LIMITED LEGAL RECOURSE FOR OLDER WOMEN'S INTERSECTIONAL DISCRIMINATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

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Theories and empirical evidence suggest older women face heightened discrimination on the basis of age and sex. Current legislation does not adequately offer protection for older women in the labor force against discrimination based on the intersectionality of age and sex. This article discusses invoking an age-plus-sex or sex-plus-age cause of action for older women's intersectional discrimination. This Article explains the Age Discrimination in Employment Act and Title VII of the Civil Rights Act frameworks for discrimination, along with an explanation on why courts do not recognize this cause of action. In addition, this Article analyzes the rising concern regarding older women facing discrimination and compares relevant case law.

Older women compose a large share of the labor force in the United States.[1] *There are two federal statutes that provide protection for older women against discriminatory behavior by employers: the Age Discrimination in Employment Act ("ADEA") and Title VII of the Civil Rights Act ("Title VII"). Theories and empirical evidence suggest*

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1. Mitra Toossi & Teresa L. Morisi, *Women in the Workforce Before, During, and After the Great Recession*, U.S. BUREAU OF LAB. STAT. 6 (July 2017), https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/pdf/women-in-the-workforce-before-during-and-after-the-great-recession.pdf [hereinafter *Women in the Workplace*].

that older women are more discriminated against for being old and female.[2] *Despite this evidence, there is a concerning policy implication that current legislation does not provide adequate protection for older women. The main reason for this concern is that the prevalence of older women's intersectional discrimination in the workplace calls for the invocation of an age-plus-sex or sex-plus-age cause of action. However, the courts do not recognize this cause of action under the ADEA and they have mixed views on this issue under Title VII. This Article discusses evidence of older women's intersectional discrimination and the importance of recognizing this intersectionality in proof structure. The Article also reviews case law and the effectiveness of age discrimination laws on older women's labor market outcomes. The findings indicate that the ADEA does not provide equal employment opportunities for older women. Older women's legal recourse for their unique intersectional discrimination for being old and female is constrained under the ADEA and Title VII strictly due to legislative peculiarities in statutes intended to solve this exact problem.*

Key words: older women, intersectional discrimination, ADEA, Title VII, age discrimination, sex discrimination, age-plus-sex, sex-plus-age

JEL: J14, J16, J18, J21, J70, J71, J78, K31

I. Introduction

A rapidly aging population in the United States coupled with public finance solvency problems heightens the importance of employment issues older American workers face. The federal Age Discrimination in Employment Act ("ADEA")[3] is the primary legislation that helps provide equal employment opportunities for older workers in the United States. The ADEA was enacted in 1967 to protect older workers against age discrimination in employment practices.[4] Since its enactment, the ADEA has been amended several times and is still the fundamental federal legislation to combat age discrimination in the workplace and to provide equal employment opportunities for all individuals age forty and older.[5]

The composition of labor force participation in the United States has changed significantly since the enactment of the ADEA. First, the

2. *See generally* Lauren Stiller Rikleen, *Older Women Are Being Forced Out of the Workforce*, HARV. BUS. REV. (Mar. 10, 2016), https://hbr.org/2016/03/older-women-are-being-forced-out-of-the-workforce **(**discussing recent evidence showing that "it is harder for older women to find jobs than older men") **[**hereinafter Rikleen].

3. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2018).

4. *See id.* § 621(b).

5. In this Article, older workers are defined as those who are legally covered under the ADEA.

overall labor force participation of women has increased drastically.[6] Currently, women comprise almost half of the U.S. labor force[7] and this proportion continues to grow (top panel of Figure 1). Second, though the share of older workers for both men and women has increased, the share of women older than fifty-years-old has increased much more dramatically in the last twenty years (Figure 1).[8] Figure 1 shows the current labor force participation rate for older male workers age forty or older (i.e., the age group covered under the ADEA) and age fifty or older are 38% and 22%, respectively. For older female workers, these rates for the same age groups are 32% and 18%, respectively. This is a notable increase from the past. For example, in the 1980s these statistics for men were 31% and 18%;[9] for women they were only 19% and 10%.[10] Compared to the 1980s, the labor force participation rates for older female workers grew between 68–80%, while it grew only between 22–23% for older male workers. The Bureau of Labor Statistics ("BLS") projects that the labor force will continue to age.[11] These labor force statistics stress the importance of older workers and the related employment policies to ensure that these workers are treated equally in the workforce.[12] And perhaps even more attention can be paid to older women whose labor force participation rate continues to grow at a much faster rate than older men.

