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Article: THE FUTURE OF LAW SCHOOL FACULTY HIRING IN LIGHT OF SMITH V. CITY OF JACKSON

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"[Giuseppe] Verdi wrote Falstaff when he was 70 - late - in his late 70's. It was his greatest creation."

Justice Ruth Bader Ginsburg's observation during oral argument in Smith v. City of Jackson [1]

TEXT:
[*1]

I. INTRODUCTION

The U.S. Supreme Court in Smith v. City of Jackson [2] ended the uncertainty over whether it was permissible to introduce evidence of disparate impact as a proxy for intent in certain age discrimination claims brought under the Age Discrimination in Employment Act of 1967 ("ADEA"). [3] The Supreme Court's decision undoubtedly will have an impact on organizations' hiring practices.

[*2] With respect to alleged discrimination in academia, and to law schools in particular, the Supreme Court has dealt with cases brought under Title VII of the Civil Rights Act of 1964 ("Civil Rights Act" or "Title VII"), the most famous of which concern discrimination in undergraduate and law school student admissions. [4] In its decisions, the Court expressed the view that colleges and universities could pursue diversity in their student bodies as a goal, provided that admissions decisions were "narrowly tailored" and not decided principally upon the race of the applicant. [5] The Court has not yet examined, however, whether individuals above the age of forty should be able to present evidence of disparate impact to prove discrimination in the hiring practices in higher education. [6] Here, unlike student admissions, the [*3] decision-making process is not as concerned with potential. Rather, in this process, there is more information available about a faculty applicant so as to allow for an evaluation of actual achievement. Furthermore, faculty diversity remains an important objective in recruiting faculty. The law school's consumers (i.e., students) can benefit from having access to faculty with substantial practical experience on a full-time basis. [7] Although there have been numerous cases alleging discrimination in faculty and other hiring in higher education, [8] the Supreme Court has yet to hear a case concerning the use of disparate impact to prove age discrimination by law schools in their [*4] hiring process. [9] In light of the Smith decision, this question will likely arise in the not too distant future. [10]

[*5] This article is organized into eight parts. Part II examines the legal arguments advanced by the parties in Smith. Part III provides an overview of faculty hiring practices at law schools. [11] Part IV examines certain complex issues involved in law school faculty hiring decisions. Part V discusses the role of the Association of American Law Schools in law school faculty searches. Part VI discusses changing trends in attitudes towards older persons in the work force. Part VII presents and analyzes data on the age and work experience outside academic or research settings of full-time law school faculty prior to their hiring in three states: Massachusetts, Ohio and Texas. [12] Part VIII examines the possible relevance of the D.C. Human Rights Act as an example of how non-federal legislation may apply to cases where age discrimination in faculty hiring is alleged. Finally, Part IX offers observations on the evolving legal norms regarding the role of age in the hiring of faculty by law schools.

[*6]

II. THE SUPREME COURT'S RULING THAT THE ADEA PERMITS PLAINTIFFS TO PRESENT EVIDENCE OF DISPARATE IMPACT IN SUPPORT OF THEIR DISCRIMINATION CLAIMS

Smith addressed the issue of whether plaintiffs may use evidence of "disparate impact" alone, without other proof of defendant's discriminatory intent, to support their claims of age discrimination under the ADEA. In Smith, a group of police and public safety officers, all above the age of forty, brought a lawsuit under the ADEA asserting that the City of Jackson, Mississippi discriminated against them by means of the structure of a new compensation scheme. [13] Under this new system, officers with less seniority were to receive salary increases, which, on a percentage basis, were larger than the increases their

more senior, and generally older, colleagues were to receive. [14] The City justified this action by claiming that it was necessary to make its efforts to recruit and retain younger officers more effective. Younger officers are more likely to switch jobs than their senior colleagues for a variety of reasons, including a greater concern with current salary and promotion opportunities than pension benefits. In addition, they are probably more willing to take on a position in a new work environment.

In urging the Supreme Court to rule that the ADEA, and Section 4 in particular, permit the demonstration of "disparate impact" to show age discrimination, the Petitioners advanced three arguments. [15] The Petitioners contended:

1. It was a reasonable (or at least a permissible) reading of the ADEA's relevant provisions to conclude that Congress delegated responsibility in this area to the Equal Employment Opportunity Commission ("EEOC"). Thus, the Supreme Court should defer to the EEOC's interpretation of these provisions. [16]

[*7] 2. When read in context, the ADEA's text specifically granted persons over the age of forty the right to bring "disparate impact" claims. [17]

3. The ADEA's legislative history indicated the intent to protect those over the age of forty as a "protected class." Congress intended that individuals covered under the ADEA should be treated by the courts in the same manner as persons protected under Title VII of the Civil Rights Act, except as explicitly provided in the ADEA. [18]

The EEOC's regulation on this provision of the ADEA supported the Petitioners' position. The regulation provided that:

[*8]

When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. [19]

The EEOC regulation's language may have far-reaching implications beyond Smith, a case in which the Court was specifically concerned with the meaning of 29 U.S.C. 623(a)(2), and which dealt solely with individuals who were already employed. The EEOC regulation is broader in that it can be read to cover individuals over the age of forty who are seeking employment and who believe that they are the victims of age discrimination pursuant to 29 U.S.C. 623(a)(1). [20]

The Petitioners emphasized Congress' general intent in enacting the ADEA. [21] They bolstered their arguments with empirical research on the issue of age discrimination. [22] The Petitioners made use of the Wirtz Report [23] to demonstrate that Congress intended

that the disparate impact liability theory be allowed to support a claim of age discrimination brought under the ADEA:

The Wirtz Report recommending the enactment of the ADEA is also consistent with the recognition of disparate impact liability. The Report targeted [*9] employment policies that have a "wholly unintended adverse effect" on older workers, or "indirectly restrict the employment of older workers." Indeed, it even cited as an example of a troubling employment practice exactly the policy at issue in Griggs: [24] a high school diploma requirement that will "obviously work against the employment of many older workers - unfairly, if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education." Although respondents often note the Report's concern with "arbitrary" discrimination, that perfectly describes disparate impact liability: employment practices that adversely affect older workers but have no reasonable justification. [25]

The Petitioners also challenged the Fifth Circuit's decision for reasons of statutory interpretation. [26] For example, they pointed out that:

The EEOC's reading is also confirmed by the ADEA's RFOA [reasonable factors other than age] provision, which provides that "otherwise prohibited" conduct is not subject to liability if it is "based on reasonable factors other than age." Petitioners' opening brief identified, and respondents fail to rebut, two inferences from the RFOA provision that strongly support the conclusion that the ADEA recognizes disparate impact liability. First, the ADEA cannot be limited merely to purposeful discrimination, because the RFOA provision operates on the premise that "otherwise prohibited" conduct includes action undertaken based on "factors other than age." Second, arbitrary action that disadvantages older workers is illegal, for the RFOA provision only exempts from liability conduct that is "reasonable," while unreasonable - but not purposefully discriminatory - employer conduct remains actionable. [27]

[*10] The Petitioners noted that the long-standing tenets of statutory interpretation strengthened their contentions. [28]

The Petitioners asked the Court to defer to the EEOC's reasonable interpretation on the issue of whether they should be permitted to use the disparate impact theory in asserting that age discrimination had occurred. [29] They buttressed their position with arguments advanced by scholars in the field. [30] The Petitioners urged the Court to make its ruling on the merits of the case, marshalling three separate but related arguments: (i) Congress's intent, (ii) the ADEA's actual text, and (iii) the EEOC's established position, as shown by its long-standing regulation. [31]

The American Association of Retired Persons ("AARP") and other organizations filed an

amicus brief in support of the Petitioners. [32] The AARP argued that Congress had almost identical motives in enacting Title VII and the ADEA, which was proof that disparate impact claims, not merely disparate treatment claims, were envisioned when both laws were adopted. [33] The logic behind this position was that if the Court were [*11] to refuse the Petitioners (or other ADEA protected persons) the possibility to present evidence of disparate impact to show age discrimination, there would be severe consequences, which would prove to be:

devastating to individuals, society, and the national economy, and [would undermine] ... the core civil rights principle that workers should be judged based on their abilities rather than characteristics unrelated to their participation in the work force, such as age. Because the consequences of discrimination are devastating regardless of the employer's motivation or the protected status of the victim, older workers must be afforded the same rights and avenues for redress as those enjoyed by victims of other forms of employment discrimination. [34]

The AARP Brief noted that since the Supreme Court had construed the relevant text of Title VII to permit the use of disparate impact theories, and since Congress used nearly identical language in the corresponding ADEA provisions, the Supreme Court should make an identical determination. [35]

The City, not surprisingly, argued that, despite the similarity of language used in the Civil Rights Act and the ADEA, Congress did not intend simply to treat age discrimination in the same manner as [*12] discrimination motivated by race, color, religion, and the other classes protected by the former Civil Rights Act. [36] The City distinguished age discrimination from other unlawful forms of discrimination, arguing that the classes protected under the two statutes were not the same; therefore, plaintiffs' allegation of age discrimination required proof of discriminatory intent as well as disparate impact. [37]

The City contended that existing precedent did not permit age discrimination to be shown by use of disparate impact theory alone and that the key element to a viable age discrimination claim remained discriminatory intent, which the City argued had not been demonstrated. [38] It also asserted that neither the ADEA's legislative history nor the statute's text supported the Petitioners' position [39] and that [*13] "the "presumption of uniform usage' "is not rigid and readily yields' to other indicia of statutory meaning." [40] The City pointed out that:

In General Dynamics, in addition to finding that the word "age" has different meanings within different sections of the ADEA, 124 S. Ct. at 1246-47, the Court held that the phrase "because of ... age" has a different scope than the phrase "because of ... race ... [or] sex" in Title VII. Id. The Court found that "age" "can be readily understood either as pointing to any number of years lived, or as common shorthand for the longer span and

concurrent aches that make youth look good." Id. at 1246. In contrast, the Court found that ""race' and "sex' are general terms that in every day usage require modifiers to indicate any relatively narrow application." Id. at 1247. The Court thus found that cases construing Title VII's prohibitions as applying broadly to distinctions that hurt persons of all races and genders were inappropriate as a guide to construing the ADEA's prohibitions; the Court held that "the prohibition of age discrimination is readily read more narrowly" to apply only to "distinctions that hurt older people." Id. [41]

Finally, the City argued that Griggs v. Duke Power Co. [42] and its progeny under Title VII do not support recognition of disparate impact claims under ADEA. [43]

[*14] The Court ultimately disagreed with the Fifth Circuit that the disparate impact theory of recovery was never available under ADEA (the limitation being the reasonable factors other than age provision (the "RFOA" provision)). [44] Nonetheless, the Court affirmed the Fifth Circuit's determination that the City's policy to enhance its competitiveness in its efforts to recruit and retain junior police officers was reasonable. [45] Justice John Paul Stevens wrote the decision for the Court. He noted that:

As enacted in 1967, 4(a)(2) of the ADEA, now codified as 29 U.S.C. 623(a)(2) ... , provided that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age ... ." 81 Stat. 603. Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in 703(a)(2) of the Civil Rights Act ... . Other provisions of the ADEA also parallel the earlier statute. [46]

The opinion explained that it is a well-established principle of statutory interpretation that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." [47]

Justice Stevens continued: "we have consistently applied that presumption to language in the ADEA that was "derived in haec verba from Title VII.' Our unanimous interpretation of 703(a)(2) of the Title VII in Griggs is therefore a precedent of compelling importance." [48] He further noted that, "unlike Title VII, however, 4(f)(1) of the ADEA contains language that significantly narrows its coverage by permitting any "otherwise prohibited' action "where the differentiation is based on [*15] reasonable factors other than age.'" [49] Thus, where disparate impact is demonstrated, the burden of proof shifts to the defendant. [50]

Smith was brought under 623(a)(2), which concerns an employer's adoption of policies that "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

status as an employee." [51] With the substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language is nearly identical to that found in 703(a)(1) of the Civil Rights Act. [52] Consequently, it appears that 623(a)(1) of the ADEA should be interpreted in the same fashion as the comparable provision of the Civil Rights Act, with the exception of the RFOA provision. Thus, it would be appropriate for a court to permit evidence of a hiring practice's disparate impact where there does not appear to be a valid RFOA. In reviewing such cases, it would seem that a court would be obligated to see if a purported RFOA was reasonable.

In a separate concurring opinion, Justice O'Connor (joined by Justices Kennedy and Thomas) dealt with the question of whether the principles being applied to 623(a)(2) of the ADEA also applied to 623(a)(1), which would also cover the hiring process. According to Justice O'Connor,

Paragraphs (a)(1) and (a)(2) do differ in one informative respect. The employer actions targeted by paragraph [*16] (a)(1) - i.e., refusing to hire, discharging, or discriminating against - are inherently harmful to the targeted individual. The actions referred to in paragraph (a)(2), on the other hand, i.e., limiting, segregating, or classifying - are facially neutral. Accordingly, paragraph (a)(2) includes additional language which clarifies that, to give rise to liability, the employer's action must actually injure someone: The decision to limit, segregate, or classify employees must "deprive or tend to deprive [an] individual of employment opportunities or otherwise adversely affect his status as an employee." That distinction aside, the structures of paragraphs (a)(1) and (a)(2) are otherwise identical. Each paragraph prohibits an employer from taking specified adverse actions against an individual "because of such individual's age." [53]

What constitutes "reasonable" hiring practices in situations where there is the possibility of hiring discrimination based on age would in all likelihood need to be examined on a case-by-case basis. In most instances, the required analysis would include a careful investigation and require highly subjective judgments. When individual rights come into conflict with university practices, courts have frequently resolved the dispute. [54]

III. OVERVIEW OF FACULTY HIRING PRACTICES AT LAW SCHOOLS

Law school search committees purport to balance a number of competing and complex objectives when recruiting new faculty. [55] [*17] Members of search committees insist that they seek the most qualified individuals and are understandably reluctant to admit to considering an applicant's qualifications or characteristics that are not job-related.

Determining which candidate is the "most qualified" is a particularly difficult task when there are a number of candidates with the necessary academic qualifications, scholarship (potential or actual), and demeanor. Although some law schools place emphasis on candidates' teaching ability, it is often the case that professors' effectiveness in the classroom is secondary to scholarship or scholarly potential.

