REGARDING AGE AS A DISABILITY: CONCEPTUALIZING AGE DISCRIMINATION AT WORK AS (MIS)PERCEPTION OF DISABILITY DISCRIMINATION

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INTRODUCTION

A number of recent media reports include anecdotal evidence that some people pass as disabled to obtain rights to which they are not entitled.[1] These reports focus on the use of disability to avoid no-pet policies in various contexts, including restaurants,[2] stores,[3] airplanes,[4] and apartment complexes.[5]

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1 *See, e.g.*, Kwame Anthony Appiah, *Should I Out My Friend's 'Service Dog' Scam?*, N.Y. TIMES MAG., Dec. 4, 2016, at MM22; Ellen Eldridge, *Fake Service Animals and Why Airline Passengers Are Upset*, CHI. TRIB. (Nov. 15, 2016, 8:35 AM), http://www.chicagotribune.com/lifestyles/travel/ct-fake-service-animals-on-planes-20161115-story.html; Katie Fairbanks, *Bill Would Help Prevent Fake Documentation to Allow Pets in Rental Units*, JAMESTOWN SUN (Feb. 28, 2017, 6:39 AM), http://www.jamestownsun.com/news/local/4226086-bill-would-help-prevent-fake-documentation-allow-pets-rental-units; Sacha Pfeiffer, *Pretending Your Pet Is a Service Animal? That Could Soon Be Illegal*, BOS. GLOBE (Mar. 16, 2017), https://www.bostonglobe.com/business/2017/03/15/pretending-your-pet-service-animal-that-could-soon-illegal/Rs36mDVZ8mbSiPLVl89qLI/story.html; B.R., *Should Animals Be Allowed to Roam Freely on Jets?*, ECONOMIST (June 10, 2017), https://www.economist.com/blogs/gulliver/2017/06/canines-cabin.

2 *See, e.g.*, Kelly Weill, *Finally, Colorado Is Cracking Down on Service Dog Fraud*, DAILY BEAST (Apr. 2, 2016, 11:10 AM), http://www.thedailybeast.com/finally-colorado-is-cracking-down-on-service-dog-fraud ("Ivana Trump allegedly flashed a therapy animal card when toting her miniature Yorkie into Manhattan's high-end Altesi Ristorante in June 2014, sparking complaints from other diners.").

3 *See, e.g.*, Sue Manning, *Fake Service Dogs a Growing Problem*, NBC NEWS (Oct. 10, 2013, 10:06 AM), http://www.nbcnews.com/health/fake-service-dogs-growing-problem-8C11366537 ("Often, people who want to take their pets into restaurants or retail stores just go online to buy vests, backpacks or ID cards with a 'service animal' insignia.").

4 *See, e.g.*, Marc Brown, *Misuse of 'Service Animal' Designation a Growing Concern*, ABC 7 (Feb. 25, 2017), http://abc7.com/news/service-animals-like-pigs-lizards-on-airplanes-raising-new-concerns/1773786 ("A producer at a sister station to ABC7 was able to obtain an emotional support animal designation from [psychotherapist Carla Black] simply by filling out an online survey. His responses described, among other things, feeling stress at work several times a year and bad memories from 9/11.").

5 *See, e.g.*, Melody Cook, *Service or Disservice: Benefits and Abuses of the Service Animal System*, UTAH STATESMAN (Feb. 24, 2017, 5:39 PM), http://ususstatesman.com/service-

Various federal, state, and local laws grant people with disabilities the right to an exception to no-pets policies as a reasonable accommodation. For example, the Fair Housing Act requires landlords to grant an exception to a no-pets policy when it is necessary for a person with a disability to have an assistance animal.[6]

Interest in service animals has grown significantly in recent years.[7] This is particularly true of emotional support animals.[8] Capitalizing on this interest, some companies have begun selling certifications and accessories, such as vests, to "prove" that an animal is a service animal.[9] It seems clear that at least some people who do not have qualifying disabilities are "passing" as disabled in order to bring their loved, though not necessary, animals with them to places where pets are generally not welcome.

Despite all of the attention paid to this "problem," there is evidence that disability is actually under-utilized in many contexts in which it could be used justifiably to remedy discrimination. This is true, for example, with respect to older people. Age discrimination often intersects with disability discrimination. However, there is considerable evidence that older people often do not use disability to pursue rights. News accounts and public discourse often focus on the benefits of passing as disabled, but they generally ignore the costs of using disability to pursue and realize rights.

This Article will examine the intersection between age and disability discrimination in the context of work and show that older people actually do not use disability to pursue rights as frequently as they could. Part I will describe the relationship between aging and disability. Although there is a clear correlation between age and disability, that correlation is often perceived to be stronger than it actually is. In Part II, this Article will document the challenges that older people face when they try to remedy employment discrimination under

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disservice-examination-benefits-abuses-service-animal-system ("Local landlords Megan and Andrew Ostler said they've had trouble with tenants who claim to need emotional support animals.").

6 *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 6–7, 13 (2004), https://www.hud.gov/sites/dfiles/FHEO/documents/huddojstatement.pdf.

7 Web searches in the United States for "service animal" hit peak popularity in August 2017. *See Service Animal*, GOOGLE TRENDS, https://trends.google.com/trends/explore?q=service%20animal (last visited Oct. 18, 2017).

8 Web searches in the United States for "emotional support animal" hit peak popularity in October 2017. *See Emotional Support Animal*, GOOGLE TRENDS, https://trends.google.com/trends/explore?q=emotional%20support%20animal (last visited Oct. 18, 2017). Even as recently as five years ago, searches for this term were rare. *See id.*

9 *See, e.g.*, NATIONAL SERVICE ANIMAL REGISTRY, https://www.nsarco.com (last visited Oct. 18, 2017) (selling a "Complete Service Animal Certification Kit" for "ONLY $64.95," based on a self-certification of disability).

the Age Discrimination in Employment Act (ADEA). Recent Supreme Court decisions that narrowly interpret the ADEA will be highlighted. Part III will show that older persons have another option—to use the Americans with Disabilities Act (ADA) to remedy discrimination. They can do so because they often qualify as disabled under the ADA and some of the barriers that the ADEA poses are not present under the ADA. In Part IV, individual case examples and Equal Employment Opportunity Commission (EEOC) charge data will be examined to show that older people do not use disability to remedy employment discrimination as frequently as they could. This Part offers some hypotheses for this reticence that are drawn from the literature on disability and passing. The Conclusion emphasizes the need for further research on the intersection on aging and disability in other contexts, including housing discrimination.

I. THE ACTUAL AND PERCEIVED RELATIONSHIP BETWEEN AGING AND DISABILITY

There is a significant relationship between aging and disability. However, that relationship is not as significant as it is generally perceived to be. This Part will begin by analyzing the terms "older person" and "disability" and the most common ways in which those terms are used. The overlap between age and disability and misperceptions about that overlap will then be examined.

A. *Definitions of "Older Person" and "Disability"*

1. "Older Person"

"Older person" is an elusive term. "Older" is a comparative adjective. A ten-year-old girl is "older" than a five-year-old girl, but we generally do not refer to ten-year-old children as "older persons."

As Richard Posner has written, "'old age' . . . is a relative term," noting that "[d]ifferent societies have dated the onset of old age at different ages . . . ."[10] In Sierra Leone, for example, the average life expectancy at birth is approximately fifty years, and the life expectancy at age sixty is thirteen years.[11] In Japan, life expectancy at birth is

10 RICHARD A. POSNER, AGING AND OLD AGE 49 (1995) (quoting Herbert C. Covey, *The Definitions of the Beginning of Old Age in History*, 34 INT'L J. AGING & HUM. DEV. 325, 332 (1992)).

11 *Life Expectancy Data by Country*, WORLD HEALTH ORG., http://apps.who.int/gho/data/view.main.SDG2016LEXv?lang=en (last visited Oct. 18, 2017) (discussing 2015 data).

approximately eighty-four years.[12] At age sixty, it is twenty-six years.[13] Therefore, one would expect that the perceived onset of old age is different in these two countries. A person who is considered to be an older person in Sierra Leone would not necessarily be considered an older person in Japan.

Differences *within* countries can also be significant. For example, in the United States, the gap in life expectancy at birth by county is as large as twenty years.[14] Life expectancy at birth in the United States also varies greatly by race—from 71.7 years for non-Hispanic black males to 83.7 years for Hispanic females.[15]

U.S. law generally uses the term "older persons" to describe a class of people who are older than a certain numeric age. Some laws provide multiple age cut-offs. The Older Americans Act defines "eligible individual" to include anyone who has a low income and is at least fifty-five years old,[16] but it prioritizes people who are at least sixty-five for certain benefits[17] and allocates the "caregiver allotment" to the states based on the percentage of people who are at least seventy years old.[18] The Fair Housing Act defines "housing for older persons" to include, *inter alia*: housing that is "intended for, and solely occupied by, persons 62 years of age or older" as well as, under certain circumstances, housing that is "intended and operated for occupancy by persons 55 years of age or older . . . ."[19]

Based on its definition of "[o]ld age dependency ratio," the U.S. Census Bureau considers "old age" to begin at sixty-five.[20] The Administration for Community Living similarly focuses on sixty-five as the age at which someone becomes an "Older American."[21]

Civil society definitions of "older person" also focus on a numeric threshold but differ on what that threshold is. The founding principles

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12 *Id.*

13 *Id.*

14 Laura Dwyer-Lindgren et al., *Inequalities in Life Expectancy Among US Counties, 1980 to 2014: Temporal Trends and Key Drivers*, 177 JAMA INTERNAL MED. 1003, 1005 (2017) (describing a 20.1-year gap in life expectancy between the counties in the United States with the lowest and the highest life expectancy).

15 63 KENNETH D. KOCHANEK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., DEATHS: FINAL DATA FOR 2011 8 (2015), http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_03.pdf.

16 42 U.S.C. § 3056p(a)(3)(A) (2012).

17 *Id.* § 3056p(b)(1).

18 *Id.* § 3030s-1(f)(1)(A).

19 *Id.* § 3607(b)(2).

20 *Glossary: Old Age Dependency Ratio*, U.S. CENSUS BUREAU, https://www.census.gov/glossary/#term_Oldagedependencyratio (last visited Oct. 18, 2017) (defining "[o]ld age dependency ratio" as "[a] measure derived by dividing the population 65 years and over by the population 18–64 years and multiplying by 100").

21 ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS (2016) [hereinafter OLDER AMERICANS PROFILE], https://www.acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2016-Profile.pdf.

of AARP focus on "older persons,"[22] and the organization advocates for people who are at least fifty years old.[23] In contrast, the National Council on Aging, which has a mission of "[i]mprov[ing] the lives of millions of older adults," focuses on advocating for people who are at least sixty years old.[24]

More consistently than U.S. law, international law essentially defines "older persons" as people who are sixty or older.[25] Although there is no convention on the rights of older persons, the rights of older persons have been included in various international instruments. The United Nations Committee on Economic, Social and Cultural Rights (CESCR), for example, requires "States parties . . . to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons."[26] The United Nations International Day of Older Persons focuses attention on problems that are facing people who are at least sixty years old.[27]

Based on the above discussion, it is clear that laws and civil society often focus exclusively on chronological age to define who is an older person. However, there are other ways to define "older person," including "based on a remaining life expectancy."[28] Remaining life expectancy is also a number, but it is impacted by various environmental, economic, and cultural factors. There is a growing recognition that old age is not defined by age alone: "[W]hat older persons share, as a group, is the experience of living within societies in which stereotyping, the attribution of lesser value, political disempowerment and economic and social disadvantage often accompany ageing."[29] In addition to birth-date, context, culture, and other societal factors play a role in determining whether an individual is considered to be an older person.

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22 *About AARP: History*, AARP, http://www.aarp.org/about-aarp/company/info-2016/history.html (last visited Oct. 19, 2017).

23 *About AARP: What Guides Us*, AARP, https://www.aarp.org/about-aarp/company/what-guides-us (last visited Oct. 20, 2017).

24 *About NCOA,* NAT'L COUNCIL ON AGING, https://www.ncoa.org/about-ncoa/ (last visited Oct. 20, 2017).