The increasing number of older women in the labor market raises the concern that older women face unique challenges in the workplace, for being both old and female, that are not adequately covered by the ADEA.[13] This unique type of discrimination, based on two protected

6. *See Women in the Workplace*, *supra* note 1, at 2.
7. *Id.*
8. *See infra* Figure 1.
9. *See id.*
10. *See id.*
11. This is based on a BLS projection through 2024. *See Labor Force Projections to 2024: The Labor Force is Growing, but Slowly*, U.S. BUREAU OF LAB. STAT. (Dec. 2015), https://www.bls.gov/opub/mlr/2015/article/labor-force-projections-to-2024.htm.
12. *See id.*
13. Sabina F. Crocette, Comment, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis – A Pragmatic Model*, 28 GOLDEN GATE U.L. REV. 115, 115 (1998) [hereinafter Crocette].

classes (i.e., age and sex), [14] is referred to as intersectional discrimination (also called "age-plus-sex" or "sex-plus-age" discrimination).[15] The ADEA has never recognized this intersectionality of discrimination. In other words, older women may be *more* discriminated against for being old *and* female, but our current federal age discrimination law cannot protect older women from this intersectional discrimination. Older women's discrimination is different from age discrimination or sex discrimination individually, but their discrimination claims can be classified as only age discrimination under the ADEA.[16] Similarly, this intersectionality is not guaranteed under Title VII of the Civil Rights Act ("Title VII").[17] The implication of this issue is that the ADEA and Title VII are ineffective in providing adequate protection for older women in a labor environment in which older women represent more than a quarter of the labor force.[18]

There is a large amount of anecdotal evidence of more discrimination against older women that is continuously reported in the media.[19] Further, a recent field experiment has found direct evidence of older women's intersectional discrimination in hiring to support these anecdotes.[20] Neumark et al.[21] found robust evidence that employers

14. There are other forms of intersectional discrimination such as sex-plus-race, sex-plus-religion, but this Article focuses only on older women's age-plus-sex or sex-plus-age in this Article. *See id.* at 153–68.

15. Technically, age-plus-sex and sex-plus-age are different and the differences are explained in Section II. *See infra* Section III.

16. *See* Crocette, *supra* note 13, at 149–56.

17. *See* 42 U.S.C. § 2000(e) (2018); *see also* Crocette, *supra* note 13, at 115.

18. Based on the author's calculation using Annual Social and Economic Supplement of the Current Population Survey 1962-2017. *See infra* Figure 1.

19. *See e.g.*, Patricia Cohen, *Over 50, Female and Jobless Even as Others Return to Work*, N.Y. TIMES (Jan. 1, 2016), https://www.nytimes.com/2016/01/02/business/economy/over-50-female-and-jobless-even-as-others-return-to-work.html; Ronnie Cohen, *Older women set the brush-off from potential employers*, REUTERS (Mar. 15, 2017), https://www.reuters.com/article/us-health-employment-women/older-women-get-the-brush-off-from-potential-employers-idUSKBN16M3DO; Trish Mehaffey, *KGAN anchor sues former employers for age, gender discrimination*, THE GAZETTE (June 9, 2017), http://www.thegazette.com/subject/news/kgan-anchor-sues-former-employer-for-age-gender-discrimination-20170609; Rikleen, *supra* note 2.

20. David Neumark et al., *Is it Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment* 36–37 (forthcoming) (on file with the Journal of Political Economy), https://www.journals.uchicago.edu/journals/jpe/forthcoming) [hereinafter Neumark et al.].

