was 1,913; 1,515 of these cases asked for approximately \$5.8 billion in unpaid minimum wages and overtime compensation.¹¹⁰ At times, the requested relief exceeded the employer's working capital, and, in several instances, the relief sought surpassed the firm's entire net worth.¹¹¹ Congress feared that such large claims might retard the financial positions and future expansion plans of the firms, as well as swamp employers with paperwork if they had to maintain detailed compensation records for employee travel time.¹¹² Moreover, because most of the defense contracts signed with the government were on a "cost plus fixed fee" basis,

decisis value. See generally Spahn, *supra* note 89, at 126-28 ("spurious" class actions, under the 1938 Rules, bound only those opting into the class).

108. 321 U.S. 590 (1944).

109. *Id.* at 597-99.

110. S. REP. NO. 48, 80th Cong., 1st Sess. 2 (1947) (letter from Henry Chandler) [hereinafter SENATE REPORT].

111. *Id.* at 25. For example, the steel industry faced approximately \$1 billion in portal-to-portal claims, surpassing the entire net earnings of all the companies in that industry from 1942 to 1946. *Id.* at 26. The aircraft industry faced \$461 million in portal-to-portal claims, but it only had \$366 million in net current assets, with a net worth of only \$423 million. These claims were primarily for wartime work where the number of employees had increased from 48,639 to 1,250,000 over a five year period. *Id.* at 29.

112. *Id.* at 27-29.

the potential government liability stemming from portal-to-portal claims could be immense.¹¹³ This liability, combined with the business deductions for reasonable employee salaries, meant the Treasury Department stood to lose between \$1.21 billion and \$1.43 billion in revenues.¹¹⁴

Congress acted quickly by passing the Portal-to-Portal Act of 1947.¹¹⁵ Section 4 stipulated that "walking, riding, or traveling to and from the actual place of performance of the principal activity within the employer's plant, mine, building, etc. is not compensable under the Fair Labor Standards Act."¹¹⁶ Section 6 added the two-year statute of limitations for filing claims.¹¹⁷ Unfortunately, Congress also amended section 16(b) of the FLSA by abolishing the representative class action and adding the opt-in requirement,¹¹⁸ further reducing potential FLSA claims. Although nothing in the legislative history indicates why Congress added this opt-in element, it presumably feared that labor unions would file large claims for all of their members. Since the portal-to-portal claim itself had already been abolished under section 4, the opt-in requirement seems to be an example of Congress overreacting to a perceived problem.

In 1966, the Advisory Committee, under the Supreme Court's authority, completely overhauled Rule 23.¹¹⁹ Rather than maintain the consent theory of class actions, whereby plaintiffs must affirmatively opt into the class, the Committee adopted the congruence theory in which representatives and other class members must have the same interests. This theory is visible in the Rule 23(a) safeguards which ensure a close match between the interests of the rep-

113. *Id.* at 32-33. The government could be responsible for the contractor's litigation costs because it becomes a "product" cost reimbursable under "cost plus fixed fee" contracts.

114. *Id.* at 33.

115. Portal-to-Portal Act of 1947, ch. 52, §§ 1-15, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 216, 251-62 (1983)).

116. *Id.* § 4.

117. *Id.* § 6.

118. *Id.* § 5(d):

The second sentence of § 16(b) . . . is amended to read as follows: 'Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his *consent in writing* to become such a party and such *consent is filed* in the court in which such action is brought.' (emphasis added).

119. MOORE, *supra* note 104, at ¶ 23.01[8]. Although the drafters of Rule 23(a) believed the described forms of class actions comported with prevailing practice, "the terms 'joint,' 'common,' etc. . . . proved obscure and uncertain." *Id.*

representative and the class members.¹²⁰ The consent theory was demoted to the Rule 23(b)(3) class and incorporated as an opt-out allowance.¹²¹ Thus, the Committee abolished the spurious class action with its opt-in requirement. The Committee Notes accompanying the 1966 revision stated that "the present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended."¹²² The Advisory Committee apparently believed that it had no authority to change the definition of the FLSA's class procedures under the guise of a Federal Rules revision.¹²³

It is likely that Congress passed the 1966 revision without being aware either of the changes to Rule 23 (recommended by the Supreme Court), or that the changes were not to be included in the FLSA. Therefore, the FLSA class action has accidentally been frozen in its pre-1966 spurious class action form. By unwittingly incorporating the FLSA enforcement standards into the ADEA in 1967, Congress equally restricted the ADEA class action. Consequently, private enforcement actions have not been viable for either FLSA or ADEA enforcement.¹²⁴ Because there is nothing in either the legislative history or the statutory evolution of the class action to suggest Congress' desire to require an opt-in element, courts should act cautiously when reviewing this prerequisite.¹²⁵ As a final note, post-judgment intervention procedures are allowed in jurisdictions with liberal collateral estoppel rules.¹²⁶ Since employees, who fail to opt into the given suit, can either opt in after judgment, or gain favorable judgment on their own claim through offensive collateral estoppel, nothing is really saved by the opt-in rule.

Thus, extension of the Rule 23 class action to victims of employment-related age discrimination will not contravene congressional intent. A statutory accident does not justify withholding access to

120. Spahn, *supra* note 89, at 130.

121. *Id.*

122. MOORE, *supra* note 104, at ¶ 23.10[5].

123. See Spahn, *supra* note 89, at 131.

124. *Id.* at 124-32.

125. *Lorillard v. Pons*, 434 U.S. 575 (1978). Although the Court noted that ADEA follows the procedural framework of the FLSA, it never actually addressed the opt-in question. Instead, it considered whether juries were allowed in ADEA suits. Noting that ADEA § 626(b) allows a court to grant "legal or equitable relief," and § 626(c) authorizes individuals to bring actions for "legal or equitable relief," while the seventh amendment provides a right to a jury trial in all cases in which legal relief is available, the Court determined that a jury trial should be permitted in ADEA actions. The implication of the jury right certainly conforms with the liberal, remedial goals of the ADEA. Thus, the *Lorillard* rationale easily could be extended to the opt-in question, and the lower courts may have overreacted to the *Lorillard* holding.

126. *National Classes*, *supra* note 69, at 1513.

this mechanism allowed by Title VII to ameliorate race and gender inequities. Legislative mistakes are not irreparable, and the effects of rampant age discrimination demand the removal of the opt-in requirement from the ADEA.

3. *Judicial Interpretation of FLSA Section 216*

Section 216 of the FLSA requires potential party plaintiffs affirmatively to opt into the class. Courts have had difficulty harmonizing the stark language of section 216 with the professed purpose of the ADEA (which incorporates section 216 of the FLSA). While struggling with early interpretations, the courts were tempted to use Title VII's Rule 23 as a model. Thus, in *Blankenship v. Ralston Purina Co.*,¹²⁷ for example, the district court reasoned that since the ADEA's substantive procedures are almost identical to those of Title VII, the procedural devices used in Title VII actions also should be available in ADEA litigation.¹²⁸ If Rule 23 class actions are liberally allowed in Title VII discrimination suits, reasoned the *Blankenship* court, they should also be available for ADEA suits, because a strict interpretation of section 216(b) would unduly restrict ADEA enforcement, thereby contravening Congressional intent.¹²⁹ In stating that Rule 23 was to be applied and that absent class members would be bound by the court's decision, the *Blankenship* court set forth three limitations for ADEA class actions:

- (1) The class action must meet the requirements of Rule 23(a) and (b)(2);
- (2) The issues raised by the "party plaintiff" or the class action [would be] those issues that he [had] standing to raise . . . and that he [had] raised in the charge filed with the Secretary of Labor . . . ; and
- (3) Class members *need not file consents to sue* under 29 U.S.C. § 216(b) provided that their grievances [fell] within the charges filed by the party plaintiff.¹³⁰

127. 62 F.R.D. 35 (N.D. Ga. 1973).

128. The Court based its decision on the congressional intent underlying the ADEA: Since Congress clearly defined its policy as remedial with respect to such social problems, the courts have generally looked to the Congressional intent behind the law rather than to procedural restrictions which might impair the law's effectiveness The federal courts in particular have recognized that the Rule 23 class action is particularly adaptable to situations involving discrimination.

Id. at 38.