25 *See* U.N. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, ¶ 9, U.N. Doc. E/1996/22 (Dec. 8, 1995) ("According to the practice in the United Nations statistical services, these terms cover persons aged 60 and above.").

26 *Id.* ¶ 13.

27 *International Day of Older Persons: Background*, UNITED NATIONS, http://www.un.org/en/events/olderpersonsday/background.shtml (last visited Oct. 20, 2017).

28 Warren C. Sanderson et al., *Probabilistic Population Aging*, 12 PLOS ONE 1, 2 (2017), http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0179171&type=printable.

29 U.N. Secretary-General, *Follow-up to the Second World Assembly on Ageing*, ¶ 41, U.N. Doc. A/66/173 (July 22, 2011).

2. "Disability"

"Disability" is also an elusive term.[30] Definitions of disability can generally be grouped into two categories: the medical model and the social model. The medical model considers disability to be inherent in the impairment that a person has.[31] The social model considers disability to be the result of the interaction between the condition that a person has and society's attitudinal and physical barriers.[32]

The current edition of Black's Law Dictionary defines disability in accordance with the medical model. The first definition is "[t]he inability to perform some function."[33] The second definition focuses on the inability to work and states that disability is "[a]n objectively measurable condition of impairment . . . ."[34] Merriam-Webster defines disability as "a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions."[35] Like Black's Law Dictionary, Merriam-Webster focuses particularly on the inability to work.[36]

The U.S. Census Bureau defines disability as:

> A long-lasting physical, mental, or emotional condition. This condition can make it difficult for a person to do activities such as walking, climbing stairs, dressing, bathing, learning, or remembering. This condition can also impede a person from being able to go outside the home alone or to work at a job or business.[37]

However, the Census Bureau acknowledges that disability is a "complex" and "dynamic" concept that is not easily measured by a "short set of six questions."[38] The American Community Survey's

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30 Rachel Adams et al., *Disability*, *in* KEYWORDS FOR DISABILITY STUDIES 5, 7 (Rachel Adams et al. eds., 2015) (noting that "disability" is growing "more ambiguous and unstable in its meanings").

31 *See, e.g.*, MARK S. STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY: UTILITARIANISM AGAINST EGALITARIANISM 24 (2006) (essentially defining disability as "health-related conditions that might be expected to reduce welfare").

32 *See* Adams et al., *supra* note 30, at 5 (noting that "a central tenet of disability studies [is] that disability is produced as much by environmental and social factors as it is by bodily conditions").

33 *Disability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

34 *Id.*

35 *Disability*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/disability (last visited Oct. 20, 2017).

36 *Id.* (defining disability as "an impairment (such as a chronic medical condition or injury) that prevents someone from engaging in gainful employment").

37 *Glossary: Disability*, U.S. CENSUS BUREAU, https://www.census.gov/glossary/#term_Disability (last visited Oct. 20, 2017).

38 U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY AND PUERTO RICO COMMUNITY SURVEY: 2015 SUBJECT DEFINITIONS 58–59, https://www2.census.gov/programs-surveys/acs/

subject definition for "disability status" also acknowledges the social model of disability: "[D]isability is defined as the product of interactions among individuals' bodies; their physical, emotional, and mental health; and the physical and social environment in which they live, work, or play."[39]

A variety of federal statutes define the term "disability." They do so differently depending on the relevant benefit. Programs that target persons with disabilities often do so using a medical definition of disability.[40] For example, although the Social Security Act's definition of disability is very different from the Individuals with Disabilities Education Act's definition of disability, both are medical definitions.[41]

As will be discussed in more detail in Section III.A below, the ADA has a three-pronged definition of disability that is influenced by both the medical model and the social model of disability.[42] The ADA's definition of disability is consistent with the definition of disability and the term "handicapped" in various other federal laws.[43]

The Convention on the Rights of Persons with Disabilities[44] (CRPD) was adopted on December 13, 2006, during the sixty-first session of the United Nations General Assembly.[45] The CRPD describes disability as the product of "the interaction between persons with impairments and attitudinal and environmental barriers that hinder[] their full and effective participation in society on an equal basis with others."[46] This is broadly consistent with the World Health Organization's view of disability: "Disability is thus not just a health

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tech_docs/subject_definitions/2015_ACSSubjectDefinitions.pdf.

39 *Id.* at 58.

40 BRIGITTE ROHWERDER, DISABILITY INCLUSION IN SOCIAL PROTECTION 5 (Jan. 13, 2014), http://www.gsdrc.org/docs/open/hdq1069.pdf.

41 *Compare* 42 U.S.C. § 423(d)(1)(A) (2012) (defining "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months"), *with* 20 U.S.C. § 1401(3)(A) (2012) (defining "child with a disability" as a child: "(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services").

42 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102(1) (2012).

43 *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3602(h) (2012); Air Carrier Access Act, 49 U.S.C. § 41705(a) (2012).

44 United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

45 G.A. Res. 61/106 (Jan. 24, 2007).

46 *Id.* at pmbl., (e); *see also id.* at art. 1 ("Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.").

problem. It is a complex phenomenon, reflecting the interaction between features of a person's body and features of the society in which he or she lives."[47] The United States is one of the 160 signatories to the CRPD.[48] Although the United States has not ratified the CRPD, 174 countries have ratified or acceded to it.[49] The CRPD's dictates therefore represent "the overwhelming weight of international opinion."[50]

B. *The Significant Relationship Between Age and Disability*

There is a significant relationship between age and disability. Rates of disability increase with age[51]:

Table 1: Rates of Disability by Age Bracket	
Age Bracket	Rate of Disability in 2014
Under 5 years old	< 1%
5-17	5.4%
18-64	10.5%
65 and older	36%

This positive correlation exists for all types of disability—auditory, visual, cognitive, ambulatory, self-care, and independent living.[52] Ambulatory disabilities are the most common disability among older people.[53] The majority of older people who have disabilities actually have more than one disability.[54]

Within the age bracket of sixty-five and older,[55] disabilities continue to increase with age. People who are at least eighty-five represent approximately fourteen percent of older persons, but they account for over twenty-five percent of the older persons who have

47 *Disabilities*, WORLD HEALTH ORG., http://www.who.int/topics/disabilities/en (last visited Oct. 20, 2017).

48 *CRPD and Optional Protocol Signatures and Ratifications*, UNITED NATIONS: ENABLE, http://www.un.org/disabilities/documents/2016/Map/DESA-Enable_4496R6_May16.jpg (last visited Oct. 20, 2017).

49 *Convention on the Rights of Persons with Disabilities (CRPD)*, UNITED NATIONS, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html (last visited Oct. 20, 2017).

50 *Cf.* Roper v. Simmons, 543 U.S. 551, 578 (2005) (acknowledging "the overwhelming weight of international opinion against the juvenile death penalty" in holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

51 *See* LEWIS KRAUS, UNIV. OF N.H., 2015 DISABILITY STATISTICS ANNUAL REPORT 2–3 (2015), https://disabilitycompendium.org/sites/default/files/user-uploads/2015%20Annual%20Report%20%28PDF%29.pdf.

52 *See id.* at 2.

53 WAN HE & LUKE J. LARSEN, U.S. CENSUS BUREAU, OLDER AMERICANS WITH A DISABILITY: 2008–2012: AMERICAN COMMUNITY SURVEY REPORTS 2 (2014), https://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-29.pdf.

54 *Id.* at 13.

55 The remainder of this Section will refer to the sixty-five and older age bracket as "older persons."

disabilities.[56] For people who are eighty or older, the chance of having a disability is seventy-five percent.[57] America's population of people who are eighty-five or older is growing even more quickly than its population of older persons in general.[58]

While there is a significant correlation between aging and disability, the correlation is not complete. The majority of older persons do not have disabilities. The probability that an older American might incur certain types of disabilities might actually be decreasing.[59]

The overall number of older people with disabilities is increasing, however, because lifespans and the total number of older people are increasing.[60] As Martha Nussbaum has written, "[a]s the life span increases, the relative independence that many people sometimes enjoy looks more and more like a temporary condition, a phase of life that we move into gradually and all too quickly begin to leave."[61] The number of older persons who have disabilities is also increasing because, thanks to medical advances, more "individuals with debilitating early onset conditions are living longer than ever before."[62]

C. *Misperceptions of the Relationship Between Age and Disability*

Although the incidence of disability among older persons is high,

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56 HE & LARSEN, *supra* note 53, at 2.

57 CTRS. FOR DISEASE CONTROL & PREVENTION, THE STATE OF AGING AND HEALTH IN AMERICA 2013 18 (2013), https://www.cdc.gov/aging/pdf/State-Aging-Health-in-America-2013.pdf (defining "disability" based on "an affirmative response to either of the following two questions on the 2010 BRFSS Survey: 'Are you limited in any way in any activities because of physical, mental, or emotional problems?' or 'Do you now have any health problem that requires you to use special equipment, such as a cane, a wheelchair, a special bed, or a special telephone?'").

58 OLDER AMERICANS PROFILE, *supra* note 21, at 1 ("The 85+ population is projected to triple [sic] from 6.3 million in 2015 to 14.6 million in 2040.").

59 *See* NAT'L INSTS. OF HEALTH, DISABILITY IN OLDER ADULTS 1 (2010), https://report.nih.gov/nihfactsheets/Pdfs/DisabilityinOlderAdults(NIA).pdf (indicating that "between 1982 and 1999, the prevalence of physical disability in older Americans decreased from 26 percent to 20 percent [and] that the probability of being cognitively impaired at a given age has been decreasing (from the mid-1990s up until at least 2004)"); Sanderson et al., *supra* note 28, at 2 (noting that "tomorrow's older people . . . may well have longer life expectancies, better cognition, better education, and fewer severe disabilities"). *But see* Vicki A. Freedman, *Research Gaps in the Demography of Aging with Disability*, 7 DISABILITY & HEALTH J. S60, S60 (2014) ("At the population level, the remarkable declines in the prevalence of activity limitations among older adults in the U.S. during the 1980s and 1990s have paused and may soon reverse course as the baby boom generation enters late life.").

60 OLDER AMERICANS PROFILE, *supra* note 21, at 1 ("Over the past 10 years, the population 65 and over increased from 36.6 million in 2005 to 47.8 million in 2015 (a 30% increase) and is projected to more than double to 98 million in 2060.").

61 MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 101 (2007).

62 Freedman, *supra* note 59, at S60.

the perception of that incidence is even higher. A Pew Research Center survey highlights this perception gap.[63]

The survey shows a large perception gap between the incidence of certain disabilities among people sixty-five or older[64] and the perception of that incidence by other adults.[65] For example, while twenty-five percent of older persons report experiencing memory loss, fifty-seven percent of other adults expect to experience memory loss as older persons.[66] The gap regarding the ability to drive is similar: merely fourteen percent of older persons are not able to drive, but forty-five percent of other adults expect to have that limitation as older persons.[67] There is also a large perception gap—twenty-one to forty-two percent—regarding the incidence of serious illness.[68]

Perceptions of when a person becomes "old" vary widely based on a person's age. People who are eighteen to twenty-nine years old "believe that the average person becomes old at age 60."[69] In contrast, older persons believe that the threshold for old age is seventy-four.[70] Only eleven percent of older persons believe that a person becomes old at age sixty-five.[71]

This perception gap seems largely a function of stereotyping.[72] Research shows that "many Americans hold inaccurate and negative stereotypes against older people[,] viewing them as senile, sad, lonely, poor, sexless, ill, dependent, demented, and disabled."[73] Based on "an

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63 *See generally* PAUL TAYLOR ET AL., PEW RESEARCH CTR., GROWING OLD IN AMERICA: EXPECTATIONS VS. REALITY (2009), http://www.pewsocialtrends.org/files/2010/10/Getting-Old-in-America.pdf.

64 This Section will refer to people who are sixty-five years old or older as "older persons."

65 This Section will refer to people who are eighteen to sixty-four years old as "other adults."

66 *See* TAYLOR ET AL., *supra* note 63, at 29.

67 *See id.*

68 *See id.*

69 *Id.* at 2.