21. *Id.*

discriminate against older women in hiring but did not find strong evidence of age discrimination against older men.[22] Other empirical findings analyzing older women's intersectional discrimination include a disproportionate increase in long-term unemployment for older women when compared to unemployment for older men after the Great Recession.[23] These discriminatory behaviors can be explained by the sociological and psychological theory that older women may suffer more from a negative age stereotype than older men.[24] For example, physical attractiveness matters much more for women in the workplace[25] than for men.[26] Moreover, since attractiveness oftentimes deteriorates with aging faster for women than for men,[27] it is clear how age discrimination may disproportionally affect women.

All these lines of evidence and theories on older women's discrimination emphasize the importance of policies that ensure older women can have equal opportunities in the workplace.[28] However, the current ADEA has never recognized older women's intersectional discrimination as a cause of action.[29] Under the ADEA, older women are not allowed to compare their group with either young women or older men

22. *Id.* at 36.

23. *See* Alexander Monge-Naranjo & Faisal Sohail, *Age and Gender Differences in Long-Term Unemployment: Before and After the Great Recession*, ECON. SYNOPSES 1 (Nov. 2015).

24. *See generally* Francine M. Deuisch et al., *Is There a Double Standard for Aging?*, 16 J. APPLIED SOC. PYSCHOL. 771 (1986) [hereinafter Deuisch].

25. Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity, and Discrimination: Lawyers' Look and Lucre*, 16 J. LAB. ECON. 172–201 (1998); Daniel S. Hamermesh & Amy Parker, *Beauty in the Class Room: Instructors' Pulchritude and Putative Pedagogical Productivity*, 24 ECON. EDUC. REV. 369–96 (2005); Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174–94 (1994) [hereinafter *Beauty and the Labor Market*].

26. *See* LINDA A. JACKSON, PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES 103–179 (1992) [hereinafter JACKSON].

27. *See, e.g.*, Doris G. Bazzini et al., *The Aging Woman in Popular Film: Underrepresented, Unattractive, Unfriendly, and Unintelligent*, 36 SEX ROLES 531 (1997); Phyllis W. Berman et al., *The Double Standard of Aging and the Social Situation: Judgments of Attractiveness of the Middle-Aged Woman*, 7 SEX ROLES 87 (1981); Deuisch, *supra* note 24; Ronald Henss, *Perceiving Age and Attractiveness in Facial Photographs*, 21 J. APPLIED SOC. PSYCHOL. 933–46 (1991) [hereinafter Henss]; Kathleen M. Korthase & Irene Trenholme, *Perceived Age and Perceived Physical Attractiveness,* 54 PERCEPTUAL & MOTOR SKILLS 1251–58 (1982).

28. JACKSON, *supra* note 26; *Beauty and the Labor Market*, *supra* note 25.

29. Joanne S. McLaughlin, *Falling Between the Cracks: Discrimination Laws and Older Women* 7 (July 2018), Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219278 [hereinafter McLaughlin].

and are restricted to comparisons with all younger workers.[30] This constraint dramatically reduces the strength of evidence older women can present in courts if they experienced intersectional discrimination in the workplace. Consider a company that has twenty employees: five old women, five young women, five old men, and five young men. Suppose the company discharges three old women and one from each remaining group. In this example, the discharge rate for older women is three times as large, which reflects the larger pattern of intentional intersectional discrimination older women experienced in real life. If a court allowed older women to bring their case as an age-plus-sex (or sex-plus-age) cause of action, the data would indicate that the probability of being discharged for older women is estimated to be 40 percentage points higher (3/5 vs. 1/5) than for the other groups (i.e., young women, old men, or young men). However, if this claim were to be viewed solely as either sex or age discrimination, the estimated probability of being discharged for older women is only 20 percentage points higher (4/10 vs. 2/10) than for men or all young employees. In other words, an older woman's case may become more difficult to prove if she cannot be treated as an independent group separate from younger women or older men. This leads to a concerning policy implication about the effectiveness of the ADEA in combating older women's intersectional discrimination.[31]

This Article analyzes the shortcomings in contemporary American anti-discrimination laws and argues that these laws are not successful in creating equal opportunities for older women in the workplace. This Article also reviews evidence of older women's intersectional discrimination and demonstrates why it is critical and necessary to classify older women's discrimination as intersectional, rather than age or sex discrimination alone. Finally, this Article presents case law, both successful and unsuccessful, related to older women's intersectional discrimination claims, theories on older women's discriminations involving negative age stereotypes, and state laws that are more protective for older women.