Even if it were possible for law schools to make hiring decisions solely on the basis of merit, there is no single objective way to determine what constitutes merit. How is it possible to determine a candidate's ability to produce scholarly works? What criteria should be used to measure a candidate's achievement (or potential)? Can one assume that an individual's scholarly works improve with time, or will an individual run out of fresh ideas? Will a person with broader educational and lifetime experiences make greater contributions to the legal literature than someone whose entire professional life was spent in an academic setting?

Similarly, how is it possible to evaluate a candidate's effectiveness as a teacher? How does one take into account factors such as the difficulty of teaching a particular subject matter? How is it possible to weigh factors such as class size and the quality of the students, when reviewing evaluations of candidates' teaching ability and past performance? Unfortunately there are no clear approaches to resolve such topics.

How can a person's ability and willingness to be a contributing member of the faculty in other ways be predicted? Is it valid to assume that younger individuals are more willing to branch into new areas of the law or become active members of an academic institution than their older counterparts? Is relative youth a predictor of one's ability to be molded according to a specific model of pedagogy or scholarship? Is there a relationship between innovativeness and appropriateness for a particular position? It is probably impossible to predict the future [*18] performance and behavior of a particular candidate with a high degree of confidence.

Is it appropriate to think that if an individual, in the very early stages of his career, produces a significant academic work that is published in an important journal, that it is a valid predictor of future performance? [56] Perhaps concerns about the decline in productivity, relevance, and quality of scholarship are factors that sometimes give rise to the sensitive (and often highly charged) subject of post-tenure reviews of law school faculty. [57] The very existence of this debate would seem to highlight the difficulties involved in hiring decisions made on the basis of academic potential.

A person in an academic environment or a recent graduate may be more inclined to publish in scholarly publications, whereas an experienced practitioner might be more inclined to examine a practical issue of law. [58] Faculty search committees are probably more likely to [*19] value the first type of article believing that publication history is a good predictor of future performance. In addition, since the members of the search committee are themselves more likely to write theoretical and scholarly articles, they are likely to pick the candidate whose interests and approaches to subjects are most similar to their own. [59]

Of course, merit alone does not explain hiring outcomes. Educational institutions understandably seek to achieve diversity in their faculty, including diversity in the ethnicity, gender, geographic origin, race, religion, and sexual orientation of their faculty members. [60] To what degree is it appropriate to consider these factors during the hiring

process?

In the past, hiring was far less complex. Faculty members, like personnel in most organizations, hired persons most like themselves. Since most full-time faculty were not employees at will, but were hired pursuant to a contract and often on a tenure track, [61] professors frequently judged candidates by whether they would make good colleagues. [62] Sometimes, faculty members placed their personal interests before those of their institution by rejecting potential candidates who worked in their same field and who might be viewed as a potential threat (i.e., they could have become even more prominent scholars or more popular professors) - which is one reason why the institution of tenure was created. [63]

In addition, law school faculty search committees consider a candidate's area of interest or specialization, suitability to meet student [*20] body academic interests, and ability and willingness to contribute to the academic institution. Rather than conduct careful case-by-case evaluations of each candidate, many faculty search committees seem to engage in a form of "stereotyping" as a way to meet competing goals - seeking the proper balance with respect to such factors as scholarly potential, teaching ability, diversity, and willingness to contribute to the law school community. [64]

While there are numerous exceptions, the hiring process tends to produce outcomes that favor graduates of well-known, prestigious law schools that previously have provided individuals to law school faculties as well as outcomes in which there is an overrepresentation of individuals who have specific career patterns. For many schools, a candidate's pedigree is an important factor in the hiring decision, especially when the members of the hiring committee either do not personally know the individuals who wrote the candidate's references or are familiar with the institutions at which the candidate studied or had a post-J.D. fellowship. [65] Furthermore, hiring committees find it [*21] particularly difficult to assess how well young faculty candidates performed in their previous jobs, since they often did not work long enough to obtain significant responsibility. Consequently, persons with hiring authority typically feel more comfortable making job offers to candidates with the best pedigree; fewer uncertainties are involved and the decision is less likely to elicit criticism if the new faculty members do not work out well.

These factors often have resulted in law schools hiring young, inexperienced lawyers from the most prestigious institutions instead of older practitioners. This policy may prove to be less than optimal since how likely is it that someone can effectively teach evidence who has never tried a case? This problem has been reduced to some degree by the institution of clinical programs in which students are frequently instructed by lawyers with significant practical experience. [66] While some clinical attorneys or instructors are on tenure tracks and have the title of "professor," this appears to be the exception rather than the rule. The implicit message conveyed to clinicians is that they are members of a sub-stratum of faculty at law schools, who, unless they have long-term contracts, enjoy little job security. In many cases, law schools largely refuse to consider experienced lawyers as entry-level candidates for tenure track faculty positions, [67] often on the mistaken belief

that such individuals are merely looking for less demanding jobs and therefore will not devote themselves to a different professional environment or are [*22] not capable of producing "scholarship" [68] despite their practical experience.

The argument that it is reasonable for law school faculty hiring committees to focus their efforts on younger applicants is open to contention. Initially, it might seem that hiring younger faculty can be justified for reasons of cost minimization and institutional stability (in other words, not hiring applicants over forty can be explained by reasonable factors other than age). This may not be the case since faculty members may choose to leave a school either to join another faculty for personal reasons (e.g., family or a desire to work at a more prestigious institution) or to leave academia entirely (either recognizing that the individual will not receive tenure at the institution where she is teaching or to seek other opportunities due to financial or other reasons). [69] Furthermore, assistant professors on tenure tracks do not always receive tenure, sometimes being asked to leave after several years, thus requiring the recruitment of new faculty members. [70] This dynamic suggests that a potential plaintiff's opportunity to provide evidence of possible age discrimination by means of demonstrating disparate impact may be difficult. [71]

[*23] Unfortunately, the hiring process described above may contribute to law school students receiving a legal education that does not adequately prepare them for the practice of law. The apparent failure of many law schools to consider properly a faculty applicant's work experience presents an issue of major and increasing importance. [72]

IV. ADDITIONAL FACTORS TO BE CONSIDERED WHEN EXAMINING WHETHER THERE IS EMPLOYEMENT DISCRIMINATION IN ACADEMIC SETTINGS

Academic institutions, many of which are organized as private corporate entities, often find themselves defending allegations of discrimination in their hiring, promotion, salary, and termination policies and practices. To date, most of these claims have been based on Title VII of the Civil Rights Act [73] or the Americans with Disabilities Act ("ADA"). [74] In light of Smith, age discrimination cases involving hiring processes brought under the ADEA would be analyzed using an [*24] approach similar to that used in Title VII or ADA cases, except where the employer can demonstrate a valid RFOA. In most cases, the standards applied to private corporations are applicable to educational institutions; however, there are two notable exceptions: (i) state colleges and universities, and (ii) religious educational institutions.

A. State Colleges and Universities

With respect to the admission of students to state educational institutions, the Supreme Court has taken the position that the Constitution's Fifth and Fourteenth Amendments call for "strict scrutiny" of all race-based action taken by any level of government. [75] The most controversial cases to date involve the contention that the plaintiffs were adversely affected by defendants' affirmative action policies. [76] Affirmative action policies aimed at increasing diversity are usually permissible so long as race is only one of many factors

considered in the admissions process and the state educational institution shows a compelling state interest that is "narrowly tailored" to achieve the desired result. [77]

Irrespective of the nature of the defendant, a plaintiff seeking to demonstrate that unlawful discrimination under Title VII has occurred must show that:

1. Plaintiff has proven by a preponderance of the evidence a prima facie case of discrimination. The plaintiff must establish four elements to make a prima facie case: (1) he or she belongs to a protected class, (2) he or see applied and was qualified for the job, (3) despite his or her qualifications, he or she was rejected, and (4) the position remained unfilled and the employer continued to seek applicants after the plaintiff was rejected. [78] It is easier to demonstrate a prima facie case of discrimination where the qualifications are objective (e.g., amount of experience in similar positions, holding a relevant degree or license, or number of publications in scholarly journals) rather than having to prove subjective factors such as intent. [79]

[*25] 2. If plaintiff is successful in establishing a prima facie case, the defendant then has the burden of demonstrating a legitimate, nondiscriminatory justification for declining to hire the plaintiff. [80]

3. If defendant has a lawful rationale for its actions, then the plaintiff must prove by a preponderance of the evidence that the alleged justification offered by the defendant was in fact not the case and served merely as a pretext for discrimination. [81]

The situation would be different if a plaintiff were to assert that a facially neutral employment policy had a discriminatory impact on a protected class, including persons protected by application of the ADEA.

When there are multiple applicants for a single position, the hiring process is a zero-sum game. If one individual obtains a position, the others do not. If one or more candidates believe that the process violated federal or state law, there is the possibility of a lawsuit. If it were necessary to prove "intent" directly, most plaintiffs would have difficulty prevailing since the hiring process has both objective and subjective elements. [82]

[*26]

B. Religious Educational Institutions

The case law involving religious educational institutions is complex and frequently inconsistent. Sections 702 and 703(e)(2) of the Civil Rights Act permit religious education institutions meeting certain defined criteria to use religion as a factor in their hiring practices. [83] In Pime v. Loyola University, Pime was teaching at the University part-time. [84] He did not apply for one of three openings in the Philosophy Department, as they had been reserved for Jesuits and he was Jewish. [85] Pime filed a complaint with the

EEOC, which took up his case. The U.S. District Court ruled that being a Jesuit was indeed a bona fide occupational qualification ("BFOQ") for the positions. [86]

The Seventh Circuit agreed that Loyola had the legal right to restrict the positions to a particularly religious affiliation. It noted that the Society of Jesus, a religious order of the Roman Catholic Church, had established the University and that the positions for which Pime applied were in the area of philosophy, an area closely tied to the religious affiliation of the University. [87] It observed that:

The BFOQ involved in this case is membership in a religious order of a particular faith. There is evidence of the relationship of the order to Loyola, and that Jesuit "presence" is important to the successful operation of the university. It appears to be significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have [*27] received the training and accepted the obligations that are essential to membership in the Society of Jesus. It requires more to be a Jesuit than just adherence to the Catholic faith, and it seems wholly reasonable to believe that the educational experience at Loyola would be different if a Jesuit presence were not maintained. As priests, Jesuits perform rites and sacraments, and counsel members of the university community, including students, faculty, and staff. One witness expressed the objective as keeping a presence "so that students would occasionally encounter a Jesuit." [88]

Pime was not a typical hiring discrimination case since Loyola was not merely affiliated with a particular religion in a nominal fashion; rather Jesuits took the leading role in the University's administration and had indeed founded the institution. [89] In addition, the positions were in the area of philosophy - an area closely tied to Loyola's religious affiliation, Loyola had non-Jesuit faculty, and the appellant was already teaching in the Philosophy Department on a part-time basis. [90]

Similar results were reached in Little v. Wuerf [91] and EEOC v. Catholic University of America. [92] The first case presented little controversy. In Little, the appellate court affirmed the trial court by holding that a Catholic diocese's refusal to rehire a Protestant teacher who had remarried did not violate Title VII because her beliefs and conduct no longer were consistent with the tenets of the Catholic Church. [93] In contrast, the latter case involved an accusation of sex discrimination rather than religious discrimination. In Catholic University of America, the University hired Sister McDonough, a nun of the Dominican Order, for a tenure-track position. [94] Eventually, she was [*28] denied tenure and brought suit claiming sex discrimination in violation of Title VII. [95]

The Court of Appeals for the District of Columbia affirmed the district court's decision to dismiss the action on a motion for summary judgment. [96] The court believed that applying Title VII would have violated both the Free Exercise Clause and the Establishment Clause of the First Amendment, and believed that the Constitution's Establishment Clause precluded a court from judging the nun's scholarship, which would have entangled the court in matters of religion. [97]

In contrast, the Ninth Circuit in EEOC v. Samehameha Schools ruled that unlawful religious discrimination had occurred when two private schools that required that teachers be Protestants refused to hire non-Protestant teachers. [98] In reaching this outcome, the Samehameha Schools court found it to be significant that "the ownership and affiliation, purpose, faculty, student body, student activities, and curriculum of the Schools are either essentially secular, or neutral as far as religion is concerned, and we conclude the general picture of the Schools reflects a primarily secular rather than a primarily religious orientation." [99] Thus, it would seem that the extent of the role of religion in the curricula and administration of the school is the key to whether it enjoys the protections provided in the Civil Rights Act's exceptions. [100]

The Seventh Circuit generally defers to a religious organization's right to manage its own affairs, despite the existence of otherwise valid civil rights claims. For example, in Young v. Northern Illinois Conference of United Methodist Church, [101] the Seventh Circuit ruled that Title VII did not prevent a church from making its hiring decisions [*29] of clergy in a manner that otherwise may be characterized as race or gender discrimination. [102]

Courts have sought to establish limitations on a sectarian educational institution's autonomy in conducting its personnel matters. For example, in EEOC v. S.W. Baptist Theological Seminary, the Commission, during the course of an investigation, sought to compel a seminary to provide it with certain personnel documents. [103] The seminary refused on First Amendment grounds, claiming it need not turnover the documents at issue since it only granted degrees in theology, religious education, and church music. [104] The Fifth Circuit performed a balancing test in which the federal government's authority to enforce the Civil Rights Act was balanced against the seminary's First Amendment rights. The court ultimately ordered the seminary to turn over those documents that concerned support staff and other non-ministers (i.e., non-clergy). [105]

Plaintiffs have less difficulty demonstrating discrimination in public and secular education institutions, even where they have not in fact applied for a position. In Chuang v. University of California Davis, for example, Dr. Ronald Chuang and Dr. Linda Chuang claimed that university discriminated against them on the basis of their race (Asian) and national origin (Chinese). [106] They asserted three separate claims, the principal one being that the University of California Davis did not offer Dr. Ronald Chuang a tenured position as it had promised. [107] The trial court granted summary judgment to the university on all three claims. The Ninth Circuit reversed the grant of summary judgment on two of the three claims, and remanded the case for further proceedings on those two discrimination claims. [108]

The existence of discrimination in hiring by religious educational institutions is generally less controversial than so-called "affirmative action" cases. In the sphere of education, the Supreme Court has examined the legitimacy of programs that promote diversity in student admission at both the undergraduate and law school levels. [109] With [*30] respect to student admissions, apart from the diversity factor, the school is concerned in part with a student's academic development. [110] While there have been numerous cases alleging

discrimination in hiring, [111] there has not been any case alleging age discrimination by law schools in their faculty hiring process.