129. *Id.* at 39. Opt-in requirements have been frowned upon under federal class action rules and were abolished by the 1966 amendments. *National Classes*, *supra* note 69, at 1499. Most state rules do not expressly provide for opting in. *Id.*

130. *Blankenship*, 62 F.R.D. at 41 (footnotes omitted) (emphasis added). See *Procedural Aspects*, *supra* note 50, at 927.

The third guideline demonstrates that “[w]hile implicitly recognizing Rule 23 and section 216(b) as mutually exclusive, the court failed to confront Congress’ explicit preference for FLSA [opt-in] enforcement procedures.”¹³¹

The Fifth Circuit rejected the *Blankenship* approach in *LaChapelle v. Owens-Illinois, Inc.*¹³² *LaChapelle* held that Rule 23 could not be used to circumvent the unambiguous opt-in requirement of section 216(b).¹³³ Although some isolated cases continue to apply Rule 23 class actions to ADEA complaints,¹³⁴ the Supreme Court, in *Lorillard v. Pons*,¹³⁵ laid to rest any argument that similarities between Title VII and the ADEA imply the Congressional desire that the two statutes be enforced by similar procedures.¹³⁶ The Court reasoned that significant differences in the remedial and procedural provisions,¹³⁷ as well as Congress’ failure to adopt Title VII enforcement procedures while using its substantive prohibitions¹³⁸ require this result. Accepting the premise that Congress was aware of Rule 23 at the time it enacted the ADEA, one should also accept that Congress meant to include FLSA procedures; otherwise Congress would have expressly included Rule 23 in the ADEA. This argument has been adopted by every circuit today.¹³⁹

131. Lipschultz, *supra* note 92, at 1384. See *Bishop v. Jelleff Associates, Inc.*, 5 Empl. Prac. Dec. (CCH) § 7995 (D.D.C. 1972) (allowing ADEA actions to be brought as a class action under Rule 23).

132. 513 F.2d 286 (5th Cir. 1975) (*per curiam*).

133. “There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by [FLSA § 216(b)].” *LaChapelle*, 513 F.2d at 288.

134. See, e.g., *Allen v. Marshall Field & Co.*, 93 F.R.D. 438 (N.D. Ill. 1982) (plaintiffs allowed to send notice to potential plaintiffs under FLSA § 216(b) “in an appropriate case.”); *Sussman v. Vornado, Inc.*, 90 F.R.D. 680 (D.N.J. 1981) (employee discharged shortly after strike because of age).

135. 434 U.S. 575 (1978).

136. *Id.* at 585.

137. *Id.* at 584-85.

138. *Id.* See Lipschultz, *supra* note 129, at 1386.

139. See *Montalto v. Morgan Guaranty Trust Co.*, 83 F.R.D. 150 (S.D.N.Y. 1979) (action “to compel employment of plaintiff”); *Lusardi v. Xerox Corp.*, 99 F.R.D. 89 (D.N.J. 1983) (action for injunctive and monetary relief for discharge based on age-based corporate policy); *EEOC v. Gilbarco Inc.*, 615 F.2d 985 (4th Cir. 1980) (action commenced when complaint filed irrespective of whether individual plaintiffs are named); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975) (only opt in type classes permissible in ADEA suits); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774 (E.D. Mich. 1971), *aff’d per curiam*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972) (action for minimum wages under FLSA cannot be brought as class action); *EEOC v. Chrysler Corp.*, 546 F. Supp. 54 (E.D. Mich. 1982) (voluntary and involuntary retirement of workers based on age); *Locascio v. Teletype Corp.*, 74 F.R.D. 108 (N.D. Ill. 1977) (action against company lay-offs based on age); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975) (*per curiam*) (action for minimum wages under FLSA cannot be maintained as class action); *Partlow v. Jewish Or-*

III. OTHER PROBLEMS WITH THE ADEA

A. *The Notice Problem*

To further complicate the problems caused by the opt-in requirement, the ADEA provides no notification to potential class employees of the class' existence. This statutory silence augments the general employee ignorance of age discrimination laws.¹⁴⁰ A 1981 Harris survey found that: (1) the more educated the person, the more likely he is to know about the ADEA; and (2) men generally have greater awareness of the ADEA than do women.¹⁴¹ If age discrimination victims do not appreciate what employer conduct will constitute ADEA violations, the chances are even greater that the victims will be unaware of an ADEA class into which to opt.

Neither the FLSA nor the ADEA discuss whether plaintiffs may notify interested parties of the existence of pending representative actions. Similarly, the legislative history does not indicate any Congressional desire to prohibit notice. In fact, Congress "chose not to ban informative, nonsolicitous communication" under the Portal-to-Portal Act.¹⁴²

Numerous federal policies support the availability of notice in ADEA actions. The first amendment protects certain associational and speech rights of ADEA plaintiffs, counsel, and class members necessary for effective group legal action.¹⁴³ There also is a federal

phans' Home of S. Cal., Inc., 645 F.2d 757 (9th Cir. 1981) (action for adequate overtime compensation not barred for those plaintiffs not consenting to FELA class action); *Dolan v. Project Constr. Corp.*, 725 F.2d 1263 (10th Cir. 1984) (FLSA plaintiff must opt in to be bound by judgment); *Moysey v. Andrus*, 481 F. Supp. 850 (D.D.C. 1979) (federal disabled employees over age 60, upon reemployment, had annuity deducted from regular pay, rehired as temporary and terminable at will, brought suit to enjoin this deduction and for retroactive relief). The First Circuit has not ruled on this question.

140. A Labor Department study of employees in New Jersey, California, and Maine, for instance, found that 88% of male and 84% of female respondents did not, for whatever reason, indicate knowledge of state age discrimination laws. Only 3% of the men and 9% of the women knew of this statute and its upper age limit of 70. Fewer employees were unaware of the ADEA, the respective figures being 71% of the men and 82% of the women. Only 15% and 9%, respectively, were fully familiar with the federal statute, and this was a mere three years after the highly publicized 1978 amendments were enacted. INTERIM REPORT, *supra* note 62, at 120-21.

141. INFORMATION PAPER, *supra* note 70, at 53.

142. See 93 CONG. REC. 2093 (1947) (statement of Sen. Donnell) (condoning dissemination of information about decisions affecting rights, but not those intended to stir up "champerly" and improper court practice); *Class Notice*, *supra* note 13, at 29.

143. See *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) (en banc) (trial court ban on most communications from litigants and counsel to current or potential class members in race discrimination action held to have unconstitutionally restricted expression), *aff'd*, 452 U.S. 89, 104 (1981) (trial court order created "serious restraints on expression").

interest in avoiding a multiplicity of ADEA suits; notice will allow many individual suits to be collapsed into a few class actions. Because potential plaintiffs have time to reflect before opting in if notice, as is typically done, is posted in the workplace or mailed to class members, the federal policy against improper solicitation and stimulation of litigation is upheld. Judges can inspect these written notices for improprieties, and the attorneys will usually have no pecuniary motive to solicit business, since they are often legal aid or public interest lawyers.¹⁴⁴ Finally, notice will provide fairness and due process to all employees with claims against the defendants.¹⁴⁵

Unlike the question of Rule 23 incorporation into the ADEA, the courts are divided on whether they should allow notice, and if so, who can give it. The Ninth Circuit¹⁴⁶ allows notice when required by due process. However, because potential plaintiffs who fail to opt into the class suffer no *res judicata* effect, they cannot be adversely affected. Thus, the Ninth Circuit reasons that unless due process rights are threatened, notice need not be ordered.¹⁴⁷ This reasoning serves to prevent an employee discriminated against because of age from learning of or joining a class action.

Other courts, following the Second Circuit's lead in *Braunstein v. Eastern Photographic Laboratories*,¹⁴⁸ have expressly rejected this due process analysis. Instead, they reason that even though due process may not require notice, a district court has the power to order notice in the proper case.¹⁴⁹ Such a holding serves both the interest of avoiding multiple suits and the broad remedial purposes of the ADEA. Defining a "proper case," however, is not so easy. Some courts rely on a "fundamental fairness" test in which the critical inquiry is whether, absent notice, the potential plaintiffs possess

144. See *Class Notice*, *supra* note 13, at 31-35.

145. Benefits to the employer from notice include avoiding multiple litigation and greater efficiency. Lipschultz, *supra* note 92, at 1394-95. See *National Classes*, *supra* note 69, at 1506-07 n.91.