30. *Id.* at 6.

31. There is evidence that age discrimination laws are much less effective in increasing employment for older women. *See id*. at 3.

II. Limitations in Proving Older Women's Intersectional Discrimination

There are two models in employment discrimination claims: disparate treatment and disparate impact.[32] In short, disparate treatment involves intentional discrimination while disparate impact does not. Disparate impact refers to employment practices that have an adverse effect on a protected group, although they seem neutral and are not intentional. Most cases filed under the ADEA or Title VII are claims of intentional discrimination.[33] Although there are critical differences between Title VII and the ADEA, discussed below, the overall proof structure under the two anti-discrimination laws are similar. The following subsection briefly discusses disparate treatment and disparate impact theories and the nature of admissible evidence under each model to better explain the significance of recognizing older women's intersectional discrimination claims.

A. Theory on Disparate Treatment

The key element in disparate treatment theory is that disparate treatment involves intentional discriminatory behaviors by employers.[34] Therefore, to prove disparate treatment, a plaintiff (i.e., employee) must establish an intent by the defendant to discriminate against the plaintiff. The general proof structure is that the plaintiff must first establish a prima facie case, either through direct or circumstantial evidence. The establishment of a prima facie case is critical because without one, the defendant (i.e., employer) may be granted a summary judgment, which would be the defendant's best outcome. If the employee successfully establishes a prima facie case, then the burden shifts to the defendant employer to present evidence of a legitimate, nondiscriminatory reason for the behavior at issue. Lastly, the employee has the opportunity to show that the reasons presented by the employer are pretext.[35]

If the plaintiff can present direct evidence of discrimination, then a prima facie case is easily established. Direct evidence consists of types

32. MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 567, 608 (LexisNexis, 2d ed. 2011) [hereinafter CRAIN ET AL.].

33. *Id.* at 567.

34. *Id.*

35. Moore v. City of Philadelphia, 461 F.3d 331, 340–41 (3d. Cir. 2006).

of evidence that are causally connected to the discriminatory intent.[36] Some examples of direct evidence of age discrimination include comments like "we need more young girls" or "she is too old for that job." When plaintiffs can present evidence like this, then the prima facie case is established and the burden shifts to the defendant to establish one of the available defenses.[37] A possible defense is if a defendant can establish that age or gender (or another protected class) was treated as a bona fide occupational qualification, or show that the defendant would have made the same decision absent the discriminatory statements.[38] Courts are aware that this type of direct evidence of discrimination is rare.[39] In the absence of direct evidence, plaintiffs are allowed to present circumstantial evidence to draw an inference of discrimination.[40]

One way to infer discrimination when direct evidence is not available was delineated in the 1973 case *McDonnell Douglas Corp. v. Green*.[41] This analysis is often referred to as the *McDonnell Douglas* test. Under the *McDonnell Douglas* framework, an inference of discrimination can be shown in four steps: (1) the plaintiff belongs to the protected class; (2) the plaintiff applied and is qualified for a job; (3) despite the qualifications, the plaintiff was rejected; and (4) after the rejection, the position remained open and the defendant continued to seek applicants.[42] This test is not limited to hiring cases and is also applicable to other employment practices such as promotion, layoff, and discharge.[43] Once the inference of discrimination is shown, the burden shifts to the employer to provide evidence of a legitimate, nondiscriminatory reason for the employment decision.[44] Then, finally, the burden shifts back to the plaintiff to demonstrate that the employer's stated legitimate, nondiscriminatory reason for the decision is pretext.[45]

36. CRAIN ET AL., *supra* note 32, at 568.
37. In Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985), the Supreme Court explained that the McDonnell test is inapplicable where the plaintiff presents direct evidence of discrimination.
38. CRAIN ET AL., *supra* note 32, at 568.
39. *Id.* at 567.
40. *See* Nat'l Labor Relations Bd. v. Link-Belt Co., 311 U.S. 584, 602 (1941) (quoting 29 U.S.C. § 160(e)).
41. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
42. *Id.* at 802.
43. *Id.* at 804–05.
44. *Id.*
45. *Id.*

Plaintiffs can also prove intentional discrimination by showing a pattern or practice of discrimination by the employer.[46] This method of proof is often used in class action cases under a disparate impact theory, but it is also used in disparate treatment to show intent.[47] A prima facie case of a pattern or practice of discrimination may be shown through statistics alone or a combination of statistical and anecdotal evidence.[48] In either method, statistical methodology is a valuable tool and plays a central role in employment discrimination cases.