The reason for the absence of such cases may be the common view that age is different from race, gender or ethnic origin. That view is represented by the City's argument in Smith that neither the ADEA's text nor its legislative history supported the view that the disparate impact theory could support an age discrimination claim. [112]

V. THE ROLE OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS IN LAW SCHOOL FACULTY RECRUITMENT

Personnel turnover is constant at all institutions, in all fields, and at different levels; though due to the tenure system, faculty mobility is probably less than the mobility of individuals employed in most other capacities. [113] One would expect that mobility within law school faculties declines with members' seniority. The particular faculty needs of different law schools are in constant flux as numerous factors that influence their faculty needs (e.g., number of students, accreditation requirements, the availability of visiting and adjunct faculty, faculty members changing schools, retirements) change over time.

[*31] The Association of American Law Schools ("AALS") is a voluntary organization of law schools that includes most of the leading law schools in the country. [114] The AALS plays a significant role in the law school faculty recruitment process. [115] For example, the AALS organizes a recruiting conference where, for a fee, applicants complete an AALS Faculty Appointments Register form and submit resumes, which then can be reviewed by AALS members seeking new faculty. [116] Candidates provide information relating to their teaching experience and subject preferences, past employment, major publications, and references. This form also provides a small space for candidates to add a short comment about their suitability for positions. In addition, the AALS Form solicits personal data on a candidate's gender and race. It does not inquire as to disabilities; nor does it seek information on sexual preference. While it does not explicitly ask for the candidate's age, this information can be derived with some precision by examining when the individual graduated from college and law school, or by reviewing a candidate's resume.

Law school search committees review the information of candidates included in the AALS database and select which candidates they will invite for a short (typically twenty minute) screening interview at an annual recruiting conference held in Washington, D.C. Most recruiting teams interview between twenty and forty candidates at this meeting, with the goal of identifying three strong candidates to invite to their law school in order to be evaluated by other members of the law school faculty.

AALS also publishes a quarterly newsletter listing job announcements placed by law schools. [117] Interested individuals write directly to the relevant contact person at the law school. Many law schools also advertise openings in the Chronicle of Higher Education, [*32] which is available both in printed form as well as online. [118] In addition, openings are advertised in other publications such as the National Law Journal [119] as well as on other job websites [120] and listservs. [121] From the applications received, a law school decides

which candidates to invite to a campus visit consisting of numerous interviews. The candidate is usually expected to make one or more formal lectures ("job talks") to the faculty and sometimes students as well. According to AALS's data, from 1990-2004, approximately 12.3% of the candidates in the AALS applicant pool succeeded in obtaining faculty positions.

AALS also publishes a directory of law school faculty. [122] The data in the directory consists entirely of information provided by law school deans and individual faculty members. According to the AALS's Statistical Report on Law School Faculty and Candidates for Law Faculty Positions reflecting data for 2002-2003, 488 law faculty members who were not listed in the prior edition were included in the 2002-2003 AALS Directory. [123] This figure does not include new assistant and associate deans as well as Judge Advocate General's School faculty. [124]

[*33]

A. Illustrative Profiles of Successful Candidates

In reviewing the credentials of recently hired faculty members, there are certain distinct types of candidates who seem to be the most successful in obtaining tenure track positions. [125] Conceptually, we have identified three paradigms for "successful" AALS candidates:

1. A graduate of a prestigious law school with an editorship on the law review, high class rank, a judicial clerkship (preferably federal), and no more than two or three additional years of work experience; [126]

2. An individual with both a J.D. and Ph.D. Persons with interdisciplinary backgrounds can often make scholarly contributions in areas where a person with a law degree alone cannot. Such individuals often have spent their entire working lives up to this point in an academic setting.

3. Members of groups who historically have been underrepresented on law school faculties, whether based on color, ethnic origin, [*34] gender, or race, as well as individuals with disabilities and persons having veteran status. [127]

With respect to the third category of candidates, critics may argue that any system that considers factors having nothing to do with performance can be considered discriminatory. Nonetheless, the Supreme Court and most educators recognize that there are distinct social and educational benefits in achieving greater diversity at educational institutions.

People with different backgrounds arguably are more likely to hold diverse opinions, are interested in subjects that are not frequently examined, or view the world and the

operation of law in a non-traditional manner. Similarly, having a faculty that is politically or geographically diverse may have desirable effects. Of course, not all schools subscribe to these views. Many focus on candidates who have a particular expertise that is in demand or those with ties to the area where the university is located.

When a law faculty search committee develops a list of candidates to examine in greater detail, it tends to look for individuals who fit one ore more of the three paradigms outlined above. If committees seek to increase the percentage of women and racial minorities on the faculty so as to more closely approximate their percentage of the school's student body (or general population), they must hire a disproportionately high percentage of women and minority candidates. Even with the increase in the number and size of law schools over the years, the actual number of tenure track faculty positions is limited. Since the average age of white male faculty members is higher than that of other groups, their rate of retirement provides an opportunity to change the composition of the faculty over time. [128]

To facilitate the hiring of a diverse faculty, which is a laudable goal and is in many ways a desirable goal, most law schools (or the [*35] educational institutions to which they are attached) have established equal opportunity operations that identify qualified faculty candidates and improve outreach to women and racial minorities. It is standard practice for the educational institution's equal opportunity office to send forms to all prospective candidates asking them to classify themselves by gender, race and other categories. Some applicants decline to complete these forms. It would seem reasonable to assume that they do so because they either do not believe that they will benefit by completing them, refuse to submit them on principle, do not have a high level of interest in obtaining a position at the institution, or are merely neglectful.

While not involved in all law school faculty hiring, the AALS can play a critical role as a clearinghouse for information about potential law school faculty candidates. The AALS functions as the law school's agent in performing certain tasks in the faculty recruitment process. Law schools must either be an AALS member or a non-member fee-paid law school to use its services. [129] In facilitating conduct arguably unlawful under the ADEA, it offers services analogous to that of an employment agency or a law school's contractor or agent. [130] The ADEA's requirements cover not only employers, but also employment agencies [*36] and labor organizations. [131] Whether this role indeed places the AALS within the scope of the ADEA is not clear.

The first hurdle a candidate must overcome is to get the search committee to examine his or her qualifications in a systematic manner. The AALS Faculty Appointments Register form can help a law school identify or exclude individuals possessing particular characteristics. No candidates will be hired if their applications are not included in the pool of applications being seriously examined. Because the number of qualified applicants far exceeds the number of openings, for an application to proceed through the AALS process, the application must survive the initial selection process, often with the active help of law school faculty members who are willing to contact their counterparts to promote a particular candidate. If candidates survive the initial screening process, their

chances of ultimately being hired are dramatically increased. Of course, persons over forty may prove not to be the best candidate for a given position, but under the ADEA it is required that their application be considered without age playing a role in the process. Given the subjective aspects of evaluating candidate qualifications and the difficulty of demonstrating intent, it may only be possible to demonstrate that discriminatory practices exist by examining data on which candidates were invited for screening or campus interviews as well as data on the ultimate hiring outcomes. [132]

As noted above, the AALS does not play a role in all of its member schools' tenure-track faculty hiring. Faculty search committees analyze applications that are submitted directly by a candidate and those that are submitted by intermediaries (e.g., applications submitted by a person known to the faculty by reputation or professional association). These informal networks are often critical factors in the hiring process as [*37] they can provide a search committee with reliable information about a promising candidate. At the same time, the use of such intermediaries and informal networks may be viewed as reducing the role of merit in faculty hiring. It is not infrequent that academic positions are posted merely to comply with public (and sometimes private) law schools' regulations even though the individual to be hired has already been chosen.

B. Complementing Full-Time Faculty with Adjunct Professors

Law schools hire adjunct professors to supplement their full-time faculty. Adjunct faculty fall into two categories: (1) practitioners and (2) individuals who would like full-time positions in law schools but are unable to obtain acceptable positions. There are multiple motivations behind the hiring of adjunct faculty. Among the reasons for making use of adjunct faculty are:

1. A law school can offer specialized courses that its full-time faculty either does not want to teach or lacks the expertise to cover.

2. Since adjunct faculty are usually employees at will, the school is free not to renew their contracts if they are not sufficiently dedicated or competent to teach.

3. Student preferences for particular courses vary over time; consequently, one year corporate governance may be a "hot subject," but not the next.

4. Law schools need not offer benefits to adjunct faculty or put them on a tenure track. In fact, the cost of hiring adjunct faculty is so much less than permanent faculty that if the American Bar Association did not consider the ratio of full-time faculty to students as part of its accreditation review, [133] it is likely that many law schools would hire even more adjunct faculty.

5. The adjunct faculty member may have no interest in a full-time faculty position for financial or other reasons.

To a limited extent, adjunct faculty can offset a lack of experience or expertise on law school faculties. However, since most adjuncts have [*38] other full-time employment, their involvement with students and law school faculty is limited in time and reduced by distance. The quality of adjunct faculty is often uneven, particularly at institutions not located in urban areas. Many adjunct faculty members find that their principal work obligations interfere with their law school commitments. In addition, adjunct faculty members may be difficult to integrate into the law school, affecting grading and other policies.

VI. CHANGING DEMOGRAPHICS AND ATTITUDES IN THE UNITED STATES CONCERNING AGE

When Congress enacted the Social Security Act in 1935, the average life expectancy of males was approximately fifty-eight years and, for females, it was sixty-two years. [134] In recent years, average life expectancy increased to more than seventy-seven and seventy-nine years, respectively. [135] While these are aggregate figures and the data vary for groups (racial, professional, regional, smokers, drinkers, etc.), the trend is clear: Americans are living longer, more productive lives. Although some Americans choose to retire at an early age, others prefer to or must work. The aging of the population is just one of many factors contributing to the increase in the number of job changes in a professional's career. Re-entering the work force after leaving paid employment to take care of children is another. [136] Consequently, a greater number of older American workers are seeking new jobs as well as new professions than was previously the case. Not surprisingly, the aging of the U.S. work force has led to an increase in the number of age discrimination cases filed in the courts. [137]

[*39] As noted above, in 1967, Congress adopted the ADEA. Specifically, it provides that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act. [138]

The ADEA defines an employer as including all private sector firms with more than twenty employees as well as state and local governments (including their agents). [139]

VII. LAW SCHOOL FACULTY RECRUITING OUTCOMES

Typically, law school hiring committees looking for new faculty place more weight on a candidate's academic potential than on the candidate's proven performance as a lawyer. [140] There appears to be an inherent assumption that a younger individual is more capable of developing into a scholar or teacher than someone who is beginning a new career. Generally, the RFOA affirmative defense to liability would not seem to be applicable to law faculty hiring. [141]

[*40] Law school hiring committees often focus on a candidate's publication record. In most cases, the committee evaluates the applicant's law review articles. A candidate's publications in professional journals are often discounted and in many cases are not even considered part of the applicant's record.

Doubts about law schools' emphasis on the number of law review articles a candidate has published were highlighted by Judge Richard A. Posner, who questioned why law students rather than law professors or other trained professionals are the gatekeepers to most scholarly journals in the field of law.

> [Many law review] articles are too long, too dull, and too heavily annotated, and ... many interdisciplinary articles are published that have no merit at all. Worse is the effect of these characteristics of law reviews in marginalizing the kind of legal scholarship that student editors can handle well - articles that criticize judicial decisions or, more constructively, discern new directions in law by careful analysis of decisions. Such articles are of great value to the profession, including its judicial branch, but they are becoming rare, in part because of the fascination of the legal academy with constitutional law, which in fact plays only a small role in the decisions of the lower courts. [142]

In contrast, professional editors choose the topics of the articles for many non-academic journals geared towards working professionals. They frequently seek articles on cutting edge legal topics. While state bars publish many of these publications, others are produced by profit-making businesses. In order to maintain the circulation (and the price [*41] the publication can charge for advertisements), these editors are frequently far more demanding in both substance and style than are student edited law reviews.

A. The Recruiting Process

As with all professional positions, the faculty hiring process is a complex endeavor. As noted above, while a large share of entry-level faculty are identified by law school faculty search committees using the AALS database, many candidates apply directly to the law schools. In addition, informal networks are critical - already knowing members of the

faculty or getting a former professor, colleague or friend to promote one's candidacy can provide a decisive advantage (particularly if that reference/promoter knows members of the search committee and the school's deans). [143] Often a law school's priorities in recruiting are dominated by the need to fill a specific vacancy or find someone who specializes in a particular topic.

The toughest hurdle for many aspiring faculty candidates is to be selected from a large number of applicants for a particular position and actually be given serious consideration, as the number of positions is relatively small. Generally, law school faculty search committees look for candidates for entry-level faculty positions who fit certain standard "profiles" as discussed in Part V.A. [144]

B. Data on the Age and Non-Academic Work Experience of Full-Time Professors in Selected States [145]

At the beginning of the article, we stated that we would examine certain characteristics of the law faculties in three states (Massachusetts, Ohio & Texas - numbering twenty-five schools in all). Specifically, we looked at the age at which the individual became a full-time professor (irrespective of title) and the number of years the individual spent in the work force prior to becoming a member of a law faculty on a full-time basis. We did not attempt to determine at what level a particular [*42] individual had been hired (assistant, associate or full professor). [146] We made this decision since many faculty members leave academia for a period of time to take other positions, only to return to the same or different law school at a higher rank. In addition, we found that the source for the data often did not present all the relevant information needed.

We chose to group faculty members into four categories with respect to age and number of years worked outside of academic or research institutions. We organized faculty members identified in the AALS Directory in five-year groupings with respect to (i) the age that an individual with a legal education was hired and (ii) the number of years of work experience the individual had in a non-academic or research setting prior to becoming a full-time faculty member.

We did not attempt to classify (i) faculty members who held advanced degrees in fields other than law and (ii) faculty members whose age and experience we could not determine through the use of the AALS Directory. In organizing the data, we made no attempt to compare the schools by perceived level of prestige (as this is exceedingly difficult to measure) or the law school's principal mission (e.g., scholarship vs. teaching). This is not to deny that the law schools differ in (i) the quality of the relevant law school faculty members and students, (ii) the desirability of their location, (iii) faculty salaries, (iv) law school and university facilities, (v) opportunities for outside consulting and legal work, and (vi) the likelihood that one will receive tenure. These are all complex factors that play a significant role in a law school's ability to recruit faculty.