146. *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977).

147. See also *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211 (8th Cir. 1984); *Dolan v. Project Constr. Corp.*, 725 F.2d 1263 (10th Cir. 1984); *Georke v. Commercial Contractors & Supply Co.*, 600 F. Supp. 1155 (N.D. Ga. 1984); *Soler v. G&U, Inc.*, 568 F. Supp. 313 (S.D.N.Y. 1983); *Baker v. Mitchie Co.*, 93 F.R.D. 494 (W.D. Va. 1982). See also Lipschultz, *supra* note 92, at 1394-95.

148. 600 F.2d 335 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979).

149. See also *Behr v. Drake Hotel*, 586 F. Supp. 427 (N.D. Ill. 1984) (all potential plaintiffs entitled to notice although some may be subsequently dismissed from the class); *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982); *Johnson v. American Airlines, Inc.*, 531 F. Supp. 957 (N.D. Tex. 1982); *Lusardi v. Xerox Corp.*, 99 F.R.D. 89 (D.N.J. 1981).

meaningful access to the courts.¹⁵⁰ A second standard is to allow notice when the Rule 23(a) requirements have been met.¹⁵¹ One should observe, nevertheless, that notice is discretionary under Rule 23(d)(2). The judge can grant notice at any stage of the certification process, including precertification, regardless of due process considerations. Moreover, the judge has two other sources of power under the Federal Rules of Civil Procedure. Rule 42(a) recognizes the court's power to make such orders as may "tend to avoid unnecessary costs or delay in a pending action."¹⁵² This broad authority would certainly include providing notice to potential plaintiffs concerning pending litigation under section 216(b). Similarly, Rule 83 allows federal district courts to make or amend rules as long as the new or amended rules do not conflict with existing federal rules or statutes. Since section 216(b) does not prohibit the court from granting notice, the judge should be able to do so under Rule 83.¹⁵³

Even if a court should allow notice to be given to potential class plaintiffs, it must still decide which parties may convey it. *Braunstein* held that the court, the plaintiff-representative, or his attorney could send this communication. Other courts, however, allow only the plaintiff or counsel to perform this function, not wishing to imply court approval of the cause of action.¹⁵⁴ The Eighth Circuit follows the most restrictive approach, allowing only the plaintiff to send notice.¹⁵⁵

If potential plaintiffs must opt into ADEA class actions, then it is incumbent upon the court to allow notice of such a class to be given to all potential class members; otherwise, aggrieved employees will have a seriously diminished opportunity to litigate the alleged age discrimination through a class action. Since public policy requires the notice to reach all potential plaintiffs in the most efficient, effective manner, the largest number of conduits should be permitted. This means that the plaintiff, his counsel, and perhaps even the court should be allowed to convey notice.¹⁵⁶

150. See *Hubbard v. Rubbermaid*, 21 Empl. Prac. Dec. (CCH) ¶ 12,919 (D. Md. 1979); *Riojas v. Seal Products, Inc.*, 82 F.R.D. 613 (S.D. Tex. 1979).

151. See *Geller v. Markham*, 19 Fed. Empl. Prac. Cas. (BNA) 1622 (D. Conn. 1979); *Lipschultz*, *supra* note 92, at 1393. This method has not been widely embraced by the courts. *Id.* at 1393-94.

152. FED. R. CIV. P. 42(a).

153. *Lipschultz*, *supra* note 92, at 1394-96; *Spahn*, *supra* note 89, at 140-44.

154. See, e.g., *Dolan v. Project Constr. Corp.*, 725 F.2d 1263 (10th Cir. 1984); *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982).

155. See, e.g., *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211 (8th Cir. 1984).

156. There are a number of factors which a judge might consider in deciding whether notice should be permitted, including: class members' awareness of their substantive rights,

Of course, should Congress and the courts recognize, by overriding the opt-in requirement, that the current version of the ADEA cannot adequately combat age discrimination, the notice provision carefully crafted by the authors of Rule 23 will take care of the lack of notice under the ADEA. In any case, the widespread expansion of age discrimination demands availability of class-wide notice.

B. *Soliciting Potential Plaintiffs*

A related question is whether the plaintiff and his attorney may independently solicit potential plaintiffs under section 216(b). The courts traditionally have been reluctant to permit solicitation, fearing that an onerous number of frivolous cases will be submitted by greedy plaintiffs and attorneys. Solicitation is considered unprofessional, something that might be done by a backstreet panhandler.

Although some courts do in fact permit solicitation,¹⁵⁷ others only allow judicially-authorized notice identifying the plaintiff's counsel.¹⁵⁸ Still other courts feel that a bar on solicitation is an unconstitutional prior restraint.¹⁵⁹ One justification for banning solicitation is that unless due process requires it, a statute must specifically authorize it for the court to allow independent notice.¹⁶⁰

The need for independent plaintiff/counsel solicitation arises only if there is no court-authorized notice. Therefore, it is in the court's interest to authorize notice, because it can directly control its content and method of conveyance. If no notice is allowed for an opt-in class action, the court should permit independent solicitation. Congress indicated that it wanted class actions under the ADEA to have an opt-in element, not insurmountable hurdles. As the ADEA is currently codified, it is completely lacking in remedial

poverty which might otherwise preclude filing of an individual suit, size of the individual damages claim, common issues of law and fact, and any pecuniary interest of counsel in a positive outcome. *Class Notice*, *supra* note 13, at 37-41. This will aid the remedial goals of the ADEA while preventing unwieldy classes.

157. *Joyce v. Sandia Laboratories*, 23 Empl. Prac. Dec. (CCH) ¶ 31,043A (N.D. Cal. 1980) (although constrained by *stare decisis*, the court felt that allowing notice was acceptable in some narrow circumstances).

158. See *Riojas v. Seal Products, Inc.*, 82 F.R.D. 613 (S.D. Tex. 1979).

159. See *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980); *Coles v. Marsh*, 560 F.2d 186 (3d Cir. 1977), *cert. denied*, 434 U.S. 985 (1977); *Zerate v. Younglove*, 86 F.R.D. 80 (C.D. Cal. 1980).

160. *Roshto v. Chrysler Corp.*, 67 F.R.D. 28 (E.D. La. 1975). See also *Partlow v. Jewish Orphans' Home of S. Cal., Inc.*, 645 F.2d 757 (9th Cir. 1981); *Montalto v. Morgan Guaranty Trust Co.*, 83 F.R.D. 150 (S.D.N.Y. 1979); *Wagner v. Loew's Theatres, Inc.*, 76 F.R.D. 23 (M.D.N.C. 1977).

capacity.¹⁶¹

IV. THE PROBLEM OF AGE DISCRIMINATION IN EMPLOYMENT

A. *The Need for Legislative Action*

While Title VII prohibited job discrimination on the basis of race, sex, religion, and national origin, it made no mention of age discrimination. Consequently, Congress directed the Labor Department to research the extent of the problem.¹⁶² The Secretary's findings were sobering, reporting widespread employer use of arbitrary age cutoffs in hiring and termination decisions.¹⁶³

Many of these age limits were reactions to stereotypes. As noted by James P. Mitchell, discrimination developed from perceptions and attitudes based on prejudices "entirely out of step with modern industrial reality."¹⁶⁴ Newell Brown, Assistant Secretary of Labor and Chairman of the Federal Council of Aging, similarly stated that "[a]ge barriers were largely created by what men think."¹⁶⁵

Congress was generally shocked by the dimension of the problem.¹⁶⁶ The Labor Secretary concluded that "[t]he possibility of

161. See Lipschultz, *supra* note 92, at 1396-98.

162. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241 (1983).

163. Most establishments used upper age limits in the age 45-59 range. This was particularly true of skilled industrial, service, clerical, and professional/semiprofessional jobs. However, 60% of the nonskilled industrial concerns with limits set them in the 35-49 year range (21% for the ages 35-39). An alarming 13.5% of age limits for sales positions were for workers under age 35. Very few companies reported limits in the age 60+ brackets, indicating that any ceilings were set at even lower age levels. U.S. DEP'T OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT: RESEARCH MATERIALS 9* (1965) [hereinafter *RESEARCH MATERIALS*].