The first step in analyzing data is to measure the disparity in employment practices between protected and unprotected (favored) groups. However, this disparity in the data could occur for one of two reasons: (1) there is a "true" disparity between the two groups, or (2) the disparity arose purely by chance. The objective of using statistics is to rule out the second reason, that the observed pattern of employment practices occurred by chance. If the second reason can be ruled out, then it can be inferred that the observed pattern is likely to be due to some intentional action. The test of statistical significance, also called statistical inference, is the statistical process that helps rule out occurrence due to chance. To make this inference, statisticians calculate the probability of observing a large disparity when there are no differences between two groups (i.e., p-value). If this probability is low, then it is inferred that the observed disparity is not due to chance (i.e., rule out the second reason), but is likely to be intentional. Once the prima facie case is established by showing this pattern, the burden shifts to the defendants where they can offer a defense by disputing the statistical method used by the plaintiff, or show that the disparate pattern or practice is due to a bona fide occupational qualification.[49]

B. Theory on Disparate Impact

The seminal case that established the disparate impact theory in 1971 is *Griggs v. Duke Power Co.*[50] Disparate impact refers to employment practices or required qualifications that have a disproportionally

46. *See generally* Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
47. CRAIN ET AL., *supra* note 32, at 613.
48. Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 158 (2d. Cir. 2001).
49. *See* Int'l Bhd. Of Teamsters, 431 U.S. at 360.
50. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

adverse effect on certain protected classes, although the practices or required qualifications appear to be facially neutral.[51] Thus, disparate impact cases do not need to prove intent to discriminate.[52] The rationale is that an employment practice or policy should affect employees in the same way. If a practice or policy has an adverse effect on certain protected classes, then the employer must have good reasons to justify the disproportional adverse effect. For example, in the 1980 case *Geller v. Markham*,[53] the plaintiff was replaced by younger workers under the employer's cost-cutting policy that limited the hiring of new teachers to those who had less than five years of teaching experience. Since older teachers had longer teaching experiences, this neutral policy had the disparate impact on older teachers of not hiring older teachers. The jury ruled that this facially nondiscriminatory cost-cutting policy had a disparate impact on older teachers.[54]

One way to measure whether the employment practices have a disparate impact is to use the "four-fifths rule," a measure of the practical significance of disparity between the protected classes and the comparison group.[55] This rule is specified in the Code of Federal Regulations[56] and is defined as follows:

> Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.[57] Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.[58] Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which

51. CRAIN ET AL., *supra* note 32, at 614.
52. *Id.*
53. Geller v. Markham, 635 F.2d 1027, 1030 (1980).
54. *Id.*
55. 29 C.F.R. § 1607.4(d) (2018).
56. *Id.*
57. *Id.*
58. *Id.*

> are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.[59]

Although there is a debate about the use of the four-fifths rule, federal enforcement agencies consider a selection rate of any protected group that is less than 80% of the favored (i.e., comparison) group to have a disparate impact on a protected group.[60] For example, suppose there is a total of forty applicants, with twenty older applicants and twenty younger applicants. Suppose further that five older applicants and nine younger applicants were selected. The selection rate for older applicants is 0.250 and the selection rate for younger applicants is 0.450. According to the 80% rule, the adverse impact ratio is 0.560 (0.250/0.450) and this ratio is much smaller than 80%. Therefore, the rule specifies that the selection procedure had a disparate impact on older workers. If this ratio were to be greater than 80%, then there is no evidence of disparate impact under this rule. This rule is discussed further in the following subsection to demonstrate why it is important for older women's intersectional discrimination to be classified as age-plus-sex or sex-plus-age.