70 *See id.* at 21.

71 *See id.* at 25.

72 Stereotypes are "cognitive structures that store our beliefs and expectations about the characteristics of members of social groups . . . ." Amy J. C. Cuddy & Susan T. Fiske, *Doddering But Dear: Process, Content, and Function in Stereotyping of Older Persons*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 3, 4 (Todd D. Nelson ed., 2002). In general, members of one group—in this case, young people—perceive members of another group—in this case, older people—"as less variable" than their own group. *Id.* at 6. Cuddy and Fiske refer to this as the "out-group homogeneity effect." *Id.*

73 Richard L. Wiener & Stacie Nichols Keller, *Finding the Assumptions in the Law: Social Analytic Jurisprudence, Disability, and Aging Workers*, *in* DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY 1, 2 (Richard L. Wiener & Steven L. Willborn eds., 2011) (internal citations omitted); *see also* Melissa J. Bjelland et al., *Age and Disability Employment Discrimination: Occupational Rehabilitation Implications*, 20 J. OCCUPATIONAL REHABILITATION 456, 458 (2010) ("Common negative stereotypes about older workers are that they do not perform as well, are less trainable, more resistant to change, less economically beneficial, more costly, and a poorer return on investment as compared with

age-based double-standard," when an older person forgets something, it is interpreted differently than when a younger person does.[74] Stereotyping based on age "goes largely unchallenged and even unnoticed in the United States."[75] The large consumer market for products such as hair dye also provides evidence "of how entrenched ageism is in U.S. culture."[76]

Another factor might be causing the perception gap. Older people and people with disabilities are, in some ways, perceived similarly. According to Cuddy and Fiske, they are both generally perceived to be warm ("e.g., good-natured, trustworthy, sincere, friendly"), but incompetent.[77] This tends to lead to a "paternalistic prejudice" against individuals who are older or have a disability.[78] More generally, research shows that there are "several parallels" between the employment discrimination experienced by people with disabilities and older people.[79]

There is also evidence that there is a significant perception gap between the perception of disability and the data on disability among older persons themselves. That perception gap is, however, in the other direction—older persons generally see themselves as *less disabled* than they might actually be. Although, as discussed in Section I.B above, data shows that older persons are disproportionally disabled, "a high proportion of older adults who are classified as disabled (defined as limitations in one or more 'activities of daily living,' . . . .) do not consider themselves disabled."[80]

Older persons "who develop physically limiting conditions later in life may attribute the process to normative aging" instead of describing

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younger workers."); Robert McCann & Howard Giles, *Ageism in the Workplace: A Communication Perspective*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS, *supra* note 72, at 167 (describing the "widely held perceptions that 'the elderly' are cognitively deficient, physically unsuitable for work, unable to cope with change, poor performers at work, and pining for retirement still persist in society at large").

74 *See* Cuddy & Fiske, *supra* note 72, at 11 (noting that studies "revealed an age-based double standard concerning attributions of memory failure, such that when young people forget, it is attributed to lack of effort or attention, but when older people do the same, it is attributed to incompetence").

75 *Id.* at 3.

76 *See* Todd D. Nelson, *Ageism: The Strange Case of Prejudice Against the Older You*, *in* DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY, *supra* note 73, at 41.

77 *See* Cuddy & Fiske, *supra* note 72, at 8–9.

78 *See id.* at 9.

79 *See* Kelly E. Cichy et al., *The Workplace Discrimination Experiences of Older Workers with Disabilities: Results from the National EEOC ADA Research Project*, 43 J. VOCATIONAL REHABILITATION 137, 138 (2015).

80 Jessica A. Kelley-Moore et al., *When Do Older Adults Become "Disabled"? Social and Health Antecedents of Perceived Disability in a Panel Study of the Oldest Old*, 47 J. HEALTH & SOC. BEHAV. 126, 127 (2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2134789/pdf/nihms24429.pdf.

the condition as a disability.[81] They also "may be less likely to develop a 'disability-rooted' identity."[82] Stigma likely plays a role in older persons' hesitation to perceive themselves as disabled. Compared to individuals who develop disabilities later in life, individuals who have had disabilities since childhood generally "accept[] the label *person with disability* more often."[83]

A study by Jessica A. Kelley-Moore and others sheds some light on why some older persons perceive themselves to be disabled and some do not.[84] The study found that poorer health, negative changes in functional status, receipt of home health care, and stopping driving were all associated with "higher levels of perceived disability."[85] Older persons who are anxious about their health also have higher levels of perceived disability.[86]

Perceptions of disability among older persons are also influenced by social factors. For example, older persons who have more living children are less likely to perceive themselves to be disabled.[87] Older persons who are more satisfied with their social life are also less likely to perceive themselves to be disabled.[88] This finding provides support for the social model of disability.[89]

II. OLDER PERSONS FACE SIGNIFICANT CHALLENGES TRYING TO REMEDY AGE DISCRIMINATION IN EMPLOYMENT

When older people face discrimination, they have to overcome considerable challenges to remedy that discrimination. This Part will highlight the challenges of remedying employment discrimination based on age.

Despite cultural norms and laws that incentivize or require retirement at certain ages,[90] many older persons work. Of the approximately fifty million older Americans, almost ten million work.[91]

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81 *Id.*

82 *Id.* at 129.

83 Lois M. Verbrugge & Li-shou Yang, *Aging with Disability and Disability with Aging*, 12 J. DISABILITY POL'Y STUD. 253, 266 (2002); *see also* Kelley-Moore et al., *supra* note 80 (noting that "many who have been physically able for most of their lives may be slow to take on a label of 'disabled,' despite serious functional decrement").

84 Kelley-Moore et al., *supra* note 80, at 129.

85 *Id.* at 135.

86 *See id.* at 136.

87 *See id.*

88 *See id.*

89 *See id.* at 137 ("Our findings indicate that older adults who are less socially integrated tend to perceive themselves as disabled, independent of actual functional status, supporting the social model of disability.").

90 McCann & Giles, *supra* note 73, at 175.

91 AM. CMTY. SURVEY, U.S. CENSUS BUREAU, WORK STATUS IN THE PAST 12 MONTHS BY

People often perceive that they are being discriminated against based on their age at work.[92] One study found that over sixty-five percent of workers aged fifty to sixty-four perceive that they have been "[u]nfairly given jobs no one else wanted."[93] Over fifty percent reported that they have been ignored or not taken seriously by their supervisor, and over thirty percent reported that a "[c]o-worker with less experience and qualification [was] promoted before [they were]."[94] A recent AARP study found that sixty-four percent of workers ages forty-five to seventy-four "say they have seen or experienced age discrimination . . . ."[95] The AARP study found that seventy-two percent of women are significantly more likely to see or experience age discrimination than fifty-seven percent of men.[96]

When older persons face employment discrimination, they can file a complaint with the EEOC under the ADEA.[97] However, to remedy age discrimination successfully requires overcoming a number of significant challenges.

A. *The ADEA*

June 14, 2017 marked the fiftieth anniversary of the passage of the ADEA.[98] The purpose of the ADEA is "to promote employment of older persons based on ability rather than age [and] to prohibit arbitrary age discrimination in employment . . . ."[99]

Surprisingly, when it was passed in 1967, the ADEA did not actually protect older persons from discrimination. The law originally covered only workers who were "at least forty years of age but less than sixty-five years of age."[100] In other words, the ADEA did not originally protect workers who were sixty-five or older from age discrimination.

EMPLOYMENT STATUS FOR THE CIVILIAN POPULATION 65 YEARS AND OVER tbl.C23004 (2015).

92 *See* Rita Jing-Ann Chou & Namkee G. Choi, *Prevalence and Correlates of Perceived Workplace Discrimination Among Older Workers in the United States of America*, 31 AGEING & SOC'Y 1051, 1060 tbl.2 (2011), http://midus.wisc.edu/findings/pdfs/1159.pdf.

93 *Id.*

94 *Id.*

95 AARP, STAYING AHEAD OF THE CURVE 2013: THE AARP WORK AND CAREER STUDY 28 tbl.10 (2014), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2014/Staying-Ahead-of-the-Curve-2013-The-Work-and-Career-Study-AARP-res-gen.pdf.

96 *See id.*

97 Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012).

98 Victoria A. Lipnic, *50th Anniversary of the Age Discrimination in Employment Act of 1967 (ADEA)*, U.S EQUAL EMP. OPPORTUNITY COMM'N (June 14, 2017), https://www.eeoc.gov/eeoc/history/adea50th.

99 29 U.S.C. § 621(b) (2012).

100 Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

The upper limit for protection was increased to seventy in 1978.[101] It was not until 1986 that the upper limit for protection was entirely struck.[102] The threshold for coverage remains forty years of age.[103]

The subset of employees who have rights under the ADEA is also limited by the nature of their work and the size of their employer. The ADEA does not apply to elected officials and their personal staff, and it does not apply to appointees on the policymaking level.[104] The ADEA also does not apply to employees who work for businesses that have fewer than twenty employees.[105] This is a significant exception to coverage—approximately five million businesses—almost ninety percent of all businesses in the United States—have fewer than twenty workers.[106] Those very small businesses employ almost twenty million people, approximately seventeen percent of all workers.[107]

The ADEA requires a person who is alleging age discrimination in employment to file an administrative complaint before seeking relief in court.[108] During fiscal year 2016, over 20,000 age discrimination complaints were filed with the EEOC.[109] Very few EEOC complaints result in reasonable cause determinations. The EEOC issues a reasonable cause determination if there is "reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation."[110] During fiscal year 2016, only 2.7% of the EEOC's resolutions resulted in reasonable cause determinations.[111] No reasonable cause determinations were the result of 68.8% of the resolutions.[112]

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101 *See* Age Discrimination in Employment Act of 1978, Pub. L. No. 95-256, § 3, 92 Stat. 189, 189–90 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

102 *See* Age Discrimination in Employment Act of 1986, Pub. L. No. 99–592, § 2(c), 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

103 29 U.S.C. § 631(a) (2012).

104 *Id.* § 630(f).

105 *Id.* § 630(b).

106 *See* SURVEY OF BUS. OWNERS, U.S. CENSUS BUREAU, STATISTICS FOR ALL U.S. FIRMS WITH PAID EMPLOYEES BY INDUSTRY, GENDER, AND EMPLOYMENT SIZE OF FIRM FOR THE U.S. AND STATES: 2012 tbl.SB1200CSA09 (2015), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2012_00CSA09&prodType=table.

107 *See id.*

108 *See* 29 U.S.C. § 626(d)(1) (2012) ("No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.").

109 *Age Discrimination in Employment Act (Charges Filed with EEOC): FY 1997-FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (last visited Oct. 20, 2017).

110 *Definitions of Terms: Reasonable Cause*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm (last visited Oct. 20, 2017).

111 *See* source cited *supra* note 109.

112 *See* source cited *supra* note 109. The EEOC issues a no reasonable cause determination if there is "no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation." *Definitions of Terms: No Reasonable Cause*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm (last

The ADEA prohibits covered employers from:

> (1) . . . fail[ing] or refus[ing] to hire or to discharge any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) . . . limit[ing], segregat[ing], or classify[ing] . . . 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 . . . .[113]

The first provision prevents employers from intentionally discriminating based on age. The second provision prohibits policies or practices that have a disparate impact based on age. However, the ADEA allows employers to discriminate based on age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . ."[114] The next Section will discuss courts' narrow interpretation of disparate-treatment and disparate-impact claims under the ADEA.

B. *Barriers to Successfully Remedying Discrimination Under the ADEA*

In a number of decisions since the turn of the century, the Supreme Court has interpreted the ADEA in a way that makes it more difficult for plaintiffs to win employment discrimination cases based on age than it is to win employment discrimination cases based on other protected characteristics. This is true of both disparate-treatment and disparate-impact claims.

1. Disparate-Treatment Claims

The ADEA was largely modeled on Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin.[115] For many years, claims under Title VII and the ADEA were analyzed in the same way. That changed, however, with the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*[116]

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visited Oct. 20, 2017).

113 29 U.S.C. § 623(a) (West 2016) (effective Oct. 1, 2016).