Employers listed a number of reasons for these upper age restrictions and limited hirings. Physical requirements and job requirements were mentioned 34.2% and 25.1% of the time, respectively. Limited work life expectancy due to mandatory retirement drew 5.1% of the responses. Other frequent reasons cited for failure to hire older workers included: internal promotion, earnings, pension plan costs, and perceived lack of skills and experience. Significantly, adaptability, training costs, and productivity were mentioned only 2 to 3% of the time. *Id.* at 10.

164. W. GRAEBER, *A HISTORY OF RETIREMENT: THE MEANING AND FUNCTION OF AN AMERICAN INSTITUTION 1885-1978*, at 237 (1980).

165. *Id.*

166. Half of all private job openings were barred to applicants over 55, while a quarter excluded those over 45. Seven hundred and fifty thousand workers 45 years of age or older—most of them under 65—were unemployed, consuming \$750 million in annual unemployment insurance benefits. Over one-third of all men who had been unemployed for at least 27 weeks were over 45, although this group comprised less than one-quarter of the entire work force. Over one-half of the nation's poor families were headed by persons 45 or over, and more than one-third were headed by persons 55 or over. 113 CONG. REC. 34,746 (1967) (statement of Rep. Dent). Unemployed persons between the ages of 45 and 64 faced twice the average

new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren A clear-cut and implemented Federal policy . . . would provide a foundation for a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age."¹⁶⁷ This finding was largely supported by President Johnson's observation that:

Hundreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over who are unemployed. Today more than three-quarters of the billion dollars in unemployment insurance is paid each year to workers who are 45 and over. They comprise 27 percent of all unemployed, and 40 percent of the long-term unemployed.¹⁶⁸

As a means to attack age discrimination, Congress enacted the ADEA.¹⁶⁹

B. *What Is Age Discrimination?*

1. *Age Discrimination Defined*

Age discrimination technically means any incident where two groups of people are treated differently solely on the basis of age. The term is conventionally used to illustrate situations where there is no reasonable basis for particular age limitations. The use of age as a proxy is prevalent in the United States Constitution itself.¹⁷⁰

number of "sick" days experienced by employed people in the same age bracket. SECRETARY'S REPORT, *supra* note 62, at 11.

167. H.R. REP. NO. 805, 90th Cong., 1st Sess. 2 (1967) [hereinafter HOUSE REPORT]. This recommendation was due, in part, to age discrimination policies being structural, not merely stereotypical. In other words, once unemployed, older workers' lack of education hurts them in the job market. Older persons generally do poorly on personal competency exams because of rusty test-taking skills. Furthermore, internal promotion, seniority systems, corporate-wide age limits, and the adverse impact on state worker's compensation laws by recent court decisions collectively operate to reduce older workers' chances of employment. SECRETARY'S REPORT, *supra* note 62, at 12, 15.

168. HOUSE REPORT, *supra* note 167, at 2.

169. *Id.* at 1. Indeed, voting against the ADEA was considered to be unpatriotic. The bill passed the House by a 344 to 13 vote. Congress may also have rushed to catch up with the times. One Senator stated that twenty-four states and Puerto Rico already had statutes prohibiting age discrimination in employment. 113 CONG. REC. 31,253 (1967) (statement of Sen. Yarborough).

170. There are four instances in the main document: The President and Vice President must be at least 35. U.S. CONST. art. II, § 1, cl. 5. (The twelfth amendment specifies that: "[No] person constitutionally ineligible to the office of President shall be eligible to that of Vice President . . ." U.S. CONST. amend. XII.). Senators must have reached the age of 30. U.S. CONST. art. I, § 3, cl. 3. Age twenty-five is the minimum threshold required for representatives. U.S. CONST. art. I, § 2, cl. 2. Federal judges receive guarantees of life tenure, obviously barring mandatory retirement, but this provision is aimed more to insulate the

Nor is the Constitution the sole realm of governmental age line-drawing. A 1954 analysis of the Illinois laws, for instance, showed 1,978 statutes which contained references to age.¹⁷¹

The use of an arbitrary age standard is not necessarily automatically suspect. After careful debate, society has set minimum ages for entering school, voting, drinking, and driving as measures of maturity. But governmental age limits on employment and retirement which pretend there is a magic age at which a person no longer is competent to earn a livelihood deserve searching scrutiny for, unlike the former, the worker can never outgrow these prohibitions. Moreover, such use by government sets a poor example for private industry.

The government, however, is not the sole entity imposing unwarranted maximum age standards. Annual investigations by the Department of Labor in the first three years after enactment of the ADEA found many instances of age discrimination in the private sector.¹⁷² Sadly enough, these numbers have only increased. When

judiciary from public pressure than it is due to a concern over age discrimination. U.S. CONST. art. III, § 1. Note, however, that Congress has limited chief judges of federal district courts and federal courts of appeal to 70 years of age. 28 U.S.C. §§ 45(a), 136(a) (1983) (although they may of course continue their role as judges). For a long time, the American Bar Association played an informal role in approving selections for the federal judiciary, but only recently has it abandoned the practice of not recommending nominees who are above age 64. Eglit, *supra* note 5, at 865 n.20 (1981).

Furthermore, the fourteenth amendment provides for a reduction in a state's congressional representation should it abrogate the right of any 21-year-old male to vote, this being the universally accepted age of majority. U.S. CONST. amend. XIV, § 2. This provision was designed to keep Southern states from taking the franchise from black citizens. And of course the twenty-sixth amendment bars both the federal and state governments from setting a voting age higher than 18. U.S. CONST. amend. XXVI, § 1.

171. Nearly 75% of those statutes referred to the period from birth to age 21, and most of them were aimed at the protection of children, especially with respect to physical care and education, prohibition of child labor, and responsibility for criminal offenses. Those laws which referred to ages 16 to 21 were primarily enabling in nature. Few laws addressed those in the age 22 to 55 category. The 20% concerning individuals above age 50 dealt most often with pensions, *age retirement in various professions*, and the protection of frail older persons. L. Evans, *Legal Definition of Age as Contained in Illinois Statute Law* (Aug. 1954) (unpublished master's degree thesis in University of Chicago Library). See also Neugarten, *Age Distinctions and Their Social Functions*, 57 CHI.-KENT L. REV. 809, 821 (1981). A study by the United States Commission on Civil Rights of ten federal agencies and programs concluded that the use of age discrimination was widespread. CIVIL RIGHTS COMM'N, *supra* note 62, at 79-81.

172. In the first six months after the ADEA became effective, the Department of Labor survey of 10,213 establishments for compliance found 120 separate ADEA infractions. Another survey conducted in 1971 revealed that the number of violations had reached 2,000. The Labor Department additionally learned that substantial quantities of money were owed to employees. Finally, the Department informally notified 14,000 employers, advertisers, employment agencies, and other organizations that their employment practices tended to pro-

the national economy lapsed in the late 1970's and early 1980's, the number of age discrimination complaints filed with the EEOC rose to nearly 9,500 in 1981, a seventy-five percent increase over 1979's total.¹⁷³ Moreover, state equal employment agencies received another 8,400 charges, and \$12.3 million in benefits were disbursed. By 1981, the amount remitted had increased to approximately \$28 million.¹⁷⁴ At the same time, the number of EEOC initiated suits increased from 25 in 1979 to 89 in 1981¹⁷⁵ to 96 in 1985.¹⁷⁶

Even these large numbers do not tell the entire story because the number of charges filed is not:

always the best indicator of the existence of widespread age discrimination. Many charges are against small employers where the personal nature of the employee-employer relationship makes it easier for individuals to ascertain the *cause* of any action taken against them, i.e. to conclude that age was a factor. Charges are also generated by large lay-off situations where the *impact* may be clear to the individual employee.¹⁷⁷

Between these two extremes, far fewer charges are filed.¹⁷⁸ Furthermore, these statistics do not convey the reality that certain employment practices constitute age discrimination, although the law does not recognize them because the employee is not between the ages of 40 and 65.¹⁷⁹

Age discrimination may be blatant, or more recently, fairly subtle. For example, one 49-year-old woman was a secretary to a vice president of a company. When he was laid off, she suddenly found herself transferred to a new job two grades below her former one,

note discrimination and, therefore, ought to be changed. WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, U.S. DEP'T OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, A REPORT COVERING ACTIVITIES IN CONNECTION WITH THE STATUTE DURING 1968, at 6 (1969), 1970, at 3 (1971). See *Over Sixty-Five*, *supra* note 51, at 338.