C. Critical Differences Between the ADEA and Title VII

The two key federal anti-discrimination laws that apply to older women in the workforce are Title VII and the ADEA. Title VII prohibits discrimination on the basis of race, sex, national origin, religion, and color.[61] The ADEA prohibits discrimination on the basis age for those who are forty years old or older.[62] The intersectionality of older women's discrimination implies that to provide adequate protection for older women, these two laws must be used jointly. However, Congress enacted these two laws separately and courts have been reluctant

59. *Id.*
60. *Id.*
61. 42 U.S.C. § 2000e-2 (2018); *see also* 29 U.S.C. § 621 (2018).
62. 29 U.S.C. § 631 (2018).

to allow "mix-and-match" theories of discrimination.[63] Therefore, to fully understand why older women's intersectional discrimination claims face challenges in court, it is important to understand the differences between these two statutes.

First, the scope of the two statues is different. Title VII is applicable to employers who have fifteen or more employees, while the ADEA is applicable to employers who have twenty or more employees.[64] Both statutes require that employees first file their claims with the Equal Employment Opportunity Commission ("EEOC") before any lawsuits are filed with the court.[65] A charge of discrimination must be filed with the EEOC generally within 180 days from the date of the discriminatory act or within 300 days if there is a state *or* local agency that enforces a state or local law.[66] There is a subtle difference in these time limits for age discrimination under the ADEA. The filing deadline is 300 days if there is a state law *and* a state agency that enforces this law.[67] The EEOC specifies that the deadline is not extended to 300 days if only a local law prohibits age discrimination.[68]

Second, the remedies under the two statutes are different. Under the ADEA, a successful plaintiff can recover back (or front) pay as well as liquidated damages if the plaintiff can prove that the discriminatory behavior was willful.[69] The ADEA has allowed jury trials since its enactment.[70] In contrast, Title VII began providing jury trials and damages for claims of intentional discrimination only after the Civil Rights Act of 1991. Before the Civil Rights Act of 1991, remedies for plaintiffs were

63. Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 79 (2003) [hereinafter Porter].

64. *See* 42 U.S.C. § 2000e-2 (2018); *see also* 29 U.S.C. § 621 (2018).

65. *Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/charge.cfm (last visited Jan. 18, 2019).

66. *Id.*

67. *See id.*

68. *See id.* It is often unclear when the discriminatory period began. The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) ruled that the time to file a charge for pay discrimination starts when the decision is made. Many workers did not know when the decision was made and this decision was deemed controversial. The Lilly Ledbetter Fair Pay Act of 2009 clarified this issue. The Act states that discrimination commences when the salary decision is adopted or when the employee is subjected to or affected by the pay decision.

69. *See generally* Barbara L. Johnson, *Types of Damages Available in Employment Cases*, PAUL HASTINGS LLP (Aug. 7, 2011), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/annualmeeting/004.authcheckdam.pdf.

70. Lorillard v. Pons, 434 U.S. 575, 585 (1978).

limited to equitable relief and injunction and their cases were tried before a judge.[71]

Third, the ADEA and Title VII have two important doctrinal differences that classify the ADEA to be much "weaker" than Title VII in providing protection for employees. In the 2009 case *Gross v. FBL Fin. Servs., Inc.*, the Supreme Court held that the mixed-motive structure allowed in Title VII does not apply to the ADEA.[72] In *Gross* the court ruled that "a plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the 'but-for' cause" of the challenged employer decision.[73] This indicates that the burden is on the plaintiff to rule out any nondiscriminatory reasons for the challenged employment practice, which makes it much more difficult for the employee to prove the case. The second doctrinal difference involves disparate impact claims. Although the disparate impact theory has been recognized as a viable cause of action under Title VII, the courts of appeals have been divided over whether disparate impact theory was available for age discrimination cases.[74] Specifically, while the Court of Appeals for the Second, Eighth, and Ninth Circuits have allowed disparate impact under the ADEA, the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits[75] have not.[76] The Fourth, Fifth, and D.C. Circuits have not addressed this issue since 2001.[77] In the 2005 case *Smith v. City of Jackson*,[78] the Supreme Court resolved this issue by holding that the ADEA includes a disparate impact component, but the Court did not apply the business necessity test that existed under Title VII. Instead, the Court lowered the employer's burden of proof necessary to justify its employment practices to be based on reasonable factors other than age ("RFOA"), which is a significantly more relaxed test than proving the practices to be a business necessity.[79]

71. This played an important role in Arnett v. Aspin, 846 F. Supp. 1234, 1234 (E.D. Pa. 1994), in addition to viability of sex-plus-age claim.