114 *Id.* § 623(f)(1).

115 *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

116 Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

Jack Gross was a fifty-four-year-old employee who was reassigned.[117] Mr. Gross was replaced by a person who was in her early forties.[118] During the trial, "Gross introduced evidence suggesting that his reassignment was based at least in part on his age."[119] Based on its finding that "Gross' age was a motivating fact in FBL's decision,"[120] the jury awarded Mr. Gross "$20,704 for lost past salary and $26,241 for lost past stock options."[121]

The Eighth Circuit reversed the trial court.[122] It did so after holding that the district court's jury instruction improperly shifted the burden of persuasion to the employer.[123] The jury instruction in question stated that:

> Gross had the burden to prove that (1) FBL demoted Gross to Claims Project Coordinator on January 1, 2003, and (2) that Gross's age was "a motivating factor" in FBL's decision to demote Gross. The instruction continued that the jury's verdict must be for FBL, however, "if it has been proved by a preponderance of the evidence that defendant would have demoted plaintiff regardless of his age."[124]

The Eighth Circuit held that the district court erred because the burden of persuasion does not shift to the defendant unless the plaintiff presents "direct evidence that an illegitimate factor played a substantial role in an adverse employment decision."[125] In this case, Mr. Gross presented only circumstantial evidence.

The Supreme Court granted certiorari.[126] The question presented was "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]."[127] The Court did not reach this question, however, because it held that a plaintiff cannot win a mixed-motive ADEA claim under any circumstances.

Writing for the majority, Justice Thomas focused on the text of the ADEA and looked to dictionary definitions to determine the meaning of

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117 *Id.* at 170.

118 Order on Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial, Gross v. FBL Fin. Grp., Inc., No. 04-60209 (S.D. Iowa June 23, 2006), 2006 WL 6151670, at *4, *rev'd*, Gross v. FBL Fin. Servs., Inc., 526 F.3d 356 (8th Cir. 2008), *vacated*, 557 U.S. 167 (2009), *remanded to*, 588 F.3d 614 (8th Cir. 2009), *aff'd*, 489 F. App'x 971 (8th Cir. 2012).

119 *Gross*, 557 U.S. at 170.

120 *Gross*, 2006 WL 6151670, at *5.

121 *Id.* at *13.

122 *Gross*, 526 F.3d at 363.

123 *Id.* at 362.

124 *Id.* at 360 (internal citation omitted).

125 *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring)).

126 Gross v. FBL Fin. Servs. Inc., 555 U.S. 1066 (2008).

127 Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 169–70 (2009).

the words "because of."[128] Justice Thomas determined that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."[129] As a result, the plaintiff in an age discrimination case "retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action."[130] A mixed-motive jury instruction is therefore "never proper in an ADEA case,"[131] because a plaintiff cannot win a case in which there is evidence of "mixed motives."[132] Justice Thomas noted that this is a major difference between the ADEA and Title VII: "Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor."[133]

2. Disparate-Impact Claims

In *Smith v. Jackson*, the Supreme Court verified that the ADEA authorizes disparate-impact claims.[134] Those claims, however, are significantly circumscribed by the ADEA's reasonable factor other than age defense and the standard for pleading disparate-impact claims.

The plaintiffs in *Smith* were a group of thirty police officers in Jackson, Mississippi, who were all over forty years old.[135] They filed a complaint alleging both disparate-treatment and disparate-impact discrimination. The officers alleged disparate impact, because the city gave "proportionately greater raises" to police officers who had less than five years of experience.[136] The city was motivated to do this "at least in part . . . to bring the starting salaries of police officers up to the regional average . . . ."[137]

The district court granted the city's motion for summary judgment.[138] Based in large part on the ADEA's reasonable factors other than age exception to liability, the Fifth Circuit affirmed, holding that "the ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not

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128 *See id.* at 176–77.

129 *Id.* at 176.

130 *Id.* at 177.

131 *Id.* at 170.

132 *See id.* at 175 ("Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not.").

133 *Id.* at 174.

134 Smith v. City of Jackson, 351 F.3d 183, 184–85 (5th Cir. 2003), *aff'd on other grounds*, 544 U.S. 228 (2005).

135 *Smith*, 544 U.S. 228.

136 *Id.* at 231.

137 *Id.*

138 *See id.*

based on age."[139] Because there was a circuit split on this question,[140] the Supreme Court granted certiorari.[141]

Writing for a divided Supreme Court, Justice Stevens concluded that the ADEA authorizes disparate-impact cases.[142] In reaching this conclusion, Justice Stevens focused on the text of the relevant provision and the EEOC's interpretation of that text.[143] Justice Stevens relied heavily on *Griggs v. Duke Power Co.*, in which the Supreme Court had interpreted a parallel provision in Title VII to authorize disparate-impact lawsuits.[144]

Although the language of these ADEA and Title VII provisions are parallel, there are textual differences between the two statutes that are relevant to disparate-impact claims. First, as noted above, the ADEA includes the "reasonable factor other than age" exception (RFOA). An employer is not liable for disparate impact based on age "if the adverse impact was attributable to a nonage factor that was 'reasonable.'"[145] This is different from the standard under Title VII. Under Title VII, a covered entity can escape liability for disparate impact discrimination, only under the narrower "business necessity" test.[146] The business-necessity test "asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."[147]

The second difference involves the Civil Rights Act of 1991, which amended Title VII.[148] Congress amended Title VII in part because the Supreme Court's holding in *Wards Cove Packing Co. v. Atonio* "weakened the scope and effectiveness of federal civil rights protections . . . ."[149] Congress did not, however, amend the ADEA. Thus, *Wards Cove* still applies to the ADEA. *Wards Cove* held that a plaintiff alleging disparate impact has to identify "a specific or particular employment practice that has created the disparate impact under attack."[150] Because the plaintiffs in *Smith* failed to do so, the Supreme Court affirmed the Fifth Circuit's decision, but on different grounds. Based on both the RFOA exception and *Wards Cove*, Justice Stevens noted that "the scope of disparate-impact liability under ADEA is

139 *Smith*, 351 F.3d at 187.
140 *See id.* at 188–89.
141 Smith v. City of Jackson, 541 U.S. 958 (2004).
142 *See Smith*, 544 U.S. at 240.
143 *See id.* at 240–41.
144 *See id.* at 234–38.
145 *Id.* at 239.
146 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).
147 *Smith*, 544 U.S. at 243.
148 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
149 § 2, 105 Stat. at 1071.
150 Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

narrower than under Title VII."[151]

At least in one circuit, older people face an additional barrier when they are trying to remedy certain forms of employment discrimination. In *Villarreal v. R.J. Reynolds Tobacco Company*, the Eleventh Circuit recently significantly narrowed the availability of disparate-impact claims under the ADEA.[152]

Richard Villarreal was forty-nine years old when he applied for a job at R.J. Reynolds.[153] In addition to claiming that R.J. Reynolds intentionally discriminated against him, Mr. Villarreal alleged that the company used certain guidelines in evaluating job applications that had a disproportionately adverse impact on applicants who were older.[154]

R.J. Reynolds moved to dismiss Mr. Villarreal's claims, arguing in part that the ADEA does not authorize disparate-impact claims for job applicants, as opposed to employees.[155] After holding that "disparate impact failure-to-hire claims are not authorized under § 4(a)(2) of the ADEA," the district court granted R.J. Reynolds' motion to dismiss.[156] Over a dissent, the Eleventh Circuit reversed,[157] but R.J. Reynolds' motion for a rehearing en banc was granted and that opinion was vacated.[158]

On rehearing en banc, a divided Eleventh Circuit held that job applicants cannot bring disparate-impact claims under the ADEA.[159] Judge Pryor, writing for the majority, focused on the text of the ADEA and concluded that "[t]he plain text of Section 4(a)(2) covers discrimination against employees. It does not cover applicants for employment."[160] As noted above, Section 4(a)(2) makes 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 . . . ."[161] Part of this provision focuses on "employment opportunities." Taken by itself, that term would seem to

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

152 Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016).

153 *Id.* at 961.

154 *See id.* at 961–62 ("The guidelines described the 'targeted candidate' as someone '2–3 years out of college' who 'adjusts easily to changes' and instructed the contractor to 'stay away from' applicants 'in sales for 8–10 years.'").

155 *See* Villarreal v. R.J. Reynolds Tobacco Co., No. 12-0138 (N.D. Ga. Mar. 6, 2013), 2013 WL 823055, at *12–13, *rev'd*, 806 F.3d 1288 (11th Cir. 2015), *aff'd on reh'g*, 839 F.3d 958 (11th Cir. 2016).

156 *Villarreal*, 2013 WL 823055, at *16.

157 *See Villarreal*, 806 F.3d 1288, 1306 (Vinson, J., dissenting).

158 *See* Villarreal v. R.J. Reynolds Tobacco Co., No. 15-10602, 2016 WL 635800, at *1 (11th Cir. Feb 10, 2016).

159 *See Villarreal*, 839 F.3d at 970.

160 *Id.* at 963.

161 29 U.S.C. § 623(a)(2) (West 2016) (effective Oct. 1, 2016).

cover applicants as well as employees. This is particularly true, because it is preceded by the term "any individual."[162] However, Judge Pryor found that the provision's "key phrase" is "or otherwise adversely affect his status as an employee."[163] Judge Pryor found that this is the key phrase because "'or otherwise' operates as a catchall: the specific items that precede it are meant to be subsumed by what comes after . . . ."[164] Thus, Judge Pryor reads "employment opportunities" as being limited to the employment opportunities of people who are already employees of the relevant covered entity.[165]

In June of 2017, the Supreme Court declined to grant certiorari in this case.[166] One district court recently rejected *Villarreal*, concluding that "it would turn the ADEA on its head to say that Mr. Rabin cannot bring a disparate-impact claim because he was never actually hired."[167]

III. OLDER PEOPLE CAN REMEDY EMPLOYMENT DISCRIMINATION BY USING THE ADA

When older people face discrimination, they should consider whether that discrimination is based on disability or the misperception of disability. If so, they can use disability to pursue their rights under the ADA.

This Part describes how older persons can qualify for protection under the ADA. It will then describe how, in the context of employment discrimination, the ADA does not present the same barriers for plaintiffs that the ADEA does.

A. *Older People Often Qualify as Disabled Under the ADA*

The ADA prohibits discrimination against people with disabilities in three main contexts: employment, public services, and public accommodations.[168] To be eligible for ADA protection, a person must satisfy the ADA's definition of disability. Individuals are disabled if they: (A) have "a physical or mental impairment that substantially limits one

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162 *See Villarreal*, 839 F.3d at 982–84 (Martin, J., dissenting).

163 *Id.* at 963 (quoting § 623(a)(2)).

164 *Id.* at 964.

165 *See id.* at 964 ("Applicants who are not employees when alleged discrimination occurs do not have a 'status as an employee.'").

166 *See* Villarreal v. R.J. Reynolds Tobacco Co., 137 S. Ct. 2292 (2017).

167 Rabin v. PricewaterhouseCoopers L.L.P., 236 F. Supp. 3d 1126, 1130 (N.D. Cal. 2017).

168 *See* 42 U.S.C. § 12101(a)(3) (2012) ("[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services . . . .").

or more major life activities . . . ; (B) a record of such an impairment; or (C) [are] regarded as having such an impairment . . . ."[169] The first prong ("actual disability") and the third prong ("regarded as disabled") have been the subject of much litigation, and historically, the Supreme Court interpreted the ADA's definition of disability narrowly. The ADA Amendments Act (ADAA) overruled those Supreme Court cases in 2009.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court narrowly interpreted the first prong of the ADA's definition of disability.[170] The plaintiff, Ella Williams, was diagnosed with a number of impairments, including "thoracic outlet compression, a condition that causes pain in the nerves that lead to the upper extremities."[171] As a reasonable accommodation based on her disabilities, Ms. Williams asked Toyota Motor to allow her to return to her former job duties, which required less frequent use of her arms and hands. The parties disputed what happened next, but ultimately, Toyota Motor fired Ms. Williams.[172]

Ms. Williams filed a complaint with the EEOC and later brought a lawsuit in the Eastern District of Kentucky.[173] She claimed that "her physical impairments substantially limited her in (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working, all of which, she argued, constituted major life activities under the [ADA]."[174] The parties filed cross-motions for summary judgment.[175] The district court granted the defendant's motion after finding that Ms. Williams was not disabled because her impairments did not substantially limit a major life activity.[176] In particular, the court found "that gardening, doing housework, and playing with children" are not major life activities, and that Ms. Williams was not substantially limited in the major life activities that she did allege, namely "performing manual tasks, lifting, and working . . . ."[177]

Ms. Williams appealed, and the Sixth Circuit reversed the district court. The Sixth Circuit's analysis focused on whether Ms. Williams was unable to perform "a 'class' of manual activities affecting the ability to

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169 *See id.* § 12102(1) (defining the term "disability").