Figures 1 and 2 present the age and work experience data for Massachusetts, Ohio and Texas. Figures 3 and 4 present the same data, though the individual states have been

combined. Tables 1 and 2 present the same aggregated data in a numeric form. Table A-1 presents the data on the age at which law school faculty is hired, while Table A-2 shows the data on law school faculty work experience performed outside an academic or research environment prior to being hired for a tenure track position.

[*43]

Figure 1
Age of Law School Full-Time Faculty Members at Time of Hiring for Massachusetts, Ohio, and Texas [147]

[SEE FIGURE 1 IN ORIGINAL]
[*44] [*45]

Figure 2
Age of Law School Full-Time Faculty Member at Time of Hiring for Massachusetts, Ohio, and Texas, Combined [148]

[SEE FIGURE 2 IN ORIGINAL]

Figures 1 and 2 show that the thirty to thirty-four year-old category forms the largest grouping of new law school faculty members in all three states. Law school faculties tend to hire faculty in the twenty-four to twenty-nine year-old grouping slightly more than members of the thirty-five to thirty-nine year-old group. The over-forty age group is the smallest. There were a large number of instances (137) where the age of the faculty could not be determined. While such data on these persons might have been available from other sources (including by personal interview), we chose to exclude it entirely.

Not surprisingly, the data for Figures 3 and 4 showing data on the work of full-time faculty performed outside academic or research settings were consistent with the age data. Overall, the number of [*46] persons hired as new full-time law faculty appears to be those with the fewest years of practical legal experience.

Figure 3
Number of Years of Work Experience Performed Outside of an Academic or Research Setting Prior to Becoming a Full-Time Professor for Massachusetts, Ohio, and Texas [149]

[SEE FIGURE 3 IN ORIGINAL]
[*47]

Figure 4
Number of Years of Work Experience Performed Outside of an Academic or Research

Setting Prior to Becoming a Full-Time Professor for Massachusetts, Ohio, and Texas, Combined [150]

[SEE FIGURE 4 IN ORIGINAL]

Consistent with a de-emphasis on practical experience in the hiring process, the more experience applicants had gained, the less likely it was that they would be members of a law school faculty. Again, the 137 cases where we were unable to determine the faculty member's pre-hiring history might have changed these results.

Tables 1 and 2 present the aggregate data on the age and amount of non-academic or research work experience faculty members had at the time they were hired at the relevant law schools.

[*48]

Table 1

Age When Hired as a Full-Time Professor (By State) [151]

	24-29 Years	**30-34 Years**	**35-39 Years**	**40 Years & Over**	**Not Clear**	**TOTAL**
MASSACHUSETTS	77	144	74	59	54	408
OHIO	72	133	70	56	27	358
TEXAS	81	134	75	73	69	432
TOTAL	230	411	219	188	150	1198

Table A-1, which is provided in the Appendix, shows that an overwhelming majority of law schools hired new faculty falling within the twenty-four to twenty-nine year-old grouping (three cases) and the thirty to thirty-four year-old grouping (nineteen cases). Only two schools (Texas Tech University School of Law and Texas Southern University's Thurgood Marshall School of Law) were more likely to hire new faculty in the over-forty age grouping than any of the other groupings (though statistically this is not significant given that we were not confident of the ages of six faculty members at the school). Texas Wesleyan University School of Law hired a majority of its faculty that fell into either the thirty-four to thirty-nine year-old grouping or the over-forty age grouping, though it did not have a single faculty member that began at the school when they were between twenty-four and twenty-nine years of age. With this one exception, all the law schools had faculty members that joined the faculty in each of the four age groupings. Unfortunately, the data do not permit us to see if faculty viewed as a "protected class" under the ADEA were successful in obtaining entry-level positions at law school faculties, as opposed to individuals who may have left public life to assume a full professorship or other special position.

[*49] Have law school recruiting committees consciously or unconsciously favored younger applicants over their older competitors? While the data would seem to show that age had a disparate impact on hiring outcomes, there are many other factors that may explain the data. There are other ways to present the data, and we leave that for others to examine hiring practices in academia as a whole and law schools in particular (either collectively or on a case-by-case basis). We could not determine the size of the applicant pool over the age of forty who either submitted applications through the AALS system or applied directly to law faculties. Furthermore, we could not estimate the number of persons who might have applied using either method if they believed that their applications would be given fair consideration.

Table A-2, which is also provided in the Appendix, shows that at eighteen of the law schools, the largest group of their faculty fell into the grouping having the least work experience performed outside an academic or research setting (zero to five years). Six law schools had the largest group of its faculty falling into the six to ten years of experience category. Texas Wesleyan University School of Law had an equal number of its faculty falling into the first and second categories. All law school had at least one faculty member that fell within each of the four categories.

[*50]

Table 2

Number of Years of Work Experience Outside of An Academic or Research SettingPrior to Becoming a Full Professor (By State) [152]

	0-5Years	5-10 Years	11-15 Years	16 Years & Over	Not Clear	TOTAL
MASSACHUSETTS	193	96	37	29	53	408
OHIO	193	80	30	26	69	358
TEXAS	185	93	42	43	69	432
TOTAL	573	269	109	98	191	1198

The data would seem to indicate, at least for these three states, that individuals who join most law school faculties tend to have limited experience as practicing lawyers. Again, there is considerable variation among the law schools with respect to the experience of their full-time faculty. Since these states were selected to yield a diverse collection of law schools (in terms of prestige, size, public and private, urban and rural, etc.), it is unlikely that a larger sampling would provide significantly different results. Perhaps in recognition that a faculty of inexperienced lawyers may not offer their students a realistic picture of the legal profession, many law schools use practitioners on an adjunct basis or hire persons who pursued careers outside of academia as a means to bring real world experience to their students.

These results may also reflect the fact that many law school faculty members pursued career paths that made them more attractive to law school faculties (e.g., seeking judicial clerkships after graduation as well as obtaining a fellowship or gaining experience as an instructor in a law school environment). In some respects, it may seem that law school faculties work to perpetuate themselves - that is, law school grades, the prestige of the institution, and participation on a law journal may be the [*51] criteria that are most widely valued by law school faculty search committees. [153]

C. Explanations for Data Not Being the Product of Discrimination

Certain other factors surely contribute to the hiring of younger faculty. First, as lawyers become more experienced, they may, for economic reasons, be less likely to view an academic career as attractive. Thus, the pool of law school faculty candidates may not included a high percentage of experienced lawyers. Alternatively, experienced lawyers may recognize that law schools will not regard them as desirable candidates - leading to fewer experienced lawyers applying for academic positions. [154]

Another important fact is that as individuals age, they sometimes become more geographically constrained (they may have a working spouse, children, already be tied to the community in which they live, etc.). Nonetheless, this cannot be assumed in all cases. To avoid age discrimination it must be assumed that an individual who has applied directly to a law school or did not indicate a geographic preference when completing the AALS form is willing to work at a particular institution. Another factor not to be overlooked is that younger individuals are probably more willing to take the risk of applying for fellowship or non- [*52] tenure track positions than are persons who have greater work experience.

While these reasons can explain the results without the necessity of inferring implicit hostility to older applicants, it is important not to overlook a key, though often intangible factor: an older candidate during the interview process is likely to be judged by persons who are younger and who excelled in law school, but who lack more than a few years of practical experience. In other words, those with the greatest say in hiring decisions tend to perpetuate themselves to the exclusion of other equally qualified candidates. [155] Today, what is usually important as a matter of law is whether the individual can do a particular job well.

VIII. THE D.C. HUMAN RIGHTS ACT AND AGE DISCRIMINATION IN FACULTY HIRING

Many jurisdictions have laws prohibiting discrimination on the basis of age. Rather than examine the statutory and case law on this subject in Massachusetts, Ohio, and Texas, we decided to look at the law in the District of Columbia ("D.C." or "the District"), which arguably will be relevant to all law schools that recruit faculty in D.C. As mentioned above, many if not a majority of law schools are members of AALS and participate in the recruiting activities it coordinates, including the holding of the recruiting conference at which candidates are interviewed for available positions. If the AALS were to be

regarded as a law school's agent for faculty hiring purposes, a D.C. court would probably have jurisdiction over an age-based employment discrimination claim not only under applicable federal states, but the D.C. Human Rights Act as well.

In 1977, the District adopted the D.C. Human Rights Act to end discrimination "for any reason other than that of individual merit." [156] [*53] Over the years, the act has been amended several times so that each individual has "equal opportunity to participate fully" in D.C. "economic, cultural and intellectual life ... and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations." [157] The Act establishes the D.C. Human Rights Commission, Office of Human Rights Board and creates a private cause of action for victims of discrimination. [158]

A significant portion of the D.C. Human Rights Act concerns discrimination in employment. It makes it unlawful to commit acts for any reason other than that of individual merit, including, but not limited to, discrimination by reason of "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation." [159] Consequently, it establishes substantive requirements that go beyond that of federal legislation.

With respect to an employer, the D.C. Human Rights Act makes it unlawful to:

fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee. [160]

Furthermore, the Act makes it unlawful to engage in "subterfuges" to commit certain acts. The Act states that:

It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the actual or perceived: [*54] race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, ... disability, or political affiliation of any individual. [161]

Under the Act, if a plaintiff cannot demonstrate facts that directly support a claim of discrimination in hiring, the plaintiff has the opportunity of showing the existence of disparate impact. Proof of a disparate impact claim consists of a three-step process:

1. The plaintiff must establish that s/he has been harmed by a facially neutral policy of the (prospective) employer that has a disproportionately negative impact upon a protected class (a statistical showing is mandatory).

2. The employer is given an opportunity to refute the prima facie case by showing a business necessity for the policy that has a clear relationship to the position in question.

3. Assuming that the employer can show such a business necessity, the plaintiff may prevail if there is a less restrictive, non-discriminatory alternative to the practice or policy at issue. [162]

The above three-step process is similar to that traditional process used under the relevant federal statutes. The most significant difference is that the groups considered to be "protected classes" of individuals under the Human Rights Act are more extensive. Arguably, the provisions prohibiting discrimination on the basis of source of income would appear to require employers to consider candidates on the basis of their individual merit irrespective of whether they were already working in an academic setting.

IX. CLOSING OBSERVATIONS

The discussion above does not prove that age discrimination is the principal or even a major explanation for why law school hiring for entry-level tenure track faculty positions yields young individuals with limited experience practicing law. There are many reasonable explanations for this outcome, including self-selection by potential [*55] candidates. Nonetheless, this subject is worthy of additional study - which is difficult given the secretive nature of many hiring decisions.

Researchers are likely to find it challenging if not impossible to obtain reliable data on the number of lawyers above the age of forty who applied for entry level tenure track law school faculty positions, but were not successful candidates. Similarly, it will be difficult to establish with any certainty the number of individuals who may have been discouraged from applying because they were convinced that such efforts would be futile. Without greater transparency, one might expect future litigation in this area, as individuals who are protected against discrimination by the ADEA may be tempted to ascertain if indeed they have been the victims of discrimination.

Nonetheless, according to some observers, while the practice of law is becoming more complex and difficult, law school education has become less so. [163] The importance of making law school education more demanding and realistic has been heightened by the fact that many law firms are conducting less associate training. [164] This suggests that law schools should work more to expose their students to the actual practice of law, [165] but also that legal scholarship become more empirical and relevant to the practitioner and not be "academic" in the pejorative sense of the term. [166]

[*56] This does not mean that law schools should become trade schools. Nonetheless as the practice of law becomes increasingly driven by market forces and more specialized, it is important that law schools be something other than weigh stations before students prepare for bar exams. The American Bar Association's MacCrate Report and Judge Harry T. Edwards' article "The Growing Disjunction Between Legal Education and the Legal Profession" examined ways to bridge the gap between academia and practice as a way to better prepare students for their careers. [167] Perhaps an important step in narrowing this gap is for law schools to aim to increase the share of experienced lawyers on their faculties. [168]

[*57] Law tends to lag behind practice in all spheres of life, and law schools behind law practice. All employers, including law schools, must now take a hard look at their personnel practices or face the risk of violating the ADEA's age discrimination prohibition.

[*58] [*59] [*60]

Appendix

Table A-1

Age of Law School Full-Time Faculty Member at Time of Hiring for Massachusetts, Ohio, and Texas (By School) [169]

MASSACHUSETTS	24-29 Years	30-34 Years	35-39 Years	40 Years & Over	Not Clear	TOTAL
Boston CollegeSchool of Law	12	21	14	9	6	63
Boston UniversitySchool of Law	10	24	11	19	9	73
Harvard Law School	23	39	15	4	14	95
New EnglandSchool of Law	8	12	6	7	6	39
Northeastern University School of Law	7	8	7	6	4	32
Suffolk UniversitySchool of Law	14	26	15	11	10	76
Western New England College School of Law	3	14	6	3	4	30
MASSACHUSETTS TOTAL	77	144	74	59	54	408

OHIO	24-29 Years	30-34 Years	35-39 Years	40 Years & Over	Not Clear	TOTAL
University of Akron C. Blake McDowell Law Center	3	9	7	6	1	36
Capital University Law School	11	14	7	2	5	39
Case Western Reserve Law School	7	24	12	6	1	50
University of Cincinnati College of Law	6	13	3	7	4	33
Cleveland State University Cleveland Marshall College of Law	8	20	14	14	3	59
University of Dayton School of Law	6	7	7	7	2	29
Ohio Northern University Pettit College of Law	3	10	4	5	3	25
Ohio State University The Michael E. Moritz College of Law	19	22	10	6	5	62
University of Toledo College of Law	9	14	6	3	3	35
OHIO TOTAL	73	133	70	56	27	358

TEXAS	24-29 Years	30-34 Years	35-39 Years	40 Years & Over	Not Clear	TOTAL
Baylor UniversitySchool of Law	7	11	2	3	2	25
University of Houston Law Center	13	25	9	10	10	67
St. Mary's University of San Antonio School of Law	6	12	4	4	12	38

South Texas College of Law	4	21	15	10	9	59
Southern Methodist University Dedman School of Law	12	15	12	6	8	53
University of TexasSchool of Law	24	28	12	9	12	85
Texas Southern University Thurgood Marshall School of Law	5	4	9	11	5	34
Texas Wesleyan University School of Law	1	7	5	5	7	25
Texas Tech University School of Law	9	11	7	15	4	46
TEXAS TOTAL	81	134	75	73	69	432

[*61]

Table A-2

Number of Years of Work Experience Performed Outside of an Academic or Research Setting Prior to Becoming a Full-Time Professor for Massachusetts, Ohio, and Texas