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

73. *Id.* at 176.

74. *See* Adams v. Florida Power Corp., 255 F.3d 1322, 1324 (11th Cir. 2001).

75. *Id.*

76. Laura C. Marino, *A Necessary Tool: The Continuing Debate Over the Viability of Disparate Impact Claims under the Age Discrimination in Employment Act*, 77 ST. JOHN'S L. REV. 649, 660 n.59 (2003).

77. *Id.*

78. *See* Smith v. City of Jackson, 544 U.S. 228, 247 (2005)

79. In response to Smith v. City of Jackson, 544 U.S. at 247, and Meacham v. Knolls Atomic Power Lab, 554 U.S. 84 (2008), the EEOC issued a final rule, effective April 30, 2012 that explains the meaning of the RFOA defense, which is expected to

D. Significance of Age-Plus-Sex or Sex-Plus-Age Theory

The need for age-plus-sex or sex-plus-age theory does not mean that it is impossible for older women to win claims under age discrimination or sex discrimination laws alone. Indeed, if an older woman is discharged and replaced by a young man, she, hypothetically, can show her age discrimination or sex discrimination under the ADEA and Title VII, respectively.[80] Age-plus-sex or sex-plus-age theory becomes necessary if a young woman or an old man replaces the older woman. Broadly speaking, if a young woman replaces her, then she cannot show sex discrimination; if an old man replaces her, then she cannot show age discrimination. Under the disparate treatment theory, the application of the *McDonnell Douglas* test in a termination case would be the following: (1) the plaintiff belongs to the protected class; (2) at the time of the plaintiff's termination, she was qualified for other available positions within the company; (3) the employer did not offer such positions to the plaintiff; and (4) a similarly-situated employee who is not a member of the protected class was offered the opportunity to transfer to an available position, or other direct, indirect, or circumstantial evidence supporting an inference of discrimination.[81]

One way to prove the fourth requirement would be to show that employees who are not in the protected group received favorable treatment. If an older woman was replaced by a young man, she could establish her prima facie case under either age *or* sex discrimination. However, if a young woman or an older man replaces her, she cannot establish her prima facie case under either sex or age discrimination, respectively. For example, assume that an older woman was the only employee let go in her department and her department still has ten employees left.[82] Those ten employees left are five young women under age forty and older men over the age of forty. Furthermore, assume that this termination was due to discrimination against older women, but she does not have any direct evidence. To prove the fourth prong of the *McDonnell Douglas* test for age discrimination, she must show that

complicate employers' ability to prevail on age-based disparate impact claims. *See* Jill Cox, *What Constitutes "Reasonable Factors Other Than Age"? The EEOC's Final Regulation Raises the Bar for Employers to Establish Defense to ADEA Claims,* CONSTANGY BROOKS & SMITH, LLP (Apr. 2, 2012), https://www.constangy.com/assets/html documents/CB%20462.pdf.

80. Porter, *supra* note 63, at 104.

81. *See* Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 351 (1998).

82. Porter, *supra* note 63 (including more specific details).

younger employees were favored over older employees. But she cannot show age discrimination in this example because the department still has older workers (i.e., men older than forty). Similarly, she cannot establish her prima facie case of sex discrimination because an equal number of women and men remains. As this example illustrates, the older woman is without recourse for experiencing intersectional discrimination unless courts allow age-plus-sex or sex-plus-age theory.