170 Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196–98 (2002) (holding that the terms "substantially limit" and "major life activity" need to be interpreted strictly), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

171 *Williams*, 534 U.S. at 189.

172 *See id.* at 189–90.

173 *See id.* at 190.

174 *Id.*

175 *See id.*

176 *See id.* at 190–91.

177 *Id.* at 191.

perform tasks at work."[178] Over a dissent, the Sixth Circuit held that Ms. Williams was "substantially limited in performing manual tasks . . . ."[179] The Supreme Court granted certiorari[180] to determine "the proper standard for assessing whether an individual is substantially limited in performing manual tasks."[181]

Writing for a unanimous Court, Justice O'Connor focused on two elements of the first prong of the ADA's definition of disability: the meaning of the terms "substantially limits" and "major life activities." Based on the ADA's legislative history, Justice O'Connor concluded that both of "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled . . . ."[182] Thus, the Court held that an individual does not qualify as disabled under the first prong of the ADA's definition unless the individual has "an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[183]

In another case, the Supreme Court also held that when analyzing whether a person qualifies as a person with a disability under the first prong of the ADA's definition of disability, a court must consider the individual's impairment in its mitigated state.[184] Under this narrow reading of the ADA, if a person has a mental impairment, but therapy and medication are preventing that impairment from substantially impairing any of the person's major life activities, then the person does not qualify as having a disability. Similarly, if a person does not have legs but prostheses prevent that physical impairment from substantially limiting the person's major life activities, then the person would not qualify as a person with a disability. *Sutton v. United Air Lines, Inc.* also narrowly interpreted the "regarded as disabled" prong of the ADA's definition of disability.

Justice O'Connor also wrote for the majority in *Sutton*. According to Justice O'Connor, there are two apparent ways to be regarded as disabled: "(1) a covered entity mistakenly believes that a person has a *physical impairment* that substantially limits one or more major life

178 Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 843 (6th Cir. 2000), *rev'd sub nom*. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

179 *Williams*, 224 F.3d at 843.

180 Toyota Motor Mfg., Ky., Inc. v. Williams, 532 U.S. 970 (2001).

181 *Williams*, 534 U.S. at 192.

182 *Id.* at 197.

183 *Id.* at 198.

184 *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482–83 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C) ("A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity.").

activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."[185] This was an extremely difficult standard for a plaintiff to satisfy. A plaintiff had to show, for example, that her employer not only thought that she had an impairment, but that the employer thought that that impairment severely restricted the plaintiff from engaging in a specific activity that was of central importance to most people's daily lives.

In 2008, however, Congress unanimously passed the ADAA to overrule the Supreme Court's narrow interpretation of the definition of disability.[186] The ADAA specifically criticized and overruled the *Toyota Motor* and *Sutton* holdings discussed above.[187] Congress also clarified that "substantially limits" does not mean "significantly restricted."[188] More generally, the Act provides that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis" and that, instead, "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations . . . ."[189]

The ADAA incorporates a non-exclusive list of examples of major life activities relevant to determining whether an individual is disabled.[190] The ADAA also clarified that the term major life activity "includes the operation of a major bodily function . . . ."[191] Moreover, the inquiry into disability should not take into account the "ameliorative effects of mitigating measures" such as medication, therapy, or prostheses.[192]

The ADAA also lowers the burden facing litigants who plead that they are "regarded as" disabled.[193] Congress explained that:

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185 *Id.* at 489 (emphasis added). That Justice O'Connor limited the first "apparent way" to "physical impairments" only is puzzling and difficult to justify. The author of this Article assumes that the omission of mental impairments was an oversight.

186 *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

187 *See id.* § 2(a)–(b).

188 *See id.* § 2(a)(8).

189 *Id.* § 2(b)(5).

190 *See id.* § 3(2)(A) ("[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.").

191 *Id.* § 3(2)(B) ("[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.").

192 *See id.* § 2(b)(2) (stating that one of the purposes of the Act is "to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures").

193 *See id.* § 3(3)(A).

> [a]n individual meets [this] requirement . . . if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[194]

Even though the ADAA lowered the bar for "regarded as" claims, EEOC charges alleging that the complainant was "regarded as disabled" constituted only approximately ten percent of charges under the ADA in fiscal year 2016.[195] The number of "regarded as" disabled charges has been decreasing consistently since a peak of eighteen percent of charges in 2004[196]:

Table 2: ADA EEOC Charges Alleging "Regarded as Disabled"	
Fiscal Year	Percentage
1997	11.4
1998	11.1
1999	11.6
2000	13.7
2001	12.8
2002	13.7
2003	16.8
2004	18.2
2005	17.4
2006	17.2
2007	17.7
2008	16.7
2009	14.1
2010	12.8
2011	11.7
2012	11.8
2013	11.4
2014	11.2
2015	10.8
2016	10.5

The ADAA did not halt that trend. A similar trend exists in the data on EEOC resolutions[197] and merit factor resolutions.[198]

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194 *Id.*

195 *ADA Charge Data by Impairments/Bases–Receipts (Charges Filed with EEOC) FY 1997-FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm (last visited Oct. 20, 2017).

196 *Id.*

197 *Id.*

198 *See ADA Charge Data by Impairments/Bases–Merit Factor Resolutions (Charges Filed with EEOC) FY 1997-FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *Merit Factor Resolutions*], https://www.eeoc.gov/eeoc/statistics/enforcement/ada-merit.cfm (last visited Oct. 20, 2017). Merit resolutions are "[c]harges with outcomes favorable to charging parties and/or charges with meritorious allegations," including "negotiated settlements,

Interestingly, however, it appears that "regarded as" disabled resolutions appear to disproportionately result in merit factor resolutions.[199]

Given the data on the relationship between aging and disability discussed in Section I.B above, it is clear that a significant percentage of older persons qualify as disabled under the first prong of the ADA's definition of disability.[200] For example, approximately ten million older people, or approximately twenty-five percent of all older people, report "having serious difficulty walking or climbing stairs."[201]

The data discussed in Section I.C also makes it clear that, even if an older person does not have an impairment that substantially limits a major life activity, she might be perceived as having an impairment. For example, although only approximately twenty-five percent of older persons report experiencing memory loss, fifty-seven percent of other adults expect to experience memory loss as older persons.[202] As described in the next Section, significant differences between the burdens facing litigants under the ADA and ADEA give older persons an incentive to potentially use disability to pursue rights.

B. *The Advantages of Remedying Employment Discrimination Under the ADA*

There are a number of potential advantages if an older person uses disability to remedy employment discrimination. The ADA covers employers of fifteen or more people.[203] As noted above, the ADEA covers only employers of twenty or more people, effectively excluding ninety percent of all businesses in the United States.[204] Significantly more employers and employees are therefore covered under the ADA.

The rights provided by the ADA are also more expansive than they are under the ADEA in at least one significant way. Unlike the ADEA, the ADA requires employers to make reasonable accommodations for

withdrawals with benefits, successful conciliations, and unsuccessful conciliations." *Definitions of Terms: Merit Resolutions*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm (last visited Oct. 20, 2017).

199 *Compare ADA Charge Data by Impairments/Bases–Resolutions (Charges Filed with EEOC) FY 1997-FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *Resolutions*], https://www.eeoc.gov/eeoc/statistics/enforcement/ada-resolutions.cfm (last visited Oct. 20, 2017), *with Merit Factor Resolutions*, *supra* note 198.

200 Shengli Dong, *Assessing Workplace Accommodation Requests Among Older Workers*, REHABILITATION COUNSELING BULL., Feb. 15, 2017, at 1 (noting that "a remarkably high proportion of older workers will likely qualify for protection under Title I of the Americans With Disabilities Act (ADA)").

201 HE & LARSEN, *supra* note 53, at 2.

202 TAYLOR ET AL., *supra* note 63, at 29.

203 *See* 42 U.S.C. § 12111(5)(A) (2012).

204 *See* source cited *supra* note 106.

otherwise qualified individuals with disabilities.[205] Their failure to do so constitutes discrimination.[206] During fiscal year 2016, over forty percent of EEOC charges based on disability involved reasonable accommodation requests.[207] There is evidence that older workers could particularly benefit from reasonable accommodations.[208]

An employer is not obligated to provide a reasonable accommodation if the person requesting the modification is not disabled.[209] An employer can also prove that the requested modification would constitute an undue hardship[210] or that the person requesting the modification poses a direct threat to health or safety.[211] The undue hardship and direct-threat defenses are, however, limited in scope.

To prove that a modification would constitute an undue hardship, an employer must show that the accommodation would require "significant difficulty or expense, when considered in light of," *inter alia*, "the nature and cost of the accommodation" and "the overall financial resources of the covered entity . . . ."[212] The cost of most reasonable accommodations is generally not significant—"57% of accommodations cost absolutely nothing to make, while the rest typically cost only $500."[213] To invoke the direct-threat defense successfully, the employer must prove that the person in question poses "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable

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205 42 U.S.C. § 12112(b)(5).

206 42 U.S.C. § 12112(b).

207 *See Statutes by Issue (Charges Filed with EEOC) FY 2010-FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *Statutes by Issue*], https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Oct. 22, 2017) (showing 11,865 ADA charges with the issue of "Reasonable Accommodation" during fiscal year 2016); *see also Americans with Disabilities Act of 1990 (ADA) Charges (Charges filed with EEOC) FY 1997-FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *EEOC ADA Charges*], https://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm (last visited Oct. 22, 2017) (showing 28,073 total ADA charges received during fiscal year 2016).

208 *See* Wiener & Keller, *supra* note 73, at 3 ("Despite the fact that the picture that emerges shows few, if any, consistent performance decrements for aging workers, and that the positive attributes of older worker[s] offset those decrements that do exist, the research literature suggests that older people have specific problems related to their age that may require some workplace accommodations.").

209 A covered entity may also show that the person is disabled under the ADA only by virtue of being "regarded as" disabled, because the ADA Amendments Act clarifies that individuals who are disabled based on the "regarded as" prong are not entitled to reasonable accommodations or modifications. *See* 42 U.S.C. § 12201(h) (2012) ("A covered entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) of this title solely under subparagraph (C) of such section.").

210 *See id.* § 12112(b)(5)(A).

211 *See id.* § 12113(a)–(b).

212 *Id.* § 12111(10).

213 *Employers and the ADA: Myths and Facts*, U.S. DEP'T LAB., https://www.dol.gov/odep/pubs/fact/ada.htm (last visited Oct. 22, 2017).

accommodation."[214]

Disability-based complaints to the EEOC are more likely to result in reasonable cause determinations (4.0% to 2.7%) and less likely to result in no reasonable cause determinations (63.7% to 68.8%) than ADEA-based complaints.[215] Part of the reason for this is likely that the framework for evaluating complaints under the ADA is different than the framework for evaluation of claims under the ADEA. This Section will describe how the framework for disparate-treatment and disparate-impact claims is different under the ADA than under the ADEA.