(By School) [170]

MASSACHUSETTS	0-5 Years	6-10 Years	11-15 Years	16 Years & Over	Not Clear	TOTAL
Boston College School of Law	31	15	6	5	6	63
Boston University School of Law	32	13	10	9	9	73
Harvard Law School	55	17	6	3	14	95
New England School of Law	17	11	5	0	6	39
Northeastern University	10	11	4	3	4	32

School of Law						
Suffolk University School of Law	35	19	5	7	10	76
Western New England College School of Law	13	10	1	2	4	30
MASSACHUSETTS TOTAL	193	96	37	28	53	408

OHIO	0-5 Years	6-10 Years	11-15 Years	16 Years & Over	Not Clear	TOTAL
University of Akron C. Blake McDowellLaw Center	10	10	4	1	1	26
Capital University Law School	29	2	2	1	5	39
Case Western Reserve Law School	27	15	3	4	1	50
University of Cincinnati College of Law	16	6	3	4	4	33
Cleveland State University Cleveland MarshallCollege of Law	31	10	8	7	3	59
University of Dayton School of Law	14	8	2	3	2	29
Ohio Northern University Pettit College of Law	12	6	2	2	3	25
Ohio State University The Michael E. Moritz College of Law	35	16	4	2	5	62
University of Toledo College of Law	21	7	2	2	3	35
OHIO TOTAL	195	80	30	26	27	358

TEXAS	0-5 Years	6-10 Years	11-15 Years	16 Years & Over	Not Clear	TOTAL
Baylor University School of Law	13	8	1	1	2	25
University of Houston Law Center	33	17	3	4	10	67
St. Mary's University of San Antonio School of Law	15	7	2	2	12	38
South Texas College of Law	19	20	6	5	9	59
Southern Methodist University Dedman School of Law	28	9	5	3	8	53
University of Texas School of Law	48	11	7	7	12	85
Texas Southern University Thurgood Marshall School of Law	5	4	9	11	5	34
Texas Wesleyan University School of Law	8	7	1	2	7	25
Texas Tech University School of Law	16	10	8	8	4	46
TEXAS TOTAL	185	93	42	43	69	432

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law > Discrimination > Age Discrimination
Labor & Employment Law > Discrimination > Age Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disparate Impact > Statutory Application > Age Discrimination in Employment Act

FOOTNOTES:

n1. Transcript of Oral Argument at 25, Smith v. City of Jackson, 125 S. Ct. 1536 (2005) (No. 03-1160).

n2. Smith v. City of Jackson, 125 S. Ct. 1536 (2005).

n3. Prior to the Smith decision, some academics believed that the disparate impact theory was not applicable to individuals complaining on the basis of age discrimination. See Martha Chamallas, Deepening The Legal Understanding of Bias: On Devaluation and Biased Prototypes, 74 S. Cal. L. Rev. 747, 752-53 (2001) (dismissing the idea that it would be appropriate to attempt to show disparate impact as a way of proving the existence of a claim under the ADEA); Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 507 n.53 (2003) (expressing skepticism that the ADEA permitted the use of disparate impact to demonstrate age discrimination). But see Michael Evan Gold, Disparate Impact Under the Age Discrimination in Employment Act of 1967, 25 Berkley J. Emp. & Lab. L. 1, 86 (2004) (concluding after examining the ADEA's legislative history that "disparate impact should be recognized as a method for proving age discrimination"); Elena Minkin, Note, Flourishing Forties Against Flaming Fifties: Is Reverse Age Discrimination Actionable Under The Age Discrimination in Employment Act?, 48 St. Louis U. L.J. 225 (2003) (observing that the circuits were not consistent in the manner in which they dealt with claims under the ADEA and identifying the existence of tension within the group of individuals falling within the scope of the ADEA); see also Elaine W. Shoeben, Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?, 42 Brandeis L.J. 597, 597 n.1, 621 n.136 (2004) (noting that it was an unsettled question whether the disparate impact theory could be used in making a claim under the ADEA). Prior to 1993, all the circuits supported the view that a disparate claim was cognizable under the ADEA, but by November 2004 that number declined to three. Transcript of Oral Argument, supra note 1, at 22. Five years ago in Kimel v. Florida Board of Regents, the Supreme Court noted that the classification of individuals by age was not within the scope of the Constitution's Fourteenth Amendment protections, and thus could be justified on any rational basis, as was done in the ADEA. 528 U.S. 62, 81-83 (2000).

n4. See Grutter v. Bollinger, 539 U.S. 306 (2003) (finding the Equal Protection Clause did not prohibit University of Michigan Law School's flexible admission assessment process, which considered race as a factor since there were positive benefits from having a diverse student body); Gratz v. Bollinger, 539 U.S. 244 (2003) (ruling that University

of Michigan's undergraduate admission policy, which was based on a point system where twenty points were automatically added to an applicant's score violated the Equal Protection Clause since it was not carefully tailored to achieve the University's compelling interest in having a diverse freshman class); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (ordering medical school to admit white applicant since its admissions program had an entirely separate admissions program for minority students, but noted that race and other factors could be considered in the admission process if it were weighed along with other characteristics is the candidate assessment process).

n5. Grutter, 539 U.S. at 321-22.

n6. Some federal courts have heard cases involving ADEA claims against law schools in the hiring (non-rehiring) context. In Scott v. University of Mississippi, the Fifth Circuit reversed the lower court's decision that an applicant for a ten-month contractual, non-tenure-track position failed to produce sufficient evidence to allow a jury to find that age discrimination occurred. 148 F.3d 495, 514 (5th Cir. 1998). In Kassow v. St. Thomas University Law School, Inc., the trial court granted defendant's motion for summary judgment when plaintiff alleged age discrimination for the school's refusal to reappoint him to a tenure track position. 42 F. Supp. 2d 1312 (S.D. Fla. 1999). The court accepted that the plaintiff's failure to publish scholarly articles was not a pretext advanced by the defendants, since there was a legitimate, non-discriminatory reason not to reappoint the plaintiff. Id. at 1316-17. In Karlen v. New York University School of Law, rather than make a claim under the ADEA, plaintiff chose to allege age discrimination based on a breach of contract claim, when he, a tenured law professor, was forced to accept mandatory retirement. 464 F. Supp. 704 (S.D.N.Y. 1997). He also alleged that the exception in the ADEA for tenured professors, Pub. L. No. 95-256, 3(a), 92 Stat. 189 (April 6, 1978) (amending 29 U.S.C. 631(d)), is unconstitutional. Id. at 706. The University filed a motion to dismiss, which the court rejected on two grounds: it was not shown that under no set of facts that plaintiff would not prevail and it refused to decide the constitutionality issue. Id. at 709. In Ross v. University of Texas at San Antonio, an associate professor in a business school sued under the ADEA asserting that his lower pay was a result of age discrimination. 139 F.3d 521 (5th Cir. 1998). The Fifth Circuit affirmed the district court's granting of the defendant's motion for summary judgment, in part because "Ross's evidence shows no more than that he was the third oldest and lowest paid professor in his division, a fact which is adequately explained by the employer's legitimate non-discriminatory reason. We conclude that Ross's evidence is insufficient to support an inference of age discrimination." Id. at 527. By coincidence, the Supreme Court overruled a Fifth Circuit decision in Smith, thus it is unclear whether either decision would have the same outcome today. In Douglas v. Anderson, the manager of Hastings College of Law's bookstore brought a number of claims including one under the ADEA, where the Ninth Circuit upheld the district court's determination that even when

the facts were viewed in a manner most favorably to the bookstore manager, she could not prevail. 656 F.2d 528 (9th Cir. 1980).

n7. See Kevin H. Smith, How to Become a Law School Professor Without Really Trying: A Critical, Heuristic, Deconstructionist, and Hermeneutical Exploration of Avoiding the Drudgery Associated with Actually Working as an Attorney, 47 U. Kan. L. Rev. 139 (1998) (describing in a light-hearted manner the process by which law school's recruit entry-level faculty and offering pointers to potential candidates on how to increase their chances of being hired).

n8. See supra note 6.

n9. For excellent analyses from the personnel management perspectives concerning attitudes and stereotypes giving rise to age and other forms of discrimination, its impact on hiring, promotion, and other related issues, see Caren B. Goldberg & Lynn M. Shore, The Impact of Age of Applicants and of Referent Others on Recruiters' Assessments: A Study of Young and Middle-Aged Job Seekers, 27 Representative Res. In Soc. Psychol. 11 (2003); Lynn M. Shore & Caren B. Goldberg, Age Discrimination in the Workplace, in Discrimination at Work: The Psychological and Organizational Bases (Robert L. Dipboye & Adrienne Colella eds., 2004); Lynn M. Shore et al., Work Attitudes and Decisions as a Function of Manager Age and Employee Age, 88 J. Appl'd Psychol. 529 (2003); and Caren B. Goldberg et al., Job and Industry Fit: The Effects of Age and Gender Matches on Career Progress Outcomes, 25 J. Org. Behav. 807 (2004).

n10. The authors recognize that individuals of a given age vary with respect to their health, level of energy, skill set and other employment related factors. It has been argued that the protected classes under the Civil Rights Act (i.e., race, color, religion and ethnicity) are either immutable or binary in nature. While this may be true in part, such generalizations make certain assumptions that are not always true. For example, former General Wesley K. Clark, a contender for the Democratic nomination for president "grew up Baptist and Methodist, converted to Catholicism and now attends a Presbyterian Church," and his father was Jewish, showing that individuals have not only have mixed religious and ethnic backgrounds, but also backgrounds that can change over time. See Tim Funk & Celeste Smith, Candidates' Speeches Full of Social Gospel, But Not Faith Journeys, Pitt. Post-Gazette, Feb. 8, 2004 at A16; Edward Wyatt, The 2004 Campaign: The Retired General; First Campaign, Second Draft: Neo-Politician Clark Refines and Revises on the Trail, N.Y. TIMES, Feb. 9, 2004, at A17. Similarly, in the United States, an individual of a mixed race background is often categorized as belonging to a specific

minority group - but is that assumption correct for an individual who, though having a black father, was largely raised by his white mother? See Mark Leibovich, The Senator's Humble Beginning; Rising Star Barack Obama Is Resolutely Down to Earth, Wash. Post, Feb. 24, 2005, at C1. Alternatively, what is the proper way to categorize an individual whose parents are of different races, where one of the parents was both a U.S. Senator and a former presidential candidate? See David S. Broder, Thurmond's Daughter, Free at Last, Wash. Post, Dec. 21, 2003, at B7. Country of origin information can similarly be complex and may often be misleading. What is the proper way to categorize an Afrikaner born in Johannesburg, South Africa (whose ancestors have lived in the country for nearly 250 years), a Russian national whose parents are of Korean origin, or a French citizen whose grandparents emigrated to Marseille from Algeria? Reasonable people can and will come to different conclusions when determining national origin. See generally James Markham, Minorities in Western Europe Hearing "Not Welcome' in Several Languages, N.Y. Times, Aug. 5, 1986, at A6. Mixed marriage is increasing in the United States. Individuals not only can change their names, but also their religions. See Peter Steinfels, Debating Intermarriage, and Jewish Survival, N.Y. Times, Oct. 18, 1992, at A1. These classifications can be of limited value. While there is an increase in inter-religious, interethnic and interracial marriage in the United States, the percentage of individuals who indicated that they were "mixed race" in the 2004 census was a rather low - somewhere in the range of 1.3-2.4% - though this figure should increase in the future. See Robert Suro, Mixed Doubles - Interethnic Marriages and Marketing Strategy, Am. Demographics, Nov. 1999, available at http://www.findarticles.com/p/articles/mi m4021/is 1999 Nov/ ai 58293772 (last visited May 2, 2005) (stating that nearly thirty percent of Asians and Hispanics marry outside of their racial/ethnic group); U.S. Census Bureau, Modified Race Data Summary File, http://www.census.gov/popest/archives/files/MRSF-01-US1.html#tab2 (last visited May 2, 2005). It should not be overlooked that the Civil Rights Act was enacted over forty years ago, at a time when racial and other forms of discrimination were more prevalent than today. As the American work force ages, the relevance of the problem of age discrimination addressed by the ADEA is almost certainly going to increase in all sectors. Ironically, age is actually truly an immutable characteristic since no one to date has found a way to halt the aging process, except as a result of death.

n11. Although this article examines the role of age in the hiring process of law school faculties, the issues raised would also be relevant to the hiring practices in place elsewhere in academia. Smith may also give rise to ADEA-based lawsuits against both private and public entities where experienced lawyers are willing to work for salaries lower than they made in the past, but are not seriously considered as candidates for positions since they are "overqualified." These personnel practices would appear to be challengeable because they are often based on discriminatory assumptions such as the assumption that older lawyers are not capable of learning new areas of the law through work/training and are incapable of acquiring new skills.

n12. These states were selected because they offer a mix of law schools with respect to (i) competitiveness, (ii) nature (e.g., public vs. private), (iii) diversity of both the student body and faculty, (iv) mandate (scholarship vs. the practical preparation of individuals for legal practice), and (v) geography (covering both the states themselves as well as the pool of students and faculty from which they draw). This sampling is large enough to provide a good snapshot of the general composition of legal faculty. The authors do not purport that the law schools located within each state are necessarily representative of the institutions as a whole.

n13. Smith, 125 S. Ct. at 1539.

n14. Id.

n15. For a general discussion of litigating under the ADEA, see Daniel P. O'Meara, Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act, The University of Pennsylvania's Wharton School of Government, Industrial Research Unit, Labor Relations and Public Policy Series No. 33, (1989) (making use of the case law, the author provides a good summary of the ADEA's legislative history, discusses the ADEA's substantive provisions, procedural matters, and various issues in the areas of establishing and defending against liability, including how courts have treated allegations of disparate impact in the 1970s and 1980s).

n16. The Petitioners recalled that:

Congress delegated to the EEOC (and the Secretary of Labor before it) the authority to "issue such rules and regulations as [it] may consider necessary or appropriate for carrying out [the ADEA]." 29 U.S.C. 628, n2. In 1981, the EEOC promulgated a regulation ... recognizing disparate impact claims under the ADEA. 29 C.F.R. 1625.7(d). The EEOC's regulation has remained in effect for the past twenty-three years.

Brief of the Petitioners at 5, Smith v. City of Jackson, 125 S. Ct. 1536 (2005) (No. 03-1160).

n17. The Petitioners contended that the structure and the wording of the relevant provisions of the ADEA could not be explained by happenstance.