173. *The Unemployment Crisis Facing Older Americans: Hearings Before the House Select Comm. on Aging*, 97th Cong., 2d Sess. 64 (1982) (report by Chairman Claude Pepper) [hereinafter Pepper]; Kogan, *Age Discrimination*, 1982 ANN. SURV. AM. L. 795, 796 at n.11.

174. INFORMATION PAPER, *supra* note 70, at 82, app. III.

175. *Id.* at 49. An informal survey of cases filed in the United States District Court for the District of Colorado from January 1982 through October 1984 also determined that the number of filed ADEA suits had continued to increase. Twenty lawsuits which included an ADEA claim were filed in 1982, and in the first nine months of 1984, thirty-nine such suits were filed. Nosler & Wing, *supra* note 59, at 470 n.10. There is no reason to suspect that Colorado has an abnormally large incidence of age discrimination.

176. Telephone interview with Nancy Fried, Office of Public Affairs, U.S. Dep't of Labor (Jan. 9, 1986). In all fairness, this rise may have been due in part to management laying off higher paid workers to trim costs. Pepper, *supra* note 173, at 64.

177. *EEOC Enforcement*, *supra* note 80, at 66.

178. *Id.*

179. Note, *Over Sixty-Five*, *supra* note 51, at 340.

and was threatened with termination unless she accepted her new responsibilities. At the same time, a much younger woman at the company was allowed to refuse multiple secretarial jobs before accepting another promotion.¹⁸⁰

In another example, a 63-year-old man had been a sales manager for an automobile agency. He was suddenly and apparently without reason demoted. The only explanation offered by the owner was that it was "time for a younger generation to take over," notwithstanding the man's outstanding performance record.¹⁸¹

And finally, an individual who investigated white collar crimes and fraud for a county sheriff's department without making the actual arrests, was forced to retire at 61 despite the department's mandatory retirement age of 65. He was simultaneously rehired by the same department in a more dangerous job paying less money with no benefits.¹⁸²

While employers are subtle about what they tell job applicants, age clearly is a factor affecting the decisions made by public and private employers. For instance, the Denver Comprehensive Education and Training (CETA) program found placement of retired military persons difficult because "they are not the 25-year-old or the 22-year-old."¹⁸³ The executive director of the Urban League of Colorado noted that when employees responded to questions concerning referred applicants, it was clear that many were covertly judged on the basis of specific age distinctions.¹⁸⁴ Similarly, an annual report about the CETA program for the State of Washington observed that even if persons age 45 or older generally have "more experience and training, many [of these] older workers have difficulty finding employment because of employer resistance to hiring persons over 45."¹⁸⁵ Interestingly enough, the perception that employment decisions are discriminatory is pervasive among employers.¹⁸⁶

A review of ADEA charges readily portrays the character of the

180. *EEOC Enforcement*, *supra* note 80, at 9 (statement of Anne Briggs).

181. *Id.* at 14 (statement of C. Fletcher Taylor).

182. *Id.* at 17-18 (statement of LeRoy Stanley Knight).

183. CIVIL RIGHTS COMM'N, *supra* note 62, at 61 (statement of Lawrence Borom).

184. *Id.*

185. The study noted that employer resistance was rooted, in part, in mandatory retirement policies. *Id.* It would seem that employers would rather invest in younger workers having a longer time to provide returns. The Commission further noted that employers are reluctant to commit or refer older employees into CETA programs because of the fear that these "individuals [could not] be absorbed later into the regular workforce." *Id.* at 65.

186. Pepper, *supra* note 173, at 64.

victims suffering from age discrimination. Termination of employment is by far the most frequent basis for charges of age discrimination.¹⁸⁷ It appears that manufacturers have received the most complaints (approximately twenty-nine percent).¹⁸⁸ During the period 1980-1981, however, the services sector showed the largest increase in the number of EEOC complaints (thirty-nine percent).¹⁸⁹ Men lodge more complaints than women, especially in the older age brackets.¹⁹⁰ Of the aggregate number of age discrimination claims, most come from individuals in the 50-59 age range (forty-seven percent of all charges).¹⁹¹ This is alarming because most people would not consider themselves "over the hill" while in their fifties, especially since the federal government defines "retirement" as age 65 for Social Security eligibility.

Private employers are not, however, the sole practitioners of discriminatory actions. Of 108 lawsuits reviewed for an EEOC report, forty-three percent were against public employers, while three were against unions.¹⁹² Age discrimination has even affected the medical profession.¹⁹³

Thus, the evidence shows widespread age discrimination both in the private and public sectors.¹⁹⁴ Men and women in their peak

187. Sixty percent of all allegations claimed illegal job termination. Contentions of discriminatory hiring was next with 16% of all charges, and other major complaints included unfair terms and conditions (11%), promotion (9%), demotion (6%), and wages and benefits (5% each) policies. INFORMATION PAPER, *supra* note 70, at 91, app. X.

188. Other industries incurring many discrimination charges as of 1980 include both the services (20%) and public administration (14%) areas. Interestingly enough, agriculture, mining, and construction—all very physical jobs—suffered only negligible charges. *Id.* at 113, app. XV-D.

189. *Id.* Other marked increases for this period included trade-retail (26.5%), finance (23.2%), and transportation (20%). Major culprits like manufacturing and public administration showed only 19% and 1% increases, respectively, indicating that shear size may be the most important cause of many grievances. *Id.* at 114, app. XV-E.

190. *Id.* at 112, app. XV-C. The largest number of complaints come from men in the 60-64 age bracket, with the number of complaints diminishing after age 64. This is particularly true of hiring, benefits, and demotion charges, where approximately 62 to 68% of all charges are filed by men. But wages, promotion, and terms and condition discrimination seem to affect males and females equally. *Id.* at 111, app. XV-B.

191. *Id.* at 110, app. XV-A.

192. *Id.* at 51, app. XIII.

193. The Civil Rights Commission investigated selection standards of 114 medical schools, finding that 28 schools had specified age limitations. One of these 28 institutions went so far as to comment in its informal bulletin that "applicants over the age of 30 rarely will be considered. No applications from persons over 35 will be accepted." CIVIL RIGHTS COMM'N, *supra* note 62, at 76.

194. Professor Schuck forcefully argues for the use of age-based classifications to select individuals to receive aid from federally-assisted programs. He notes that age is an objective, readily measurable criterion to meet federal program requirements, posing a defense against

working years are confronted by a host of discriminatory actions in almost every job field. Such omnipresent discrimination cannot be ignored; the problem must be faced directly. Indeed, finding employment for the elderly will become a greater necessity given that elderly citizens will constitute a larger segment of society.¹⁹⁵

2. *Underlying Rationales*

What engenders the practice of age discrimination? The most obvious reasons are time and cost savings. Rather than engaging in time-consuming and costly determinations of individual capabilities, a personnel director or program administrator can rely on a clear, superficially justifiable standard: employee age. This tool has the advantage of treating all people of similar age equally. This tool also allows employers to reduce labor costs by employing younger, less expensive (perhaps nonunion) workers. In this light, age discrimination is the ultimate democratization of the work place.

Decisions resulting from public program directors' use of the time and cost saving rationales are more troublesome. A study by

bureaucratic bias, error, and citizen manipulation. Furthermore, because everyone shares a particular age characteristic at some point, other groups will be less likely to oppress persons of an older age group, because they will be in an analogous position in the future. Moreover, legislators presumably will make less arbitrary use of age standards than of race or sex classifications, which regularly undergo exacting review by courts. Finally, no systematic political disability or historical disadvantage supports the conclusion that age criteria are suspect. Professor Schuck finally contends that the use of an immutable characteristic like age to allocate benefits may cause less stigmatization or damage than the use of individual characteristics reflecting merit. See Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 *YALE L.J.* 27 (1979).

This analysis fits into a federal framework in which federal legislators must allocate limited funds, and where decisions about who receives the benefits are made in a political vortex. Such reasoning should be inapplicable in the public and private employment sectors, because it serves to deprive persons of the means to earn a living without considering whether the individual is, in fact, qualified for the employment. The same propositions could be advanced supporting race or sex classifications. The simple assertion that standardized age classifications are more egalitarian and less injurious or that persons receive the same benefits irrespective of capability at an earlier point in their life, or that it increases administrative ease is an inadequate justification.