1. Disparate-Treatment Claims

The ADA originally prohibited discrimination "because of . . . disability."[216] In that way, the ADA was similar to the ADEA. However, the ADAA amended the definition to "on the basis of disability."[217] Courts evaluate ADA disparate-treatment claims under the *McDonnell-Douglas* burden-shifting test.[218]

Under *McDonnell-Douglas*, the plaintiff has the burden to show that the relevant employer is covered by the ADA, she is a qualified individual with a disability, and that she suffered an adverse employment consequence, such as being rejected or fired, on the basis of her disability.[219] If the plaintiff establishes this prima facie case, the burden then shifts to the employer to produce a legitimate, nondiscriminatory reason for the adverse employment action.[220] If the employer is able to do so, then the plaintiff has the burden to show that the purported reason is a pretext.[221]

One circuit court has found that the ADA did not authorize mixed-motive claims, but that case was analyzing the question under the ADA's text before it was amended.[222] Congress amended the definition

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214 29 C.F.R. § 1630.2I (2017).

215 *Compare* source cited *supra* note 207, *with* source cited *supra* note 109.

216 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102, 104 Stat. 327, 331 (codified as amended in scattered sections of 42 U.S.C.).

217 ADA Amendments Act of 2008, 42 U.S.C. § 12112(a) (2012).

218 *See, e.g.*, McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009) ("Claims alleging disability discrimination in violation of the ADA are subject to the burden-shifting analysis originally established by the Supreme Court in McDonnell Douglas Corp. v. Green . . . ." (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973))).

219 *See, e.g.*, McMillan v. City of N.Y., 711 F.3d 120, 125 (2d Cir. 2013).

220 *See, e.g.*, *McBride*, 583 F.3d at 96.

221 *See, e.g.*, *id.*

222 *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010) ("The version of the ADA applicable to this case in relevant part provides that '[n]o 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

of disability "'to mirror the structure of' nondiscrimination protection provision [sic] in Title VII of the Civil Rights Act of 1964."[223] The ADA's legislative history itself "indicates Congress intended mixed-motives claims to be available under the ADA."[224] That being said, one district court has held that "there is no meaningful textual difference between 'on the basis of' and the terms 'because of.'"[225] The Supreme Court might ultimately agree, but until that time, the availability of mixed-motive claims under the ADA provides older persons with a significant incentive to use disability to remedy employment discrimination.

2. Disparate-Impact Claims

Disparate-impact claims are authorized under the ADA.[226] The ADA defines "discriminate" to include "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability" and "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability . . . ."[227] Given that the ADA focuses on "individual[s] with disabilit[ies]" and it specifically mentions "selection criteria" and "employment tests," it is clear that the ADA authorizes disparate-impact claims for job applicants. As discussed in Section II.B.2 above, in at least the Eleventh Circuit, this is another significant difference between the ADEA and ADA.

The defenses available under the ADA are also narrower than under the ADEA. As discussed in Section II.B.2 above, the ADEA provides a RFOA defense. The ADA has no such defense. Instead, a defendant in an ADA disparate-impact case can avoid liability only if it shows that the standard in question is "job-related . . . and . . . consistent

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employment.'" (quoting 42 U.S.C. § 12112(a) (2008))). *But see* Hamilton v. Oklahoma City Univ., 911 F. Supp. 2d 1199, 1207 (W.D. Okla. 2012), *aff'd*, 563 F. App'x 597 (10th Cir. 2014) ("Although [defendant's] comparison of the similarity between the ADA and ADEA statutory language is somewhat persuasive, given the absence of direct authority from this Circuit and the scant authority from other courts, the Court declines to adopt the 'but for' standard in this case.").

223 Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA*, 82 MISS. L.J. 67, 71 (2013) (quoting 154 CONG. REC. S8347 (Sept. 11, 2008) (statement of the Managers to Accompany S. 3406)).

224 Leigh A. Van Ostrand, Note, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399, 443 (2009).

225 Gulliford v. Schilli Transp. Servs., Inc., No. 15-19, 2017 WL 1547301, at *6 (N.D. Ind. Apr. 27, 2017).

226 *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) ("Both disparate-treatment and disparate-impact claims are cognizable under the ADA.").

227 42 U.S.C. § 12112(b) (2012).

with business necessity."[228]

ADA claims are not easy to litigate successfully, but they do not present some of the significant barriers to success that ADEA claims do. One might then expect to see a high percentage of older persons use the ADA, in addition to the ADEA, to remedy employment discrimination.[229]

IV. WHY DO OLDER PEOPLE NOT USE "DISABILITY" MORE FREQUENTLY TO REMEDY EMPLOYMENT DISCRIMINATION?

Despite the obvious intersection, "few discrimination studies have examined the intersection between age and disability."[230] This Part will examine individual cases that clearly involve the intersection of age and disability—cases in which an employee is perceived to be "senile." EEOC charge data will then be examined to show that older people do not use disability as frequently as they could to remedy employment discrimination. This Part ends with some hypotheses for this reticence that are drawn from the literature on disability and passing.

A. *How Frequently Do Older Persons "Use Disability" to Remedy Employment Discrimination?*

This Section examines examples of employment discrimination cases in which the employee was perceived to be senile. Both plaintiffs claimed age discrimination. Only one plaintiff used disability to pursue her rights. Available data on employment discrimination charges will then be examined to determine the frequency with which older persons in general use disability to remedy employment discrimination.

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228 *Id.* § 12112(b)(6).

229 *Cf.* John F. Burton, Jr., *The Relationship Between Disability Discrimination and Age Discrimination in Workers' Compensation*, *in* DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY *supra* note 73 (noting that "older workers with disabilities, who are the age group most likely to be adversely affected by the changes in the workers' compensation eligibility rules in the 1990s, were required to turn to the [Social Security Disability Insurance] program for protection").

230 Cichy et al., *supra* note 79, at 138; *see also* Linda R. Shaw et al., *Intersectionality and Disability Harassment: The Interactive Effects of Disability, Race, Age, and Gender*, 55 REHABILITATION COUNSELING BULL. 82, 83 (2012) ("Whereas there is a substantial body of literature on the interacting effects of race and gender, research on the interaction between disability and other stigmatizing characteristics is almost nonexistent." (citations omitted)).

1. Employment Discrimination Case Examples

Cases in which an employer allegedly suggests or acts on suggestions that an older employee is "senile" highlight the intersection between age and disability discrimination.[231] However, even in these cases, not all plaintiffs use disability to pursue their rights.[232]

Emyrtle Bennett was sixty years old when she was laid off by the District of Columbia public school system.[233] Before she was laid off, a co-worker allegedly repeatedly asked Dr. Bennett when she was going to retire and called her an "old fogey," "old fashioned," and "senile."[234] However, in her lawsuit, Dr. Bennett alleged only age discrimination.[235] The case went to trial in 2014. Dr. Bennett lost the case because, *inter alia*, the jury found that age was not the "but for" reason she was terminated.[236]

A subset of cases that include allegations like those in the *Bennett* case include an ADA "regarded as disabled" claim in addition to an ADEA claim. One example is *Hainan v. S&T Bank*.[237]

Sandra Hainan was approximately forty-nine years old when she was hired as a customer service representative by S&T Bank.[238] When Ms. Hainan did not understand how to balance an ATM machine, the head teller allegedly "began to yell, 'Are you too old to learn?' and 'Are you senile?'"[239] Approximately a month later, the head teller allegedly suggested that Ms. Hainan take Aricept, a medication that is used to treat dementia.[240] In addition to an ADEA claim, Ms. Hainan alleged that her employer regarded her as disabled and discriminated against her in violation of the ADA.[241] Ms. Hainan specifically alleged that her

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231 *See, e.g.*, Complaint at 5, Gallagher, Md. v. Penobscot Cmty. Healthcare, No. 15-244 (D. Me. June 25, 2015) ("Sometime after Dr. Gallagher joined PCHC, at least one patient complained that Dr. Gallagher was elderly, senile, and demented, among other complaints."); Complaint at 7, Erickson v. New Rushmore Radio, Inc., No. 14-5092 (D.S.D. Dec. 22, 2014) ("In August 2013, when Ms. Erickson formally complained about the harassing tone and the contradictory directives that Ms. Green gave her, Ms. Green began suggesting that Ms. Erickson was senile and had hearing problems."); Complaint, Bennett v. Rhee, No. 10-1680 (D.D.C Jan. 28, 2011) (discussed below); Complaint, Hainan v. S&T Bank, No. 10-1600 (W.D. Pa. Dec. 1, 2010) (discussed below).

232 *See, e.g.*, Complaint, *Gallagher*, No. 15-244 (alleging only age discrimination and common law claims); Complaint, *Erickson*, No. 14-5092 (alleging only ADEA and Equal Pay Act discrimination); Complaint, *Bennett*, No. 10-1680 (alleging only age discrimination).

233 *See* Complaint at 4, 11, *Bennett*, No. 10-1680.

234 *Id.* at 10.

235 *See id.* at 12–17.

236 *See* Verdict Form, Bennett v. Rhee, No. 10-1680 (D.D.C. Nov. 20, 2014).

237 *See generally* Complaint, Hainan v. S&T Bank, No. 10-1600 (W.D. Pa. Dec. 1, 2010).

238 *See id.* at 8–9.

239 *Id.* at 4–5.

240 *See id.* at 5.

241 *See id.* at 9–10.

employer "incorrectly believed that [she] suffered from a disability that substantially limited her ability to work and think."[242]

The bank moved to dismiss Ms. Hainan's complaint, but the court denied the motion with respect to her ADEA and ADA claims.[243] A confidential settlement agreement was reached.[244]

Unlike these cases, the vast majority of employment discrimination complaints do not end up in court. It is therefore helpful to analyze administrative complaint data to determine how frequently older people use disability to try to remedy employment discrimination.

2. Employment Discrimination Charge Data

People "often file charges claiming multiple types of discrimination" with the EEOC.[245] During fiscal year 2016, for example, 91,503 individuals filed charges, but by tallying the charges by laws under which the EEOC has jurisdiction, one can see that the average charge included claims under more than one law.[246]

With access to proprietary EEOC databases, researchers at Cornell's Institute on Employment and Disability have conducted studies that provide valuable insights on the intersection of charges based on age and disability. One 2009 study examined the over two million EEOC charges filed between 1993 and 2007.[247] This study found that 427,525 of those charges were filed "under the ADEA alone or jointly."[248] However, only 68,569, or sixteen percent, were filed "jointly under the ADEA/ADA."[249] The vast majority of complainants who alleged age discrimination did not also allege disability discrimination.

The decision to file jointly is influenced by a variety of different factors. Age, sex, race, type of alleged adverse employment action, and the size of the employer all influenced the likelihood of whether an ADEA charge also included an ADA charge.[250] People in their fifties

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242 *Id.* at 9.

243 *See* Hainan v. S&T Bank, No. 10-1600, 2011 U.S. Dist. LEXIS 45361, at *4 (W.D. Pa. Apr. 27, 2011).

244 *See* Stipulation of Dismissal, Hainan v. S&T Bank, Civ. No. 10-1600 (W.D. Pa. Aug. 18, 2011).

245 *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Oct. 22, 2017).

246 *See id.* (showing over 200,000 charges listed for the 91,503 individual charge filings).

247 Bjelland et al., *supra* note 73, at 459.

248 *Id.*

249 *Id.* Similarly, only approximately fifteen percent of the charges filed under the ADA alone or jointly were filed under the ADA and ADEA. *See id.*

250 *Id.* at 463.

were the most likely to file joint ADA/ADEA charges.[251] In fact, almost fifty percent of joint ADA/ADEA charges were filed by people in their fifties.[252] Disputes over demotion, harassment, hiring, termination, and promotion more commonly lead to joint complaints.[253] Men were "almost 8% more likely than women to file claims jointly . . . ."[254] People of color were thirty-five percent more likely than white people to file joint claims.[255] Employees of small companies were also more likely to file joint ADA/ADEA claims.[256] Overall, however, the vast majority of ADEA complainants between 1993 and 2007 did not use disability to pursue rights.[257]

Joint ADA/ADEA charges increased during the period covered by the Cornell study. For example, in 2000, there were 4171 joint ADA/ADEA complaints, but that number had increased to 7091 by 2010.[258] That is an increase of seventy percent. ADA complaints increased by only thirty percent over the same time period,[259] and ADEA complaints increased by only approximately twenty-eight percent.[260]

The percentage of ADEA charges that are jointly filed under the ADA has also been increasing over time. In 2000, approximately sixteen percent of ADEA charges were jointly filed under the ADA. That percentage increased to approximately seventeen percent in 2005, twenty-one percent in 2010, and twenty-three percent in 2014.[261] The increase in joint filings might mean that older persons are starting to use disability more frequently. This increase could be a reaction to the

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251 *Id.* at 461 tbl.1.