In the [ADEA], Congress found both that "the setting of arbitrary age limits regardless of potential for job performance had become a common practice," and that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. 621(a)(2) ... . Congress drew the substantive prohibitions of the ADEA directly from Title VII, which had been enacted three years earlier. Section 4(a)(2) of the ADEA, in relevant part, renders it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(2). Thus, the prohibitory language of the ADEA traces the language of Title VII to the letter, simply substituting "age" for "race, color, religion, sex, or national origin." Id. at 4-5.

n18. According to the Petitioners,

The purpose of the ADEA (like Title VII) is to eliminate workplace discrimination, and this Court's precedents establish that disparate impact claims further that goal in multiple respects: by combating discrimination that rests on subconscious stereotypes; by overcoming problems of proof raised by purposeful but veiled discrimination; and by addressing otherwise innocent practices that disadvantage protected employees but lack any reasonable business justification. Id. at 9.

n19. Id. at 2 (quoting 29 C.F.R. 1625.7(d) (2005)) (emphasis added).

n20. 29 U.S.C. 623(a).

n21. Brief of the Petitioners, supra note 16, at 2-10.

n22. Petitioners stated:

Congress in the ADEA thus sought to combat not only explicit age limits, but also subtler, ostensibly neutral employment practices that are "based in large part on stereotypes unsupported by objective fact, and [are] often defended on grounds different from its actual causes." Recent studies have concluded that "all humans, to varying degrees, are implicated in the practice of implicit ageism" - a term the researchers define as "thoughts about the attributes and behaviors of the elderly that exist and operate without conscious awareness, intention, or control." The existence of implicit ageism is also confirmed by empirical research.

Reply Brief for Petitioners at 6, Smith v. City of Jackson, 135 S. Ct. 1536 (2005) (No. 03-1160) (citations omitted).

n23. Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (June 1965), reprinted in U.S. Equal Employment Opportunity Comm'n, Legislative History of the Age Discrimination in Employment Act 22 (1981) [hereinafter Wirtz Report].

n24. 401 U.S. 424 (1971); see infra note 42 and accompanying text.

n25. Reply Brief for Petitioners, supra note 22, at 7 (citations omitted).

n26. Brief of the Petitioners, supra note 18, at 2-3, 6-7.

n27. Reply Brief for Petitioners, supra note 22, at 12-13 (citations omitted).

n28. Id. at 10-14.

n29. Id. at 18-19.

n30. Id. at 15-16.

n31. Id. at 2-19.

n32. In addition to the AARP, the other organizations that joined on the brief were American Association of University Professors, the American Jewish Congress, Asian American Legal Defense and Education Fund, the Mexican American Legal Defense and Educational Fund, the Mississippi Center for Justice, National Association for the Advancement of Colored People, the National Council of La Raza, the National Partnership for Women and Families, the National Senior Citizens Law Center and the National Women's Law Center. See Brief for AARP et al. as Amici Curiae Supporting Petitioners, Smith v. City of Jackson, 125 S. Ct. 1536 (2005) (No. 03-1160).

n33. The principal argument advanced by the AARP's brief was that both as a matter of statutory interpretation and applicable case law, Petitioners should prevail.

Section (4)(a)(2) of the ADEA provides that "it shall be unlawful for an employer ... to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." This language is the mirror image of 703(a)(2) of Title VII, 42 U.S.C. 2000e(2)(a)." In Griggs v. Duke Power Co., the Court cited 703(a)(2) as the statutory foundation for its decision that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation ... ." The Court has subsequently confirmed that the "adversely affect" language, that is identical to both Title VII and the ADEA, is the source of the disparate impact doctrine.

In Griggs, the Court declared: "The objective of Congress in the enactment of Title VII is plain from the language of the statute." Accordingly, "if the existence of the disparate impact approach is apparent from the "plain' language of Title VII, it must also be apparent from the plain language of [the] ADEA."

Since the ADEA and Title VII share common purposes and identical substantive provisions, they should be interpreted similarly. "The similarity in language [between 623(a)(2) of the ADEA and 703(a)(2) of Title VII] ... is, of course, a strong indication that the two statutes should be interpreted pari passu." The doctrine of in pari materia is especially appropriate for the ADEA and Title VII given that the substantive prohibitions

of the ADEA "were derived in haec verba from Title VII."

Id. at 3-5 (citations omitted).

n34. Id. at 3. The Respondents' lawyer, Glen D. Nager, demonstrated his mental agility and humor when he told the Justices (most of whom are between sixty and eighty years old) that though statistics show that mental and physical capabilities decline over time, there are "occupations like judging - that experience and wisdom may be something that grow over a lifetime." Transcript of Oral Argument, supra note 1, at 25.

n35. Brief for AARP et al. as Amici Curiae Supporting Petitioners, supra note 32, at 4-5.

n36. Brief for the Respondents at 2-6, Smith v. City of Jackson, 125 S. Ct. 1536 (2005) (No. 03-1160).

n37. Id. at 4-6 (citations omitted).

n38. Id. at 2, 23.

n39. The City further contended that "although the text and legislative history of the ADEA are dispositive, important pragmatic reasons also cut against reading the ADEA to provide for disparate impact claims. On an operational level, the ADEA is ill-suited for such claims." Id. at 18. It supported its position with four lines of argument:

1. In Title VII cases, disparate impact claims have traditionally been tried to courts, not juries.

2. Furthermore, in Title VII cases, disparate impact claims are usually pursued as Rule 23(b)(2) class actions. Because such claims challenge practices generally applicable to a group and can be remedied by common equitable relief, Title VII disparate impact cases are the "prime examples" of cases where individualized notice and an opportunity to opt

out are neither necessary nor appropriate. There is no mechanism for ensuring class-wide participation in ADEA disparate impact claims; the courts have no power to bind all affected to common equitable relief; and "repetitive" litigation imposing inconsistent obligations is entirely possible. These procedural differences add to the showing that the ADEA is ill suited for disparate impact claims.

3. In the ADEA context, there also is no satisfactory calculus for measuring disparate impact. In the Title VII context, race, sex, national origin, and religion are basically dichotomous variables and the effects of a selection practice on blacks versus non-blacks, Hispanics versus non-Hispanics, females versus males, etc., is relatively straightforward to measure. In contrast, "age is a continuum," and "impact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age."

4. Evidence that an employer decision that is neutral on its face has adverse effects on older workers also lacks the probative significance that such evidence has in race and sex discrimination cases. Although it may be idealistic in some ways, the working assumption of Title VII law is that, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." On this assumption, a statistical showing that a neutral employer decision produces a deviation from the norm is taken as a significant signal that the employer practice is problematic (without evidence of justification). But this assumption has no conceivable application to younger and older workers and, accordingly, "statistics showing a deviation from such a "norm' would not prove anything in the ADEA context ... ."

Id. at 18-23 (citations omitted).

n40. Id. at 26 (citing General Dynamics Land Sys., Inc. v. Cline, 124 S. Ct. 1236, 1245 (2004)).

n41. Id. at 26-27.

n42. 401 U.S. 424 (1971).

n43. The City cited a large number of cases holding that it was not accidental that Congress had declined to amend the ADEA at the same time that it amended Title VII.

See Brief for the Respondents, supra note 36, at 26-30. Other organizations that filed amicus briefs individually or collectively in favor of the Petitioners included the Academy of Florida Trial Lawyers, the National Employment Lawyers Association and the Trial Lawyers for Public Justice.

n44. Smith, 125 S. Ct. at 1540.

n45. Id. at 1546.

n46. Id. at 1540.

n47. Id. at 1541 (citing Northcross v. Bd. of Ed. of Memphis City Schs., 412 U.S. 427, 93 S. Ct. 2001 (1973)).

n48. Id. (citations omitted).

n49. Id. at 1540-41 (citations omitted).

n50. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (setting forth the now traditional burden shifting framework).

n51. Smith, 125 S. Ct. at 1540.

n52. Section 703(a) of the Civil Rights Act provides that:

(a) Employer practices. It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 200e-2 (2005). See also Smith, 125 S. Ct. at 1540.

n53. Smith, 125 S. Ct. at 1550 (O'Connor, J., concurring).

n54. See Martin H. Redish & Kevin Finnerty, What Did You Learn In School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox, 88 Cornell L. Rev. 62 (2002) (observing that courts and scholars have fully examined the interaction of educational theory and the democratic process).

n55. This article concerns itself solely with the market for new faculty members, as opposed to the lateral hiring of faculty who have been employed at other educational institutions. For a discussion of other educational institution recruiting practices, see Troy Duster, What We Can Learn from Other Experiences in Higher Education, in AALS Special Commission on Meeting the Challenge of Diversity in an Academic Democracy, Perspectives on Diversity 4 (1997), available at http://www.aals.org/ duster.html (last visited March 3, 2005).

n56. Even if junior faculty demonstrate great promise at the outset of their careers, it is no guarantee that the promise will be fulfilled. Furthermore, it is sometimes the case that the productivity of faculty declines upon receiving tenure. In addition, it is not certain that they will remain a member of the faculty they first join. There are a large number of reasons why someone may choose to leave a particular faculty. Issues such as money, location of the educational institution, promotional opportunities, personality conflicts, level of support and quality of facilities (both factors that influence one's productivity and quality of work), likelihood of obtaining professional recognition, status, and family considerations are among some of the more common reasons.

n57. See Marianne C. DelPo, Too Old to Die Young, Too Young to Die Now: Are Early Retirement Incentives in Higher Education Necessary, Legal, and Ethical?, 30 Seton Hall L. Rev. 827, 831-32, 844-45 (2000) (concluding that while unpopular within academia, there is a need for heightened scrutiny and performance of senior faculty); Neil W. Hamilton, The Ethics of Peer Review in the Academic and Legal Professions, 42 S. Tex. L. Rev. 227, 240-41 (2001) (noting that an increasing proportion of colleges and universities have instituted some system of reviewing the performance of tenured faculty); Deborah L. Rhode, Law Knowledge, and the Academy: Legal Scholarship, 15 Harv. L. Rev. 1327, 1354-55, 1357, 1360-61 (2002) (noting that legal scholarship suffers from a variety of factors, including the lack of empirical research using empirical data, a shortage of intellectual vigor in publishing encouraged by an insufficient quantity of peer-reviewed journals, and a tendency of law school faculty to focus more on legal criticism than offering solutions).

n58. See Stephen M. Feldman, The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too), 54 J. Legal Educ. 471 (2004). Feldman notes that "today law professors' sense of themselves as primarily lawyers is crumbling," which contributes to practitioners' and judges' lack of interest in "scholarship" generated at law schools. Id. at 473. Among other things, he calls for law professors not to examine law in isolation from other fields, but to make greater use of interdisciplinary approaches to improve the quality (and relevance) of scholarship. Id. at 493-94.

n59. See Benjamin Schneider, The People Make the Place, 40 Personnel Psychol. 437, 437-53 (1987); Benjamin Schneider et al., Personality and Organizations: A Test of the Homogeneity of Personality Hypothesis, 83 J. Applied Psychol. 462, 462 (1998) (seeking to show that all being equal in hiring situations, decision makers are more likely to hire persons most similar to them).

n60. See, e.g., Deborah Jones Merritt & Barbara F. Reskin, Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring, 97 Colum. L. Rev. 199 (1997) (using AALS data, the authors used certain criteria to analyze the career paths of faculty hired pursuant to affirmative action programs. The authors did not examine factors such as political views, home state, and scholarly interests in their study).

n61. For an interesting opinion piece questioning the very concept of tenure, see Max

Boot, When Tenure Jumps the Track; The System Locks Universities into Dysfunction, L.A. Times, Mar. 17, 2005, at B13.

n62. See Michael L. Seigel, On Collegiality, 54 J. Legal Educ. 406, 426 (2004) (observing that "collegiality concerns can also be a subterfuge for illegal discrimination").

n63. See Robert B. Conrad & Louis A. Trosch, Renewable Tenure, 27 J.L. & Educ.. 551 (1998) (discussing the history and rationale for granting tenure and questioning whether the purposes for creating it are still valid).

n64. See, e.g., Lynne L. Dallas, Teaching Law & Socioeconomics, 41 San Diego L. Rev. 11, 30 (2004) (observing that cultural beliefs having a discriminatory impact evolve historically); Neil Dishman, Defending the Lack of Interest Defense: Why Title VII Should Recognize Differing Job Interests Between the Sexes, 14 Geo. Mason U. Civ. Rts. L.J. 189, 215 (2004) (noting that is not a defense to allow employers to discriminate by means of classifying some jobs as being appropriate for women or men); Jonathan A. Hardage, Nichols v. Azteca Restaurant Enterprises, Inc. and the Legacy of Price Waterhouse v. Hopkins: Does Title VII Prohibit "Effeminacy" Discrimination?, 54 Ala. L. Rev. 193, 201-02, 219-20 (2002) (discussing whether Title VII covers instances of discrimination based on sexual stereotyping); Courtney T. Nguyen, Note, Employment Discrimination and the Evidentiary Standard for Establishing Pretext: Weinstock v. Columbia University, 35 U. C. Davis L. Rev. 1305, 1320-21 (2002) (discussing the evidentiary hurdles faced when attempting to prove discrimination in determining whether a female faculty member should receive tenure).

n65. Another factor that could play a determinative role in whether a particular individual should be interviewed is the fact that law school faculty search committee members are less likely to know those people serving as references for older candidates. Thus, it is possible that the references of more experienced lawyers may be either "discounted" or ignored entirely by the search committee. This situation may increase the role educational pedigree plays in the process. A recent practice has increased the importance of candidates' pedigree as well as their references' personal ties to the law school that is recruiting the new faculty. Many employers no longer provide references for their employees for fear of being sued for libel/slander. Consequently, employers frequently have a policy of merely confirming dates of employment and possibly salary. As a result, the potential employer usually will have less information about potential job candidates. This phenomenon has probably increased the importance of personal contacts

in the hiring process at law schools and elsewhere. See Joshua D. Sayko, Note, When Employers Get "Something for Nothing": The Need to Impose Limited Obligation to Disclose in Employment Reference Situations, 38 Suffolk U. L. Rev. 123 (2004); Amy Joyce, Who Cares About References?; Employers Should - Though It May Be Difficult to Get Thorough Answers, Wash. Post, Jan. 4, 2004, at F6. As a result, older faculty candidates may have more difficulty providing references than persons who have recently completed law school and can find faculty members who may be willing to contact law school search committees directly.