The fact is that age discrimination has been, and will continue to be pervasive, refuting the argument that senior citizens have not been historically disadvantaged like other protected minorities. Furthermore, the problem is destined to grow worse as a greater segment of society is represented by the elderly. At any point in time, a discrete, readily ascertainable group of older Americans are being deprived of employment simply because they are over a maximum age standard. Like color, sex, or national origin, one cannot change his age; consequently, age discrimination should not be considered less invidious than other forms of invidious characterization.

195. Persons between the ages of 20 and 34 currently constitute 45% of the entire employee population; that percentage is expected to decrease to 35% by the year 2000. *SHADES OF GRAY*, *supra* note 62, at 155-56.

the Civil Rights Commission of CETA programs discovered that some programs were concerned about the cost effectiveness of training persons over 45 when the training expense was compared with the payback received.¹⁹⁶ This essentially amounts to a return on investment analysis. As taxpayers, however, we expect public remedial programs to increase society's benefit, not only to benefit the administrative agency.

Rigid age guidelines have several disadvantages negating any potential benefits. First, the use of age alone discounts individual differences, ignoring individual strengths. Age also limits the opportunities and privileges of a person, thus preventing him from developing to his full potential. Society is thereby deprived of the elderly's complete participation. As society ages and resources dwindle, the participation and wisdom of older citizens will become even more valuable.¹⁹⁷ To summarize, the use of age as a sole employment criterion facilitates stereotyping, ignores merit, and undermines basic societal concepts of equality and individual worth. Because age is an immutable characteristic affecting only a discrete, readily ascertainable group of individuals at any given time, employment discrimination based on age becomes untenable.¹⁹⁸

C. *Tangible Effects of Age Discrimination*

Unemployment for older workers is increasing at a faster rate than for any other age group.¹⁹⁹ Ironically, union-supported senior-

196. CIVIL RIGHTS COMM'N, *supra* note 62, at 166. Some administrators contended: "The cost, the benefit to society, or the probability of success of serving persons of different ages . . . differs, and therefore resources should be focused on those age groups that will provide society with the greatest return on its investment." *Id.* at 79-81.

197. Birren & Loucks, *Age Related Change and the Individual*, 57 CHI.-[KENT L. REV. 833, 834-35 (1981).

198. *See Eglit, supra* note 5, at 860-62.

199. Pepper, *supra* note 173, at 60. In the first nine months of 1982, it jumped 24% for those 55 and older, compared to 11% for those 16-24. The unemployment increase for all others was 16%. *Id.* There were 771,000 unemployed people 55 and over, and 1.7 million jobless who were 45 and older, representing the highest unemployment since World War II. Not only are older workers temporarily unemployed, but also age discrimination largely undermines their efforts to find new employment. The House committee report indicates that roughly 67% of men 55 to 64 years old were employed, representing a 23% decrease since 1950. *Id.* at 61. Generally, employees between 55 and 64 remain unemployed approximately 20 weeks compared to 15.5 weeks for *all* unemployed persons. *Id.* at 60. The net result is that relative to all adults over 25, workers 60 years or older are thrice as likely to discontinue searching for replacement employment. *Id.* Even if this older worker is able to find a new position, studies indicate that he will lose an average annual amount of \$50 from his paycheck. *Id.* Thus, a worker returning to the work force at age 45 would lose an average \$1,000 in salary (compared to a returning worker age 25). The finding having the greatest economic significance is that age discrimination cost this country \$1.5 billion in unemploy-

ity systems greatly contribute to this problem. When a business is in trouble, the youngest employees are laid off first. When the business finally closes, the older workers find that the younger workers have already taken all the comparable positions in the community, resulting, generally, in permanent unemployment for the older worker.²⁰⁰

Contrary to popular belief, older workers do not anxiously await their golden retirement years.²⁰¹ Companies induce workers to retire early by offering lucrative early retirement options. Once out of the labor force, however, many early retirees discover they cannot afford to live off their pensions. By then it is too late to find new employment.²⁰²

The effects of unemployment are more severe on older workers than on other age groups because they typically have been with one company longer. Usually they have higher wages, stronger loyalties, and more friends. Consequently, they have more to lose by being laid off than their younger colleagues.

Although workers in their 50's often have children in college, and mortgage and car payments to make, they cannot begin to draw a pension since they have not met the age and service requirements necessary to have their pension rights vest. Furthermore, they are not eligible for Social Security early retirement until age 62, and not qualified for Medicare until age 65.²⁰³ Older workers may find themselves in a precarious financial position, sometimes resulting in poverty.²⁰⁴

ment insurance benefit payments in 1982. *Id.* Even with lower inflation rates since 1982, the amount of unemployment benefits paid because of age discrimination is still substantial. *Id.* at 60-61. See *Disparate Impact Analysis*, *supra* note 90, at 1063.

200. Pepper, *supra* note 173, at 65.

201. A study of those electing to take reduced social security benefits for retiring before age 65 showed that only 28% retired for voluntary reasons, such as being needed in the home, or job dissatisfaction. *Over Sixty-Five*, *supra* note 51, at 335. The others retired because they were in poor health, had reached the compulsory retirement age, or were being laid off. *Id.* See Lauriat & Rabin, *Men Who Claim Benefits Before Age 65: Findings from A Survey of New Beneficiaries, 1968*, 33 SOC. SECURITY BULL. (1970).

202. Pepper, *supra* note 173, at 65. Furthermore, retirement programs sometimes are not entirely voluntary, because employers have been known to coerce workers into retiring early, particularly when the economy turns sluggish. *Id.* A good example is Chrysler Corporation, which was required to reinstate eight of its workers after forcing early retirement or layoff. *Id.*

203. *Id.* at 63.

204. A 1969 Senate Special Committee on the Aging report found that "three out of every ten persons in the over sixty-five group—in contrast to one in nine younger people—[were] living below the poverty level." *Over Sixty-Five*, *supra* note 51, at 333 (citing 115 CONG. REC. 230 (1964)). Average pensions, for example, only amount to 20-40% of average pre-retirement earnings. *Over Sixty-Five*, *supra* note 51, at 335.

Because older persons tend to suffer from longer periods of unemployment, they are more likely to experience higher blood pressure, cholesterol levels, average pulse rate, and are more prone to develop stress-related diseases such as diabetes, peptic ulcers, gout, hypertension and arthritis.²⁰⁵ Long periods of unemployment also increase the likelihood of "depression, low self-esteem, anxiety and tension, insomnia, anger and irritation, resentment, and suspicion."²⁰⁶ Depleted financial resources also might contribute to the development of mental illness.²⁰⁷

People from all types of backgrounds suffer from age discrimination. Dr. John R. Coleman, who, in 1973, was the president of Haverford College, had this to say about his dismissal from experimental menial summer employment at age 51:

I'd never been fired and I'd never been unemployed. For three days I walked the streets. Though I had a bank account, though my children's tuition was paid, though I had a salary and a job waiting for me back in Haverford, I was demoralized. I had an inkling of how professionals my age feel when they lose their job and their confidence begins to sink.²⁰⁸

Age discrimination continues to affect older employees even after they have become unemployed. Although the Age Discrimination Act of 1975²⁰⁹ guarantees that federal programs will be free from arbitrary age considerations, age discrimination in the private sector can limit the very availability of these programs. CETA training and public employment programs, as well as Vocational Rehabilitation assistance plans, restrict participation of older persons because referrals to these services depend upon cooperation from public and private employment markets which discriminate on the basis of age.²¹⁰ A Civil Rights Commission report concluded that age discrimination in federally supported programs can only be

205. Pepper, *supra* note 173, at 64.

206. *Id.*

207. *Id.*

208. Agatstein, *supra* note 62, at 309 (quoting John R. Coleman, President, Haverford College).

209. Age Discrimination Act of 1975, Pub. L. No. 94-135, § 303, 89 Stat. 728 (codified as amended at 42 U.S.C. §§ 6101-6107 (1983)). "[N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." *Id.* § 6102.