252 *See id.* A plurality of ADA claims—almost thirty-four percent—were filed by people in their forties. *See id*.

253 *See id.* at 463.

254 *Id.*

255 *See id.*

256 *See id.*

257 People with disabilities appear to use age to pursue rights at a higher rate. *See, e.g.*, Susanne M. Bruyère et al., *United States Employment Disability Discrimination Charges: Implications for Disability Management Practice*, 5 INT'L J. DISABILITY MGMT. 48 (showing that twenty percent of ADA charges by people aged forty to fifty-four years old also included an ADEA charge and that over fifty percent of ADA charges by people fifty-five or older included an ADEA charge).

258 Sarah von Schrader, ADA/ADEA Jointly-Filed Charges Over Time tbl.1 (Sept. 9, 2017) (unpublished paper) (on file with author). These figures include "charges filed with both . . . the EEOC and state and local Fair Employment Practice Agencies." *Id.*

259 *See id.* Note, however, that ADA charges filed with the EEOC only increased by almost fifty-nine percent. *See EEOC ADA Charges*, *supra* note 207.

260 *See* von Schrader, *supra* note 258. Note, however, that ADEA charges filed with the EEOC only increased by approximately forty-five percent. *See* source cited *supra* note 109.

261 *See* von Schrader, *supra* note 258. More recent nationwide data on joint ADA/ADEA charges are not readily available, but 2016 data obtained pursuant to a Public Records Act request indicates that approximately twenty-three percent of employment discrimination complaints filed in California based on age were also filed based on disability. *See* Letter from California Department of Fair Employment and Housing (Sept. 30, 2017) (on file with author).

Supreme Court's narrow interpretations of the ADEA and Congress's overruling of the Supreme Court's narrow interpretation of the ADA. Further evidence in support of this hypothesis is that, since 2008, ADEA charges filed with the EEOC have significantly decreased while ADA charges have significantly increased.[262]

Because the Cornell studies are somewhat dated, this Section also examines publicly available EEOC data and press releases from more recent years. A list of ADEA cases provided on the EEOC website also indicates that litigation based on concurrent ADA and ADEA complaints is not as common as one might expect. Of the approximately seventy case descriptions, only one, *DXP Enterprises*, refers to the ADA or disability discrimination.[263] In *DXP Enterprises*, "[t]he EEOC alleged that DXP terminated Brooks because of her disability and/or the intersection of disability and age."[264]

A similar list of approximately seventy ADA cases does not include any mention of age discrimination or the ADEA.[265] A more comprehensive list of hundreds of press releases regarding the EEOC's ADA enforcement refers to both age and disability discrimination in only six cases besides *DXP Enterprises*.[266] One of these cases is *EEOC v. DynMcDermott Petroleum Operations Company*,[267] which involved discrimination against an employee based on his age and the fact that his wife had cancer.[268] In other words, the employee in that case was not alleging that he himself had an actual or perceived disability. Another case was one in which the EEOC filed an amicus curiae brief in an Eleventh Circuit case involving a plaintiff who "alleged that he was fired . . . because of his disability (a herniated disc) and age . . . ."[269] One of the cases, against Bobby Dodd Institute, Inc. of Atlanta, appears to be incorrectly listed on the ADA case list because it involves an ADEA

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262 *Compare* source cited *supra* note 109, *with EEOC ADA Charges*, *supra* note 207.

263 *See Selected List of Pending and Resolved Cases Under the Age Discrimination in Employment Act (ADEA)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/litigation/selected/adea.cfm (last visited Nov. 8, 2017).

264 *Press Releases: EEOC Settles Disability and Age Discrimination Suit Against DXP Enterprises*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Feb. 6, 2012), https://www.eeoc.gov/eeoc/newsroom/release/2-6-12.cfm.

265 *See Selected List of Pending and Resolved Cases Under the Americans with Disabilities Act Amendments Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/litigation/selected/adaaa.cfm (last visited Nov. 8, 2017).

266 *See Fact Sheet on Recent EEOC Litigation-Related Developments Under the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/litigation/selected/ada_litigation_facts.cfm (last updated June 18, 2015).

267 EEOC v. DynMcDermott Petroleum Operations Co., 537 F. App'x 437 (5th Cir. 2013).

268 *See Press Releases: Fifth Circuit Rules for the EEOC in Age and Disability Discrimination Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 30, 2013), https://www.eeoc.gov/eeoc/newsroom/release/3-30-13.cfm.

269 *See* source cited *supra* note 266 (describing Mazzeo v. Color Resolutions Int'l, Inc., 746 F.3d 1264 (11th Cir. 2014)).

complaint only.[270] It appears to be listed because the complainant is a person with a disability who alleged age discrimination.[271] The other three cases are EEOC lawsuits that involved discrimination claims based on both the ADA and the ADEA.[272]

Another list, of approximately eighty ADA cases that the EEOC filed or resolved, refers to three additional cases that involved both age and disability discrimination claims.[273] Based on this review of the lists of hundreds of cases that the EEOC highlights on its website and in press releases, it appears that the EEOC does not litigate many cases that involve both ADA and ADEA claims.

EEOC litigation statistics in general also indicate that it does not commonly litigate concurrent ADA and ADEA complaints. Only a small percentage of EEOC lawsuits are based on concurrent complaints. Of the eighty-six lawsuits the EEOC filed on any basis during fiscal year 2016, only five were filed under more than one statute.[274] Similarly, of the 139 lawsuits resolved during the same fiscal year, only sixteen were filed under multiple statutes.[275]

Examining recent ADA charges filed by impairment also yields some potentially relevant insights. Of the almost fifty impairments listed, at least five are more common in older persons: Alzheimer's, cancer, hearing impairment, heart cardiovascular impairments, and vision impairment.[276] These impairments accounted for a small percentage of ADA charges during fiscal year 2016: Alzheimer's (0%), cancer (3.2%), hearing impairment (2.7%), heart cardiovascular impairments (3.0%), and vision impairment (1.9%).[277] The data on EEOC resolutions[278] and merit factor resolutions[279] are similar. While not at all conclusive, these statistics might indicate that the ADA is the default statute used by younger people with disabilities and the ADEA is

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270 *See Press Releases: Bobby Dodd Institute to Pay $40,000 to Settle EEOC Age Discrimination Suit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 17, 2014), https://www.eeoc.gov/eeoc/newsroom/release/6-17-14.cfm.

271 *See id.*

272 *See* source cited *supra* note 266 (identifying EEOC Age and Disability Discrimination Suit settlements by Wal-Mart ($150,000),Weirton Medical Center ($12,500), and Regions Bank ($95,000)).

273 *See Significant Disability Discrimination Litigation Filed or Resolved: July 2013-July 24, 2014*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/litigation/selected/ada_7-14.cfm (last visited Oct. 22, 2017) (referring to age and disability discrimination cases against Weirton Medical Center, Regions Financial Corp., and Wal-Mart Stores of Texas).

274 *See* P. David Lopez, U.S. EQUAL EMP. OPPORTUNITY COMM'N, OFFICE OF GENERAL COUNSEL: FISCAL YEAR 2016 ANNUAL REPORT 4, https://www.eeoc.gov/eeoc/litigation/reports/upload/16annrpt.pdf.

275 *See id.* at 5.

276 *See* source cited *supra* note 195.

277 *See* source cited *supra* note 195.

278 *See Resolutions*, *supra* note 199.

279 *See Merit Factor Resolutions*, *supra* note 198.

the default statute used by older people who have age-related disabilities or are regarded as disabled.

Examining the charges filed by issue also indicates that many ADEA complainants do not also use disability to remedy employment discrimination. For example, in fiscal year 2016, no more than 2.3% of ADEA complaints about advertising were also based on the ADA.[280] During the same year, there were 124 ADEA complaints focused on apprenticeship, but only three ADA complaints on that same topic.[281]

By examining the literature on disability and "passing," the next Section will provide some theories on why older people do not use disability to pursue rights more frequently.

B. *Factors That Might Explain Why Older People Do Not "Use Disability" More Frequently to Remedy Employment Discrimination*

There are at least three potential reasons why older persons do not use disability more frequently to remedy employment discrimination. First, a significant number of older persons might not know about the ADA and the rights that it confers in the context of employment. This also might be true of attorneys who older persons tend to consult with, particularly if those attorneys specialize in elder law or employment discrimination based on age. Second, a significant number of older persons might know about the ADA but think that it does not apply to them. Third, a significant number of older persons might know about the ADA and realize that it could apply to them, but decide that, at least in the context of employment, the costs of using disability outweigh the benefits. These possibilities are briefly explored below.

A person is less likely to ask for reasonable accommodations if she does not know about the ADA.[282] Older persons often do not see themselves or want to see themselves as having disabilities or being regarded as having disabilities. As a result, they might not be aware of the rights that the ADA confers in the context of employment.[283] Even if an older person is generally aware of the ADA, she is less likely to know that she can qualify for protection even if she is only "regarded as" having a disability.[284]

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280 *See Statutes by Issue*, *supra* note 207.

281 *See id.*

282 *Cf.* Dong, *supra* note 200, at 8 (finding that "employees who requested accommodations had higher levels of workplace supports and knowledge of the ADA and accommodations").

283 *Cf.* JOHN MARSHALL FAIR HOUS. LEGAL SUPPORT CTR., SENIOR HOUSING RESEARCH PROJECT FINAL REPORT 74 (Nov. 6, 2007), http://www.jmls.edu/clinics/fairhousing/pdf/commentary/senior-housing-final-report.pdf (finding that more than half of seniors surveyed "expressed unfamiliarity with the fair housing laws and the remedies they afford").

284 *Cf.* William R. Draper et al., *ADA Perceived Disability Claims: A Decision-Tree Analysis*,

Older people who do know about the ADA might not think that it applies to them. As discussed in Section I.C, older persons who have age-related impairments are less likely to think of themselves as having a disability.

Older persons who know about the ADA and realize that it applies to them might still decide not to use disability to remedy employment discrimination. An older person would make that decision if she decides that the costs of using disability to pursue and realize rights might outweigh the benefits. The weighing of costs and benefits might even persuade an older person who has significant impairments to pass as not disabled rather than to pass as disabled.[285]

As discussed in the Introduction, reports on service animals often focus on people who allegedly are passing as disabled. Similar concerns are raised in other contexts, including handicapped parking.[286] However, data on how extensive disability fraud is in the service animal or other contexts is lacking.[287] Despite the media's preoccupation with disability fraud, more people pass as not disabled than pass as disabled. Similarly, more people pass as less disabled than pass as more disabled. For example, there is evidence that fewer people apply for disability benefits than would be entitled to such benefits.[288] The media, and

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24 J. OCCUPATIONAL REHABILITATION 213, 218 (2014) (noting that "Americans with minimal impairments or no disability whatsoever . . . are less likely to be ADA literate and, moreover, are even less likely to understand that they have ADA protections when mistakenly 'regarded as'" disabled).

285 Jeffrey A. Brune & Daniel J. Wilson, *Introduction*, *in* DISABILITY AND PASSING: BLURRING THE LINES OF IDENTITY 1, 4 (Jeffrey A. Brune & Daniel J. Wilson eds., 2013) (noting that "the meaning, costs, and morality of passing are not clear-cut"). The topic of passing and disability has generally been under-explored by scholars. *Id.* at 2 ("Despite its importance, disability passing has received inadequate attention from scholars until now. Almost all studies of passing focus on race, gender, or sexuality and fail to account for disability as a fundamental, destabilizing component of a person's identity."); *see also* Ellen Samuels, *Passing*, *in* KEYWORDS FOR DISABILITY STUDIES, *supra* note 30 (noting that "[c]omparatively little attention, however, has been given to the phenomenon of individuals passing as either disabled or nondisabled").

286 *See, e.g.*, ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE 132–33 (2014) (discussing the website Handicappedfraud.org).