n66. Jon C. Dubin, Faculty Diversity as a Clinical Legal Education Imperative, 51 Hastings L.J. 445, 449-50 (2000) (noting that today almost every law school has some form of a clinical program and a majority have faculty members devoted to such programs, and that racial minorities tend to be under-represented in such programs). Professor Dubin attributes the apparent high turnover in clinical faculty to a variety of reasons such as not being treated as full-members of the faculty and "tokenism." Id. at 451-54.

n67. The statement is based on the authors' discussions with numerous faculty members ranging from assistant professors to tenured full professors at various schools, including individuals who have served on faculty recruitment committees.

n68. Most authors tend to write about what they know best. Thus, it should not be surprising that experienced lawyers often write about practical topics, such as the development of the law in the area in which they practice, rather than theoretical topics, the latter being more associated with traditional legal scholarship. Of course, if these same experienced lawyers were working in an academic environment, they might be writing on legal theory and jurisprudence as well.

n69. According to Georgetown University Law Center Professor Richard Chused, data collected from the AALS indicated that "26.9% of the entire 1980-81 [law school] teaching population left teaching by 1987." Richard H. Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. Pa. L. Rev. 537, 543 (1988). With an increase in the number of two-career couples, it would not be surprising if this figure has increased in recent years.

n70. According to a study of tenure track faculty hired at five law schools between

1970 and 1987, 60.5% of the male candidates, but only thirty-one percent of the female candidates, obtained tenure. Robert J. Borthwick & Jordan R. Schau, Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors, 25 U. Mich. J. L. Reform 191, 202 n.56 (1991) (describing a study conducted by Marina Angel).

n71. For example, in the course of researching this article, one of the authors attempted to obtain age data on the applicants for the Climenko Fellowship Program at Harvard University Law School. This program can serve as a stepping-stone into law school faculty positions since Climenko fellows "participate in faculty workshops relating to Fellow's field of interest as well as [have the opportunity to establish] mentoring relationships with faculty." Such relationships are often critical to obtaining recommendations from prestigious law school professors, such as at Harvard Law School, which can contribute to the strength of a job candidate's application. See Harvard Law School Announcement for 14 Fellowships, http://www.ssrn.com/update/lsn/lsnjob/job073.html (last visited April 29, 2005). Certain relevant correspondence declining to turn over age data is in **Ethan S. Burger's** possession.

n72. In Gregory v. Ashcroft, Justice Sandra Day O'Connor wrote the Court's opinion, which held that the Constitution's Equal Protection Clause did not make a mandatory retirement age of seventy for most Missouri state judges a violation of the Age Discrimination in Employment Act of 1967 (incorporated as 29 U.S.C. 621-34). 501 U.S. 452, 473 (1991). The Court's ruling involved an examination of federalism and the meaning of the Fourteenth Amendment. According to Justice O'Connor, "the Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all. But a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" Id. at 473 (citations omitted).

n73. Congress originally exempted certain employees of educational institutions from Title VII's protections, but later eliminated such exemption. Equal Employment Opportunity Act of 1972, 3, 86 Stat. 103.

n74. This 1990 Act amended earlier versions of the law, the provisions of which are incorporated at 42 U.S.C. 12101. Section 12112 provides generally that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring,

advancement, or discharge of employees, employee compensation, job training ,and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). Although the legislation recognizes certain exceptions, pursuant to 12111 a "covered entity" is "an employer, employment agency, labor organization or joint labor-management committee." 42 U.S.C. 12111(2).

n75. See Adarand Contractors, Inc. v. Pena, 515 U.S. 200, 236-37 (1995).

n76. See supra note 6.

n77. Adarand, 515 U.S. at 237.

n78. See Consor v. Occidental Life Ins. Co., 469 F. Supp. 1110, 1114 (N.D. Tex. 1979).

n79. As discussed below, U.S. employment law does not currently require that the complainant actually apply for the position, so long as he can demonstrate that he would not receive the position due to unlawful factors. See Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984) (plaintiff was not required to show that he applied for a supervisory job since employer misled him as to the nature of the position, prior to being demoted); see also Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 329-35 (1977) (seniority system perpetuates a system of discrimination against minorities); Berkman v. City of N.Y., 705 F.2d 584 (2d Cir. 1983) (physical test or criterion is not job-related and its application in employment decisions has a disparate impact on women, a protected class by Title VII of the Civil Rights Act); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) (sexual harassment test was alleged to be more onerous for persons who are white or male than non-white or female).

n80. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (citing McDonnell Douglas, 411 U.S. at 802).

n81. Id. (citing McDonnell Douglas, 411 U.S. at 804).

n82. Outward appearance is another subjective factor that can play a role in the employment process. This too may work to the detriment of older workers. Individuals, particularly females, deemed by some to be unattractive as well as persons who are overweight in general are known to suffer discrimination when seeking a job and in obtaining wage increase. See, e.g., Stacey S. Baron, (Un)lawfully Beautiful: The Legal (De)Construction of Female Beauty, 46 B.C. L. Rev. 359 (2005) (noting the importance of "beauty" and "appearance" and examining whether those less attractive or overweight should be entitled to legal protection). The authors do not know whether this phenomenon also plays a role in law school faculty hiring.

n83. This latter exemption provides:

Notwithstanding any other provision of this subchapter ... (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other education institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other education institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. 2000e-2(e)(2).

n84. 803 F.2d 351 (7th Cir. 1986).

n85. Id. at 354.

n86. Id. at 352.

n87. Id. at 354.

n88. Id. at 353-54.

n89. For a discussion of the role of the Jesuits at Loyola University, visit Loyola's website at http://www.luc.edu/jesuit/ (last visited Mar. 8, 2005).

n90. Pime, 803 F.2d at 353.

n91. 929 F.2d 944 (3d Cir. 1991).

n92. 83 F.3d 455 (D.C. Cir. 1996).

n93. Little, 929 F.2d at 951. In a case in which at first glance, the facts were similar, the district court granted a Catholic School's motion for summary judgment where plaintiff, a divorced teacher who was having an affair with the father of a pupil, raised several statutory and common law claims. The court seemed to be persuaded principally by the teacher's failure to comply with the provisions of her employment contract. Gosche v. Calvert High School, 997 F. Supp. 867 (N.D. Ohio 1998).

n94. Catholic Univ. of Am., 83 F.3d at 457.

n95. Id. at 460-61.

n96. Id. at 470.

n97. Id. at 460-64.

n98. 990 F.2d 458 (9th Cir. 1993).

n99. Id. at 461.

n100. More than thirty years ago, the United States Court of Appeals for the District of Columbia expressed the viewpoint that the exemption for religious institutions under Title VII of the Civil Rights Act may be unconstitutional since if a church, mosque or synagogue engaged in secular activities (for example, operating a radio station) they would be permitted to discriminate on the basis of religion, while another type of organization could not do the same. See King's Garden, Inc. v. FCC, 498 F.2d 51, 54-55 (D.C. Cir. 1974).

n101. 21 F.3d 184 (7th Cir. 1994).

n102. Id. at 187-88.

n103. 651 F.2d 277 (5th Cir. 1981).

n104. Id. at 279-81.

n105. Id. at 287.

n106. 225 F.3d 1115, 1119 (9th Cir. 2000).

n107. Id. at 1119, 1124.

n108. Id. at 1129-30.

n109. See supra note 6.

n110. Id.

n111. See, e.g., Richard Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493 (2003) (examining disparate impact analysis in light of the Constitution's Equal Protection Clause prohibiting the use of statutory disparate impact standards since it favors one racial group over another); Michael J. Zimmer, The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?, 53 Emory L.J. 1887 (2004) (surveying judicial attitudes towards discrimination cases and the use of the concept "disparate impact," and anticipating the evolution in the law in this area); Kate L. Didech, Note, The Extension of Disparate Impact Theory to White Men: What the Civil Rights Act of 1991 Plainly Does Not Mean, 1 Tex. J. C.L. & C.R. 55 (2004) (arguing that Title VII was not intended to protect "white men" from "reverse discrimination"); Minkin, supra note 3 (discussing tension between two groups of individuals, both protected under the ADEA).

n112. See Brief for the Respondents, supra note 36, at 4.

n113. Data on the number of jobs an individual has held during a lifetime is complex. While it would be possible using the AALS directory to gather information in this area, the level of effort to undertake a meaningful research project that had more than historic value would have to be substantial. Consequently, the authors have not attempted to conduct such an analysis in connection with their research for this article.

n114. The AALS has 166 member schools and twenty-five non-member fee-paid schools. AALS Members, http://www.aals.org/members.html (last visited Nov. 7, 2005).

n115. A detailed description of how this process works is available on the AALS

website. See AALS Faculty Recruitment Services, http://www.aals.org/frs/index.html (last visited May 6, 2005).

n116. See id.

n117. Note that in some cases, the announcements are placed merely to comply with state or university requirements to advertise the position, while in fact the individual who will fill the position has already been determined by the search committee or another decision-making body at the law school.

n118. See The Chronicle of Higher Education, Chronicle Careers, http://chronicle.com/jobs/browse/field/l.htm (last visited Mar. 2, 2005).

n119. See The National Law Journal, Home Page, http://www.law.com/jsp/nlj/index.jsp (last visited Aug. 8, 2005).

n120. See Law.Com Home Page, http://www.law.com/ (last accessed Aug. 8, 2005).

n121. In addition to sending out job announcements including academic positions via a listserv, Academic Keys also maintains a website. Academic Keys Home Page, http://www.academickeys.com/splash flash.php (last accessed Aug. 8, 2005).

n122. The Assoc. of Am. Law Schs., v. 2002-03 Directory of Law Teachers (2004).

n123. Richard A. White, AALS's Statistical Report on Law School Faculty and Candidates for Law Faculty Positions for 2002-3, at 1-3, available at http://www.aals.org/statistics/2002-03/page3.html#2 (last visited Mar. 2, 2005).

n124. The AALS Directory's data is a snapshot of the composition of member-law school faculties. Its entries are not absolutely accurate and current. The degree of detail for law school faculty members tends to vary - the primary determinant being the extent to which one wanted to provide the information incorporated in the directory. Overall, faculty members may be compared principally with respect to their pre-teaching experience, as well as teaching experience and areas of academic interest. The directory does not permit a qualitative comparison on how well an individual performed in a particular capacity. Thus, an individual's accomplishments can only be assessed by examining the institutions that one attended or taught at, often the journals they worked on when in law school, the reputation of the judge one may have clerked for, the law firm at which one worked, the fellowship one may have obtained, etc. It is also impossible for the Directory to be kept absolutely current since it is published every two years.

n125. In 1991, the University of Michigan Journal of Law Reform published an excellent and comprehensive analysis of the backgrounds of law school professors relying on the AALS Directory of Law Teachers for 1988-89. The authors of the article reached conclusions that are generally consistent with the views presented here. Although the article is more than fourteen years old, it represents a major contribution to the literature on the characteristics of law school professors. Robert J. Borthwick & Jordan R. Schau, Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors, 25 U. Mich. J.L. Reform 191 (1991); see also Richard E. Redding, Where Did You Go to Law School? Gatekeeping for the Professoriate and its Implications for Legal Education, 53 J. Legal Educ. 594, 599 (2003).

n126. A decision of a search committee to meet with such an individual is often the least rigorous method of eliminating candidates. The tendency to rely on a candidate's pedigree is akin to buying a "name brand." It is harder to justify interviewing candidates from less prestigious schools. The underlying assumption in seeking candidates of this type is that the individual who performed the best as a student in an academic environment will be the one most likely to thrive as a member of the faculty. Whether this assumption is indeed true is not certain. For example, many people choose to attend law schools using criteria other than perceived prestige. Students from less affluent backgrounds may feel compelled to attend state schools and work part-time while in law school, rather than join a law review. Older law students with family obligations (as well as working spouses) may feel compelled to attend a local school than one having greater prestige. These factors may explain why prior to the GI Bill, higher education in the U.S. at private schools was largely limited to persons from the wealthier segment of society. Rachel F. Moran, The Dilemmas of Diversity, in AALS Special Commission on Meeting the Challenge of Diversity in an Academic Democracy, Perspectives on Diversity 4 (1997), available at http://www.aals.org/moran.html (last visited Mar. 2, 2005).

n127. See, e.g., Redding, supra note 125.

n128. For example, according to Dean Teitelbaum's data, the average age of white law school faculty members is approximately fifty-four years old, male faculty of color are forty-seven years old on average, white women faculty members are on average forty-four years old, and female law faculty members of color are approximately forty-two years old. Lee E. Teitelbaum, First-Generation Issues: Access to Law School, in AALS Special Commission on Meeting the Challenge of Diversity in an Academic Democracy, Perspectives on Diversity 6, 8 (1997), available at http://www.aals.org/diversity/teitelba.html (last visited Mar. 2, 2005).

n129. See the AALS website for the requirements for qualifying for membership in the AALS, in particular, Section 2 and 3 of the by-laws describe how annual membership dues are calculated. AALS Home Page, http://www.aals.org/about.html; AALS, Bylaws of the Association of American Law Schools, Inc., http://www.aals.org/bylaws.html (last visited May 24, 2005).

n130. Compare Wynn v. Nat'l Broad. Co., 234 F. Supp. 2d 1067, 1074-76, 1122 (C.D. Cal. 2002) (where plaintiff-writers sued talent agencies and film and television producers alleging a widespread pattern of age discrimination in the entertainment industry under both federal and state statutes) with Alch v. Sup. Ct., 122 Cal. App. 4th 339, 350 (2004) (allowing certain claims to proceed where twenty-three separate class action lawsuits alleging age discrimination were filed by hundreds of television writers above age forty against various television networks, studios, production companies and talent agencies); see also Cassaundra L. Manning, Comment, Hazen Paper Co. v. Biggins Revisited: The Supreme Court's Dismissal of Adams v. Fla. Power Corp., 6 U. Pa. J. Lab. & Emp. L. 767, 777 (2004) (the author explains that it is unlawful for an employment agency to not only refuse to refer for "employment, or otherwise to discriminate against, any individual because of such individual's age," but also "to classify or refer for employment any individual on the basis of such individual's age"); Andrew O. Schiff, Note, The Liability of Third Parties under Title VII, 18 U. Mich. J.L. Reform. 167, 177 (1984) (contending that under the Civil Rights Act, "when a third party controls an individual's access to employment, that individual should have the same rights as a person using an employment agency: to gain access to the job market on a nondiscriminatory basis, regardless of whether or not the ultimate employer could avoid liability under Title VII"). With respect to AALS, the key issue would be whether a court would find that it "controlled" a candidate's access to employment.