210. CIVIL RIGHTS COMM'N, *supra* note 62, at 61. Although people in the 22-44 age bracket suffered 46.5% of the unemployment in 1976, they only accounted for approximately 36% of CETA enrollees. Likewise, although the 45-54 and 55-65 age brackets account for 10.9% and 6.8% of unemployment, respectively, roughly 4% and 2% of persons respectively aged 45-54 and 55-64 enrolled in CETA Title I programs receive help. By contrast, 17.1% of

eliminated if it is concurrently eliminated from the entire job market.²¹¹

D. *Judicial Treatment: An Equal Protection Argument*

Applying an equal protection analysis to private employers demonstrates how the Court has erred in its characterization of age. If either a fundamental right is at stake or the litigant is a member of a "suspect class," the Court will protect an individual who is denied the benefits or rights given to others similarly situated. Unfortunately, the judiciary has always declined to find a fundamental right to earn a living,²¹² and the Supreme Court placed a roadblock in the latter path by deciding in *Massachusetts Board of Retirement v. Murgia* that age is not a suspect class.²¹³ *Murgia* involved a state law requiring the retirement of uniformed state police officers at age 50.²¹⁴ Deferring to the legislature's age distinctions, the Court distinguished age and race classifications in three ways. First, unlike blacks, older persons have not been subjected to a "history of purposeful unequal treatment."²¹⁵ Second, the elderly have not been discriminated against by "stereotyped characteristics not truly indicative of their abilities."²¹⁶ Finally, older people do not constitute a "discrete and insular minority deserving of extraordinary protection from the majoritarian political process," since age is a process which affects everyone in society.²¹⁷

Unfortunately, our society eases its conscience by using the suspect class analysis to justify the general belief that older workers are not victims of age discrimination—or at least affected less than those fighting other forms of discrimination. At best, such a societal view manifests reckless ambivalence; at worst, it may reflect an

the unemployment population is younger than 19, but this group accounts for 36% of CETA enrollees. *Id.* at 31.

Vocational Rehabilitation ("VR") programs are no different. Workers age 55-59 account for 16.4% and 19.2% of the disabled and severely disabled population respectively, but constitute only 6.2% of all rehabilitation clients. Although only 6.7% and 3.5% of the disabled and severely disabled groups are between the ages of 20 and 24, they comprise 22.7% of the VR's openings. *Id.* at 18.

211. CIVIL RIGHTS COMM'N, *supra* note 62, at 66-67.

212. See *Slaughter House Cases*, 83 U.S. 36, 80-81 (1873). Besides most of the rights guaranteed by the Bill of Rights, courts also view privacy, voting in state elections, freedom of travel, and an ill-defined notion of freedom from indigence-related disparities in the criminal justice system as fundamental. Eglit, *supra* note 5, at 874-75.

213. 427 U.S. 307 (1976).

214. *Id.* at 308.

215. *Id.* at 313.

216. *Id.*

217. *Id.* See Harvard Note, *supra* note 55, at 386.

insidious motive. Older people might seem to be better off compared to victims of race discrimination, who have suffered through this country's long-standing history of unequal treatment. This misperception may be attributable to the fact that age is a less obvious trait than skin color or ethnicity. Older people, in fact, suffer and probably will continue to suffer from age discrimination. The disproportionate impact evidences the removal of, and, in many cases, the conscious seizure of, the human need to be both independent and self-reliant. Because the Supreme Court has vigorously championed the plight of blacks and, more recently, women,²¹⁸ it is somewhat inconsistent for the Court to ignore the equally injurious effects of age discrimination.

Television, newspapers, and other shapers of public opinion regrettably foster erroneous images of old age. "Media coverage of the elderly poor, the elderly sick, the elderly institutionalized, and the elderly unemployed or retired may be protecting and reinforcing the distorted stereotypes of the elderly."²¹⁹ Notes another commentator:

The few exceptional characters in family dramas, detective stories, and situation comedies notwithstanding, most aged men and women are represented as one-dimensional, peripheral types who lack (or are denied) the full range of human feelings and foibles expressed by younger actors. Americans over sixty are disproportionately found in commercials recommending health aids or geared to nostalgia buffs, but they almost never sell cars or clothing.²²⁰

In short, "older people are perceived as set in their ways, conservative, disliking change, physically and mentally inactive (if not incapacitated), and generally without much to offer those around them."²²¹ The unfortunate reality is that old age is unjustifiably linked to inability, causing 9,000 annual complaints to the EEOC alone. Older workers can become more productive with age. Admittedly, at some point age is related to ability. However, older workers' capacity for physical and intellectual rigor is sufficiently

218. See *Califano v. Goldfarb*, 430 U.S. 199 (1977) (Court found invidious discrimination in Social Security Act survivors' benefits, which paid widow regardless of dependency, but paid widower only if he was receiving over half of his support from deceased wife); *Craig v. Boren*, 429 U.S. 190 (1976) (Oklahoma statute prohibiting sale of liquor to females under 18 and males under 21 was gender-based). See Levine, *Comments on the Constitutional Law of Age Discrimination*, 57 CHI.-[]KENT L. REV. 1081, 1108 (1981).

219. OLD AGE, *supra* note 62, at 163 (citing the findings of a 1975 Louis Harris & Associates survey).

220. *Id.*

221. *Disparate Impact Analysis*, *supra* note 90, at 1062.

unrelated to chronological age as to make the use of arbitrary age standards unjust. Scholars emphasize the greater variability that exists among the aged, resulting in greater awareness of the "extent and virulence of *ageism* in contemporary America."²²²

When asked to consider the issue, employers find that their older employees are more than competent.²²³ Psychological research indicates that people age at different rates in different manners,²²⁴ causing divergent effects on "competency."²²⁵ There are several crucial aspects of physical performance: strength, endurance, speed, agility and flexibility.²²⁶ Scientists have also found that the average physical performance of healthy, older adults tends to approach that of younger adults.²²⁷ Only speed of performance seems to be age-related; in contrast, endurance, agility, flexibility

222. SHADES OF GRAY, *supra* note 62, at 121 (emphasis in original). According to Dr. Butler, the first director of the National Institute on Aging, not only do gender and color form the basis of systematic discriminatory stereotypes for women and blacks, respectively, but also "[a]geism [serves] as a systematic stereotyping of and discrimination against [older] persons." *Id.*

223. An employer-answered survey rated their older workers equal to or better than younger persons in nine out of ten characteristics influencing job performance. Among the nine were: quantity of work, quality of work, accident rate, versatility, compatibility, and speed in gaining proficiency. Adaptability to change was the only characteristic in which older employees were rated inferior to younger workers. ACTION FOR OLDER AMERICANS, 1964 ANNUAL REPORT OF THE PRESIDENT'S COUNCIL ON AGING 28 (1965).

224. There are three different definitions of age: (1) *biological age*, or the person's present position with respect to his potential lifespan; (2) *psychological age*, which measures the capacity for adaptation to environmental change; and (3) *social age*, which indicates whether the individual behaves younger or older than the expected behavior of a person of his chronological age. Birren & Loucks, *supra* note 197, at 839-40.

Similarly, there are three separate processes of change over time. One is the probability that dying increases with age, called "senescing." *Id.* at 840. The second is "geronting," which constitutes changes in the worker's ability to adapt to environmental demands. *Id.* "Eldering," the third process, consists of progressive changes in roles and social habits. *Id.* If the biological, psychological, and social processes of aging were completely interdependent, then a sick, elderly person who is wise would never exist. Some individuals might age in an accelerated manner biologically, but are spared intellectually. *Id.* On the other hand, there are also people who have little intellectual awareness of their environment, but whose bodies are in excellent shape. Since no single factor seems to govern the rate of human aging, diversified patterns of aging are created. *Id.* at 840-41.

225. "Competency" refers to the ability to adapt to environmental demands, which requires a vital brain well-supplied with blood flow and nutrients. *Id.* at 841. The central nervous system which regulates the vital processes of the body and processes information to handle symbols and reasoning is also important because the electrical activity of the brain tends to slow as one ages. *Id.* at 841-42. However, this phenomenon is more significantly caused by disease rather than by age. *Id.* Consequently, senility only afflicts some people of advanced age. *Id.*

226. Birren & Loucks, *supra* note 197, at 842.

227. *Id.* at 843.

and strength of older workers tend to improve with age.²²⁸

Intelligence also appears to be unrelated to age. Recent investigations, for example, have shown that many aspects of verbal intelligence, including vocabulary size and verbal comprehension, show no gradual diminution after age 65, and may possibly increase.²²⁹ Although older people take longer to discern relevant information and seem to process information in smaller units,²³⁰ they tend to compensate by organizing material conceptually, freeing themselves to process fewer bits in classifying events, retrieving information, and responding appropriately.²³¹ This is where experience is advantageous, for the older worker has seen many similar problems in the past, and can remember the solution process. Older workers also use experience to compensate for their physical limitations, changing their approach to the given task. Similarly, elderly people tend to have very stable personalities. They manage their emotional reactions to crises better than their younger counterparts, establishing an objective approach to solving problems.²³²

If physical and intellectual abilities are not substantially age-dependent, then it would be unjust for an employer to treat employees of the same age as having identical physical and mental attributes merely to satisfy the employer's unwarranted stereotype. There simply are too many independent variables to permit homogeneous categorization. Furthermore, the employer cheats himself of productive and experienced workers if he uses an arbitrary age in employment decisions. The employer should, therefore, test employees individually to appraise each employee's actual ability.