287 *See* Sande Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 771, 771 (2016) (noting that "no reliable data exists" on the alleged abuse of service animal rules); SAMUELS, *supra* note 286, at 136 (noting that "cultural representations of individual disability 'fakers' far exceed the documented existence of such impostures . . . .").

288 *See* Kayleigh Garthwaite, *"The Language of Shirkers and Scroungers?" Talking About Illness, Disability and Coalition Welfare Reform*, 26 DISABILITY & SOC'Y 369, 370 (2011) (noting that, in the United Kingdom, "under claims [for benefits] are greater than over claims and fraud"); David M. Turner, *"Fraudulent" Disability in Historical Perspective*, HIST. & POL'Y (Feb. 1, 2012), http://www.historyandpolicy.org/policy-papers/papers/fraudulent-disability-in-historical-perspective ("The Department for Work and Pensions' preliminary figures for 2010-11 estimated that about £130 million of the £5.6 billion paid annually on incapacity benefits (or about 2.4% of the total expenditure) was overpaid due to fraud and error. Over half of this (about £70 million) was due to official error rather than detectable fraud, which accounted for about £20 million of overpayments.").

society in general, appear to be less troubled by this form of passing.[289]

Passing is not always intentional, because "[d]isability is not a static condition."[290] Among other things, the nature of the relevant disability,[291] culture, and context all have an impact on whether someone is recognized as disabled.

Passing is arguably more or less possible depending on the type of disability one has or does not have. In most contexts, it would be easier for a person who does not have a disability to pass as a person who has a psychiatric disability than it would be for her to pass as a person who has quadriplegia. Similarly, in most contexts, it would likely be easier for a person who has a psychiatric disability to pass as a person who does not have a disability than it would be for a person who has quadriplegia. However, as discussed below, context matters—this statement might not be true, for example, if the relevant interaction is taking place online.[292]

The incentive to pass also varies depending on the type of disability. As Peta Cox has pointed out, "[p]assing is particularly important for people diagnosed with a mental illness, because the costs of not passing can be quite high—including, in some instances, nonconsensual treatment and involuntary hospitalization."[293] The need or desire to pass, as well as how a person passes, varies based on the person's identity and the relevant culture.[294]

The decision to pass and what it means to pass varies by culture.[295]

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289 *See, e.g.*, Naomi Lawson Jacobs, Passing for Normal: The Austerity Politics of Visibility and Invisibility for Disabled People (unpublished paper, University of London), http://www.academia.edu/15965537/Passing_for_Normal_The_Austerity_Politics_of_Visibility_and_Invisibility_for_Disabled_People (last visited Nov. 8, 2017) ("On the whole, society is less concerned with exposing the disabled people who pass as non-disabled, than it is with other issues of counterfeiting. The more significant issue, particularly for disabled people living under the current austerity regime, is the concept of 'faking' disability.").

290 Michael Bérubé, *Disability and Narrative*, 120 PMLA 568, 570 (2005) ("Disability is not a static condition; it is a fluid and labile fact of embodiment, and as such it has complex relations to the conditions of narrative, because it compels us to understand embodiment in relation to temporality."); *see also* SAMUELS, *supra* note 286, at 58 ("The extremely contingent nature of disability itself means that any such boundaries are hopelessly fluid, allowing symbolic and actual meanings to bleed freely across them . . . .").

291 *See* Mark Sherry, *Overlaps and Contradictions Between Queer Theory and Disability Studies*, 19 DISABILITY & SOC'Y 769, 773–74 (2004) (noting that Samuels "uses the concepts of 'passing deliberately' and 'passing by default' to highlight the way many non-visibly impaired people negotiate their identities").

292 *See* Samuels, *supra* note 285 ("While disability is often conceived as both obviously and immediately legible on the body, most disabilities become perceptible only according to context and circumstance. Even an individual with extraordinary bodily difference could pass as nondisabled while chatting online . . . ." (internal citation omitted)).

293 Peta Cox, *Passing as Sane, or How to Get People to Sit Next to You on the Bus*, *in* DISABILITY AND PASSING: BLURRING THE LINES OF IDENTITY, *supra* note 285, at 100.

294 *See id.* at 105 ("Expectations of sane behavior vary across communities and identities; most people's expectation of the 'sane' behavior of a middle-aged white woman differs from their expectation of the 'sane' behavior of a teenage African American male.").

295 *See* Allison C. Carey, *The Sociopolitical Contexts of Passing and Intellectual Disability*, *in*

Woolwine and Dadlez emphasize the "Catch-22 of disabled experience wherein there are equal and opposing pressures to represent oneself 'truthfully' and to cater to the prejudices of able-bodied society."[296] Sometimes a parent or another person in a powerful position may try to influence whether a person should pass as disabled or not disabled. Jeffrey Brune has explained, in part based on his own experiences, that "other people can play a coercive role in the act of passing, as they try to fit me into one part or the other of the disability/nondisability binary."[297]

Context also matters. Some people might pass for disabled in one context but not in another.[298] Moreover, as discussed in Section I.A.2, based on the different definitions of disability under different laws, a person might qualify as disabled in one context, such as school, but not disabled in another context, such as work.[299]

Some theorists have emphasized the centrality of "performance" to disability identity.[300] Given the eligibility criteria for many government benefit programs, people with disabilities have a strong incentive to allow their disability to be evident or even to "exaggerate" their symptoms when they are being evaluated for benefits.[301] The incentive to pass as disabled was also strong in the context of slavery.[302]

DISABILITY AND PASSING: BLURRING THE LINES OF IDENTITY, *supra* note 285, at 142 ("[T]he very notion of passing, and thereby individuals' experiences with and decisions regarding passing, are shaped by the larger sociopolitical context and the way in which identity categories are socially constructed on a macro level.").

296 Sarah Woolwine & E.M. Dadlez, Rights of Passage: The Ethics of Disability Passing and Repercussions for Identity (Mar. 21, 2016) (unpublished manuscript) (on file with the University of Central Oklahoma), http://jepson.richmond.edu/conferences/colloquium-ability/papers/SWoolwine.pdf.

297 Jeffrey Brune, *Passing and the Liminal Disability Identity*, TEMPLE UNIV. PRESS (July 31, 2013), https://templepress.wordpress.com/2013/07/31/passing-and-the-liminal-disability-identity.

298 Woolwine & Dadlez, *supra* note 296 ("[I]t is very often the case that someone who passes, in this case as abled, passes because the activities and situation in which she is engaged are not compromised or made problematic by her disability.").

299 *See* Carey, *supra* note 295, at 157 (discussing the pre-ADAA case of "Charles Littleton, a young man labeled mentally retarded by both the school district and the Social Security Administration, [who] was insufficiently disabled to qualify for job accommodations through the ADA").

300 *See, e.g.*, Samuels, *supra* note 285 ("Extending this analysis of passing to the topic of disability requires us to think about disability identity as a kind of performance, an imitation without an original." (internal citation omitted)).

301 Nili Broyer, *Becoming Disabled: Knowledge and Truth*, 8 POSTSCRIPT 34, 53 (2011) ("Therefore my attempt to arouse physical pain and to perform in front of the medical committee as disabled can be understood as masquerade."). *But see* Woolwine & Dadlez, *supra* note 296 (arguing that "questions concerning deceit are misleading because they presume the existence of a singular 'authentic' identity that never emerges in the back and forth movement between passing and non-passing ways of being in the world").

302 *See* Jenifer L. Barclay, *Mothering the "Useless": Black Motherhood, Disability, and Slavery*, 2 WOMEN, GENDER, & FAMILIES COLOR 115, 133 (2014); *see also* Dea H. Boster, *"I Made Up My Mind to Act Both Deaf and Dumb": Displays of Disability and Slave Resistance in the*

The context of work often provides particularly strong incentives for people with disabilities to pass as not disabled. Passing at work often has "nothing to do with shame and everything to do with vocational survival."[303] A person who, in their personal life, might be very open about their disability, might very well decide to deemphasize her disability at work. Woolwine and Dadlez have argued that "there are strong prudential reasons for disability passing in working environments, fueled in part by ableist suppositions about the inability of the disabled to shoulder further burdens."[304]

While an older person's age might be well known or assumed in her workplace, her status as disabled or not disabled is likely more uncertain. If an older person is facing employment discrimination and she files an age-discrimination complaint, she is revealing only that she is at least forty years old—the minimum age for coverage under the ADEA. If she adds a disability discrimination charge, she is potentially revealing significantly more. This is certainly true if she alleges that she is actually disabled. It is also potentially true if she alleges that she is regarded as disabled, because it highlights how her co-workers or employer see her.

In deciding whether to use disability to remedy employment discrimination, an older person might also consider the impact that using disability might have on her EEOC complaint. Will the EEOC or the court evaluate her complaint differently if she comes out as a person with a disability? Using disability can lead to scrutiny by an administrative agency or a court about a person's capacity and credibility.[305] Future potential employers might scrutinize the older person in the same way. All of these factors might, understandably, prevent an older person from using disability to remedy employment discrimination.

Antebellum American South, *in* DISABILITY AND PASSING: BLURRING THE LINES OF IDENTITY, *supra* note 285, at 92; SAMUELS, *supra* note 286, at 28 ("[T]he disability con is an important element for many fugitive slave narrators, such as James Pennington, who pretended to have smallpox, and Lewis Clarke, who employed disguises . . . including green spectacles and handkerchiefs tied around his forehead and chin.") (internal citation omitted).

303 Woolwine & Dadlez, *supra* note 296.

304 *Id.*; *see also* Sarah von Schrader et al., *Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate*, 26 EMP. RESPONSIBILITIES & RTS. J. 237, 240 (2014) ("Individuals with disabilities often do not disclose their disability out of concerns that it would result in lowered expectations, lack of respect, isolation from co-workers, a decrease in job responsibility, being passed over for promotion, or increased likelihood of termination." (internal citations omitted)).

305 *See generally* Kevin M. Cremin et al., *Ensuring A Fair Hearing for Litigants with Mental Illnesses: The Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings*, 17 J.L. & POL'Y 455 (2009).

CONCLUSION

Media reports tend to present anecdotal evidence that some individuals allegedly use disability inappropriately to avoid no-pets policies or obtain other rights to which they are not entitled. Perhaps acting on the outrage that such accounts inspire, a number of states have passed laws criminalizing the fraudulent use of service animals.[306] However, there is evidence that disability is actually under-utilized by older people who are facing employment discrimination.

Data shows a significant relationship between aging and disability. That relationship is often perceived to be even stronger than it is. Older people often qualify for coverage under the ADA because they actually have a disability or they are regarded as having a disability. Recent Supreme Court rulings that have narrowly interpreted the ADEA give older people a strong incentive to seek alternative ways to remedy employment discrimination. The ADA is one potential alternative. The ADA does not present some of the barriers to successful disparate-treatment and disparate-impact claims that the ADEA presents. The ADA also offers the possibility of reasonable accommodations that are not available under the ADEA. However, individual case examples and EEOC charge data shows that older people do not use disability to remedy employment discrimination as frequently as they could.

Further research is necessary to determine if this is also true in other areas of law. Older people frequently experience housing discrimination, including discrimination based on age and disability.[307] However, the Fair Housing Act does not include age as a protected characteristic.[308] There would therefore seem to be a strong incentive for older people to use disability to remedy housing discrimination. Unfortunately, data on the use of disability by older people to remedy housing discrimination is not readily available.

Further research is also necessary to determine if other groups besides older people have the opportunity and incentive to use disability to pursue rights but decline to do so. The media and policy makers should be less concerned with anecdotes about people inappropriately using disability to pursue rights and more concerned about why some people are declining to use disability to pursue rights.

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306 *See* Buhai, *supra* note 287, at 790 (noting that "[f]ifteen states have criminalized making fraudulent claims that an animal is a service animal").

307 *See* source cited *supra* note 283, at 74 (finding that of the twenty-five percent of the 360 seniors surveyed who reported having experienced discrimination, nineteen percent were discriminated against based on age, and fifteen percent were discriminated against based on disability).

308 Approximately nineteen states prohibit housing discrimination based on age. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 30:3 n.5 (2017).