n131. 29 U.S.C. 623(a)-(c).

n132. Some courts have expressed skepticism about proving disparate impact through the use of statistics. See, e.g., Rathbun v. Autozone, Inc., 361 F.3d 62, 79 (1st Cir. 2004) (holding that statistics suffered from significant shortcomings so it was not possible to prove that the disparities were attributable to gender); Lakshman v. Univ. of Me. Sys., 328 F. Supp. 2d 92, 105 (D. Me. 2004) (noting that statistics must cross a "threshold of dependability" to support of claim of discrimination). Other courts have taken a more benign view towards the use of statistics. See, e.g., Morgan v. UPS of Am., Inc., 380 F.3d 459, 463, 466-67 (8th Cir. 2004) (upholding a trial court decision where plaintiffs failed to show relevant statistical disparities permitting an inference of racial imbalance in defendant's workforce when trying to prove a disparate impact in hiring practices where race discrimination was alleged).

n133. For information about how a law school obtains ABA accreditation, visit http://www.abanet.org/legaled/accreditation/acinfo.html (last visited Mar. 14, 2005).

n134. See Social Security Administration, "Life Expectancy for Social Security," available at http://www.ssa.gov/history/lifeexpect.html (last visited Mar. 1, 2005).

n135. See Center for Disease Control, Deaths: Preliminary Data for 2001, National Vital Statistics Report, Vol. 51, No. 4 , Mar. 14, 2001, at 3, available at http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51 05.pdf (last visited June 15, 2005).

n136. According to John Challenger, CEO of the Chicago outplacement firm Challenger, Gray & Christmas, the number of job changes is in the range of eight to ten. Laura Koss-Feder, It's Still Who You Know: In the Boom Economy, Job Hunting is a Way of Life. Here's How to Do It, Time Magazine, Mar. 22, 1999, at 114F.

n137. From 2000 to 2004, the number of age discrimination cases brought before the EEEOC increased from 16,008 to 17,836. Marshall Tanick, State, Federal Appellate Cases Split on Age Bias, Minn. L., May 26, 2005.

n138. 29 U.S.C. 623(a).

n139. 29 U.S.C. 630(b).

n140. Interview with members of law school faculty; Memorandum from the 2004-2005 Appointments Comm., (Jan. 25, 2005) (obtained by **Ethan S. Burger** on conditions of anonymity) (concerning its recommendation to hire a candidate at a "top-fifty" law school).

n141. For example, most academic positions do not require a degree of physical exertion comparable to working in the mining industry, consequently the age of a professor should not operate as a disqualifying characteristic during the recruitment process. See Smith, 125 S. Ct. at 1558-60. The use of any age cut-off without the examination of the individual qualifications of a candidate would probably be deemed to be "arbitrary" discrimination by a court. Id. at 1540 (citing Wirtz Report, supra note 23, at 22). Both the Griggs decision and the Wirtz report noted the requirement that workers have a high school diploma for a position for which it was not relevant as an example of "an obstacle to the employment of older workers, an African-Americans in particular. Id. at 1541 n.5. In fact, Justice Stevens keenly noted that "an employer who classifies his employees without respect to age may still be liable under the terms" of the ADEA "if such classification adversely affects the employee because of that employee's age." Id. at 1542 n.6. Again, while the Smith case concerned a claim brought under 29 U.S.C. 623(a)(2), it is difficult to show that the same principle would not apply in the hiring context under 29 U.S.C. 623(a)(1).

n142. Richard A. Posner, Against the Law Reviews, Legal Aff. (Nov./Dec. 2004), available at http://www.legalaffairs.org/issues/November-December-2004/review posner novdec04.html (last visited Mar. 14, 2005).

n143. One important network is that of former judicial clerks, particularly if the judge for whom one works is willing to support the candidacy of the individual.

n144. Kirsten Edwards, Found! The Lost Lawyer, 70 Fordham L. Rev. 37, 48-49 (2001) (discussing how the Yale model is followed with variation by most law school faculties that seem overly impressed by paper credentials rather than performance).

n145. Only Texas Southern University, Thurgood Marshall School of Law and Texas Wesleyan University School of Law are fee-paid AALS Schools, as opposed to members.

n146. We included in the data those faculty members included in the AALS Directory with emeritus status because at many law schools such individuals remain active members of the faculty. In practice, however, the arrangements with emeritus faculty members vary on a case-by-case basis.

n147. Data is derived from information contained in The AALS Directory of Law Teachers 2004-2005 (Association of American Law Schools ed., West Group and Foundation Press 2004). The authors collected data on faculty members listed in the AALS Directory who are listed at AALS Member Law Schools in the states of Massachusetts, Ohio and Texas. The authors selected these states so as to provide a geographic mix with a large number of law schools, while at the same time providing in the sample a range of law schools in terms of size and competitiveness. The authors recognize that this data is illustrative and may not be representative for the country as a whole. In compiling this data, the authors used individuals listed as "full-time professors," irrespective of level so as to capture the group of individuals most likely to have been/be hired to be faculty having tenure or be eligible for tenure. Professors with emeritus status were included. However, adjunct faculty (who may be practitioners) were not included in the data. Fellows, lecturers, and instructors were also excluded since practitioners who are age forty and above are less willing and able to relocate for short-term positions. Additionally, deans without professorial status were not included. The authors chose to include visiting professors on the assumption that they are full-time faculty at another institution on sabbatical or some other arrangement. The authors recognize that they are required to exercise some discretion in determining who should be included in their database because job titles do not always indicate actual responsibilities.

The authors acknowledge that there are limitations inherent in the use of aggregated data as opposed to individualized survey data, primarily that: (i) some individuals listed in the faculty rosters were not included in the AALS Directory's section that provides the faculty member's personal data; (ii) individuals who may have held fellowship or similar positions are counted as practicing law for the period after which they passed a bar; (iii) in some cases, it was not possible to calculate or estimate a date of birth since the AALS Directory did not list either the individual's birth year or the year in which they received their B.A. In cases where the AALS Directory does not list a year of birth for a faculty

member, the age was estimated to be the total of the number of years since the individual's year of graduation from college plus twenty-two (though this process makes the assumption that an individual went directly to college after high school graduation and did not take time off from their studies - in the case of individuals who did military or peace corps service, this approach is clearly flawed); (iv) the AALS Directory did not provide the year of the individual's bar admission (though we note that not all members of law school faculties holding the title of "professor" are bar members or even studied law, as opposed to another field such as philosophy, public policy, etc); (v) in some cases, the field providing the number of years related to job history was incomplete or lacking; (vi) the AALS Directory does not indicate whether an individual was hired on a time-limited basis or on a tenure track, nor does it always show at what level a given individual received his or her appointment (e.g., assistant, associate or full professor). Furthermore, law schools are not consistent in their nomenclature, for example some schools will give individuals teaching legal research and writing the title "professor" even though they are not on a tenure track; (vii) AALS Directory errors; (viii) individuals leaving the job force (principally women) for family/child-rearing reasons; and (ix) differences in faculty recruiting practices during different time periods due to attitudinal changes in society, faculty attitudes, and legal requirements or faculty searches that may have been initiated to fill a specific need of the faculty (e.g., the recognition of the need to cover a "hot topic," or replace a departing or deceased faculty member having significant experience). The authors believe that despite these limitations, the data has considerable relevance on the subject of the age at which individuals were hired as full-time law faculty as well as the number of years they engaged in the practice of law before changing careers. Note that all numbers are rounded up.

The authors were not able to determine both the age and experience level of every individual given the absence of needed information in the AALS Directory or if the faculty member is a non-lawyer. The figure presents data only for individuals for whom it was possible to determine age of hiring to a full-time faculty position and the number of years of pre-hire work experience.

n148. See supra note 147.

n149. See supra note 147. See supra notes 141 and 146 for a discussion of the authors' recognition of certain methodological limitations. This table reflects the number of years after a faculty member became a member of a state bar. Non-academic work experience is included, while lectureships or fellowships are not treated as work experience since they are scholarly or academic in nature. All numbers are rounded up. The authors did not attempt to determine any period of time when a person was not working.

n150. See supra notes 147. See supra notes 141 and 146 for a discussion of the authors' recognition of certain methodological limitations.

n151. See supra note 147.

n152. See supra note 147.

n153. For discussions of the role of "prestige" in faculty hiring, see John S. Elson, Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia, 64 Tenn. L. Rev. 1135, 1140 (1997) (calling for the ABA to institute an accreditation system concerned to a greater extent with ensuring that students are prepared to practice law competently. The author academia emphasis on legal scholarship has limited social utility.); see also Pat K. Chew, Asian Americans in the Legal Academy: An Empirical and Narrative Study, 3 Asian L.J. 7, 14, 16-18 (1996) (providing a view of the data on Asian-American law faculty, noting they that the prestige of where Asian Americans obtained their first tenure track faculty position seemed to be more important to their advancement that the prestige where they obtained their law degrees have attended impressive credentials than the faculty at large and noting that foreign-educated tend to older than their counterparts, presumably creating a gap in the legal academy's knowledge of Asian law); Deborah J. Merritt & Barbara A. Reskin, The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women, 65 S. Cal. L. Rev. 2299 (1992) (noting the critical role the prestige of the law school minority women attended and taught at to advance in academia).

n154. Timothy A. Salthouse & T. J. Maurer, Aging, Job Performance and Career Development, in Handbook of the Psychology of Aging 353-364, (V.L. Bengston & K.W. Schaie, eds. 1996) (supporting the view that older workers do not apply for jobs they believe they are unlikely to obtain).

n155. See Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1514-15 (2005) (discussing research on how implicit or subliminal bias operate in different contexts (e.g., hiring) against certain groups (most commonly racial but also groups based on age)); see also George R. Kramer, Note, Title VII on Campus: Judicial Review of University Employment Decisions, 82 Colum. L. Rev. 1206, 1220 (1982) (observing that gradually courts were less deferential to the employment decisions of universities than other institutions); Lu-in Wang, Race as Proxy: Situational Racism and Self-Fulfilling

Stereotypes, 53 DePaul L. Rev. 1013, 1016-18 (2004) (discussing the role of stereotypes rather than intentional bias influences on human interactions including employment).

n156. D.C. Code 2-1401.01 (2005).

n157. D.C. Code 2-1402.01 (2005).

n158. D.C. Code 2-1403.01, 2-1403.16 (2005).

n159. D C. Code 2-1402.11(a) (2005).

n160. D.C. Code 2-1402.11(a)(1) (2005).

n161. D.C. Code 2-1402.11(b) (2005).

n162. See Andersen v. Zubeita, 180 F.3d 329, 344 (D.C. Cir. 1999).

n163. Lindsay Young, Hard Law Firms and Soft Law Schools, 83 N.C.L. Rev. 667, 6781-88 (2005) (contending that law schools are not sufficiently rigorous and are not preparing their graduates for legal practice and placing some of the blame of the importance of student evaluations for the promotion and compensation of faculty).

n164. William R. Trail & William D. Underwood, The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools, 48 Baylor L. Rev. 201, 225 (1996) (contending that the increased emphasis on profitability and salaries has decreased the amount of mentoring occurring at law firms).

n165. For this reason in recent years, many law schools have responded by encouraging students (and faculty) to provide pro bono legal services to the community. Depending on the institution this is separate from its clinical program. For a description of some of these programs, see American Bar Association, Directory of Law School Public Interest and Pro Bono Programs, http://www.abanet.org/legalservices/probono/lawschools/pb faculty.html (last visited Mar. 15, 2005).

n166. See Craig A. Nard, Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and the Profession, 30 Wake Forest L. Rev. 347, 349-50 (1995) (calling for more legal scholarship relying on statistical studies from which one can better reach conclusions and make policy recommendations based on data, rather than speculation). It must not be overlooked, however, that many experienced lawyers who are seeking new careers in academia are doing so because they are frustrated with aspects of the business side of law firm operation that is a focus on billable hours and generating clients.

n167. Legal Education and Professional Development - An Educational Continuum, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap, 1992 A.B.A. Sec. of Legal Educ. & Admissions to the Bar 233-60, 330-34 (Robert MacCrate ed.) (finding that law schools are not teaching students in an effective manner so that they will be competent and ethical practitioners). Excerpts of this report are available at http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html (last visited June 14, 2005). See also Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 34-48 (1992) (criticizing law schools for being too elite and impractical and calling on them to reduce the disjuncture between legal education and the legal profession by concentrating their efforts on preparing students for practicing law); Jacqline R. Evered, Arming the Graduate for Professional Battle: No Place for the Weak Skilled: Teaching and Assessing a Course to Develop Multi-Functioning Lawyers, 43 Brandeis L. J. 325, 343-44 (2005) (noting that an ABA Task Force study indicated that less than a third of law students possess the full range of skills needed for legal practice). A majority of law school graduates had four or fewer skills "experiences" (simulated skills, clinics, externships or others), and when selected courses were removed from the list, the majority of graduating students had only one (thirty-two percent) or no (twenty-eight percent) additional exposure to professional skills instruction. These data are consistent with findings that clinical programs are generally taken by only thirty percent of law students where live client clinics are offered. Id.; see also Donald J. Dunn, Why Legal Research Skills Declined, or When Two Rights Make a Wrong, 85 Law Libr. J. 49, 52 (1993) (contending that an increased emphasis on legal writing and the use of computer-based databases such as Lexis and Westlaw have contributed to a de-emphasis on teaching conventional legal research skills); Arturo Lopez Torres, MacCrate Goes to Law School: An Annotated Bibliography of Methods

for Teaching Lawyering Skills in the Classroom, 77 Neb. L. Rev. 132, 138-99 (1998) (presenting examples of offerings indicating how many law schools have changed their curricula in order to strengthen the "lawyering skills" component of legal education).

n168. See A. Kenneth Pye, Symposium, Legal Education in an Era of Change: Legal Education in an Era of Change: The Challenge, 1987 Duke L.J. 191, 195-96 (noting that due to the tenure system the number of openings on law school faculties are limited and that "unlike a partner in private practice, the law professor has little opportunity for professional growth, except through legal scholarship or moonlighting.").

n169. See supra note 147.

n170. See supra note 147. See supra notes 141 and 146 for a discussion of the authors' recognition of certain methodological limitations.