It is likewise unreasonable for the Court to trivialize the antipathy and ambivalence²³³ historically faced by older persons. At least

228. See, e.g., Kay & Birren, *Swimming Speed of the Albino Rat: II Fatigue, Practice, and Drug Effects on Age and Sex Differences*, 13 J. GERONTOLOGY 378, 385 (1958). One research project found that older adults improve their finger movement flexibility at the same rate as young adults. Birren & Loucks, *supra* note 197, at 843.

229. Schaie & Strother, *A Cross-Sequential Study of Age Changes in Cognitive Behavior*, 70 PSYCH. BULL. 671 (1968). A random sample of 500 persons of different ages and generations were tested initially and retested seven years later. The retesting revealed only significant decrease in ability for two testing variables. *Id.* at 673. One variable measured "response" speed. *Id.* Poor test scores may result more from test rustiness, mental disease or disuse rather than physiological loss. Birren & Loucks, *supra* note 197, at 845.

230. See, e.g., Rabbitt, *An Age-decrement in the Ability to Ignore Irrelevant Information*, 20 J. GERONTOLOGY 233, 236-37 (1965).

231. Birren, *Age Decision Strategies*, in DECISION MAKING AND AGE 23, 25 (1969).

232. Woodruff & Birren, *Age Changes and Cohort Differences in Personality*, 6 DEV. PSYCH. 252, 256 (1972).

233. Levine, *supra* note 218, at 1108.

one historian has concluded that "late in the eighteenth century, . . . [the] social status of the aged, which had risen for nearly two hundred years, began to fall. . . . [D]uring the nineteenth century, expressions of hostility to old age grew steadily stronger in America."²³⁴ In short, older workers have been relegated to second class citizenship. If older persons had not suffered from some disability, Congress would not have felt the need to enact the ADEA and other age-related legislation.²³⁵

A substantial and related problem in the *Murgia* decision is the Court's adoption of a dubious and damaging suspect class analysis when it could have analyzed the mandatory retirement law as a BFOQ. Because harmful age stereotypes are patently unrelated to physical and mental ability, the historical hostility buttressing *Murgia's* unwillingness to extend equal protection to older employees is without foundation. As a final aside, there is no reason to suspect that private employers will be any more charitable in their treatment of the elderly than they are with other traditionally disadvantaged groups.

V. CONCLUSION

Unquestionably, class actions are an ideal way to litigate matters which affect large numbers of individuals, such as age discrimination. They avoid multiple suits, promote efficient adjudication, and permit claims which would be economically unfeasible if brought individually. This last benefit is particularly important in light of discovery costs and attorney's fees. Indeed, a plaintiff can often get a worthy attorney only if he has a class action.

The ADEA was enacted to fight age discrimination, an increasingly necessary task. Although Congress called for an enforcement mechanism patterned after the FLSA, the legislative history and evolution of the class action suggest a neutrality toward the use of a Rule 23 class action. Moreover, public policy requires the most efficient and effective vehicle to fight age discrimination. Employers may question whether a class action is appropriate in cases where not all plaintiffs share the same degree of suspect trait (i.e., age), as plaintiffs in a Title VII action do (e.g., all black or all female), but this is a question governed by commonality and typicality concerns in the certification process. It should not be used as an excuse to frustrate completely the group's ability to remedy past

234. *Id.* (citing D. FISCHER, *GROWING OLD IN AMERICA* 224-25 (exp. ed. 1978)).

235. See Eglit, *supra* note 5, at 885.

discrimination.²³⁶

Even if courts disallow a Rule 23 class action in an ADEA suit, they should still permit notice and independent solicitation. Furthermore, Congress should amend the ADEA to eliminate the opt-in requirement and provide for notice. It is only through Congressional amendment and liberalized judicial interpretation of the ADEA that the Act's purpose may be realized. Only by ridding the job market of stereotyped attitudes against older workers may Senator Young's characterization of "age" ring true:

We do not grow old merely by living a number of years. People grow old by losing their enthusiasm, deserting their ideals,

236. Nor would there be any danger of abuse if the ADEA adopted an opt-out requirement like Rule 23 class actions. First, many courts rule that any plaintiff failing to individually file a grievance with the EEOC is barred from pursuing a claim either alone or as a member of a class action. *See Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977); *Mitchell v. U.S. Steel Corp.*, 33 Empl. Prac. Dec. (CCH) ¶ 34,103 (N.D. Ala. 1984) (each individual must file a charge of age discrimination with the EEOC before opting into a class); *McCorstin v. U.S. Steel Corp.*, 621 F.2d 749 (5th Cir. 1980) (filing notice with Secretary of Labor in FLSA case is prerequisite to class certification). Of course, some courts do not impose such a bar. *See, e.g., Bean v. Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979) (persons that have not filed notice of intent to sue may be represented by "similarly situated" grievants); *Behr v. Drake Hotel*, 586 F. Supp. 427 (N.D. Ill. 1984) (filing requirements subject to equitable modification); *Franci v. Avco Corp.*, 460 F. Supp. 389 (D. Conn. 1978) (notice of intent to sue requirement under ADEA is subject to equitable modification); *Locascio v. Teletype Corp.*, 74 F.R.D. 108 (N.D. Ill. 1977) (where factual claims of all plaintiffs are similar, noninclusive notice does not prevent plaintiffs nor exclude others not joined in the original suit). Even if the plaintiffs file the requisite notice, the tolling of the statute of limitations may act as a further bar. *Sussman v. Vornado, Inc.*, 90 F.R.D. 680 (D.N.J. 1981). *But cf. Mahoney v. Crocker Nat. Bank*, 571 F. Supp. 287 (N.D. Cal. 1983) (persons desiring to join the suit have until 90 days before the trial begins); *Pandis v. Sikorsky Aircraft Div. of U.T.C.*, 431 F. Supp. 793 (D. Conn. 1977) (person representing the class bears the burden of the filing requirement); *Wagner v. Loew's Theatres, Inc.*, 76 F.R.D. 23 (M.D.N.C. 1977) (opportunity to join in the class continues until reasonable time before trial).

Section 216(b) of the FLSA also requires plaintiffs to be similarly situated as a class. The court may seriously restrict a class action by adopting a narrow definition of "similarly situated." *See, e.g., E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Minstretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980); *Locascio v. Teletype Corp.*, 74 F.R.D. 108 (N.D. Ill. 1977). Some courts allow a broader definition. *See Allen v. Marshall Field & Co.*, 93 F.R.D. 438 (N.D. Ill. 1982) (affected employees were similarly situated notwithstanding differences in managerial level, geographic locations, and dates on which discrimination occurred); *Behr v. Drake Hotel*, 586 F. Supp. 427 (N.D. Ill. 1977).

Finally, the ADEA allows the generous BFOQ defense. If the employer can show that he felt in good faith that the plaintiff was too old to perform the duties of the particular job, he may plead this as an affirmative defense. The arbitrariness of age limits that an employer sets may well depend on the level of skill needed by an employee. For example, an employer might set lower age limits for an intercity bus driver than for a line worker, and still successfully assert a BFOQ defense. *Levien, supra* note 62, at 238-40. With these procedural precautions, the prospect of burgeoning age discrimination class actions is too remote to justify legislative and judicial handwringing on both the opt-in and notice questions. Bold change is demanded if efforts against institutionalized age discrimination are to be successful.

abandoning their joy for life, and no longer looking forward to the challenges of adventure and change.²³⁷

DAVID L. BIEK

237. 113 CONG. REC. 31,256 (1967) (statement of Sen. Young).