To demonstrate the necessity of age-plus-sex or sex-plus-age theory in disparate impact cases, suppose that there were sixty applicants for a position: fifteen old women, fifteen old men, fifteen young women, and fifteen young men.[83] Assume only four old women are hired, and six were hired from each remaining group. Under the standard four-fifths rule, if older women could bring their claim as an age-plus-sex claim then older women could show that their selection rate was 0.267 and that younger women's or older men's selection rate was 0.400. In this example, the adverse impact ratio would be 0.668, which is smaller than the standard 0.800 benchmark. Thus, the plaintiffs could show that the selection procedure had a disparate impact on older women. If older women are solely limited to presenting their cases as age discrimination or sex discrimination alone, they can only show that the selection rate of older applicants was 0.333 and the resulting adverse impact ratio would be 0.833, which is greater than the 0.800 benchmark. Therefore, older women cannot show that the selection rate had a disparate impact on older women in the workplace.

This issue arose in the 1987 case of *Thompson v. Mississippi State Personnel Board*.[84] In *Thompson*, a Mississippi district court refused to recognize the protection of a subset of women over the age of forty from adverse treatment as opposed to men over forty.[85] The court ruled that although Title VII prohibits discrimination based on sex and that the ADEA prohibits discrimination based on age for all individuals who are at least forty, neither statute recognizes the subset of women over forty as being protected from adverse treatment as opposed to men over forty.[86] Thus, the *Thompson* plaintiff's statistical data showing the different qualification rates of women over forty and men over forty,

83. *Id.* In reality, most of the age-plus-sex or sex-plus-age claims are disparate treatment claims. But this example is useful to understand the significance of age-plus-sex or sex-plus-theory in disparate impact theory as well.

84. *See* Thompson v. Miss. State Pers. Bd., 674 F. Supp. 198 (N.D. Miss. 1987).

85. *Id.* at 211.

86. *See id.* at 203–04.

without any data as to men and women younger than forty, was not probative in proving age discrimination. The court found that the relevant comparison should have been the selection rates of *all* applicants age forty and older and *all* applicants younger than forty.[87] Under these statistics, the court found that the plaintiff did not show a disparate impact for either older employees or female employees.[88]

As discussed in Section II, statistics is an important tool to make scientific inferences of discrimination in both disparate treatment and disparate impact. It is used to show whether the employer is engaging in a pattern or practice of discrimination. Since the disparity between the protected and unprotected groups could have arisen due to chance even in the absence of discriminatory behavior, the objective of statistical inference is to be able to rule out that the observed pattern or practice occurred by chance.[89] Once chance is ruled out, it can be concluded that the discriminatory pattern or practice is likely due to some deliberate motive of discrimination. To compute this statistical significance, statisticians rely on both the magnitude of the difference and variance in the data. Specifically, statisticians calculate the proportion of the magnitude of the disparity and the variance in data to make this inference; and calculate the probability of observing a disparity this large (i.e., p-value) if there is no difference between two groups. In addition, it is helpful to understand that generally, the greater the difference that can be measured, the greater the probability of ruling out that the occurrence happened by chance.

How is this important in proving older women's intersectional discrimination case? The following hypothetical example illustrates the importance of statistical inference in proving older women's intersectional discrimination. In this example, the company had twenty employees: five old women, five young women, five old men, and five young men. The company discharges three old women and one from each remaining group. If the older woman's case is analyzed as age-plus-sex, she can show that the discharge rate was 40 percentage points higher than younger women or older men. If she can only bring her claim as age or sex discrimination alone, then her discharge rate would be 20 percentage points higher than younger workers or male workers.

87. *Id.* at 207–08.
88. *Id.* at 211.
89. *See supra* Section II.

This higher percentage point difference would be much more advantageous in determining the statistical significance and giving a smaller p-value.[90] If the plaintiff is allowed to use the larger disparity under age-plus-sex or sex-plus-age, the statistical evidence is much stronger.

III. Case Law: Difference Between Age-Plus-Sex and Sex-Plus-Age

In the past, older women have tried to bring intersectional discrimination claims as either age-plus-sex, sex-plus-age, or both. Whether the cause of action is classified as age-plus-sex or sex-plus-age, these claims invoke two independent statutes: the ADEA and Title VII. This makes the analysis of these claims more involved. If an older woman's discrimination claim is brought under the ADEA, technically, it is classified as age-plus-sex claim.[91] If it is brought under Title VII, then it is classified as sex-plus-age.[92] For this reason, although the two terms, age-plus-sex and sex-plus-age, may seem similar they are distinct and separate. Most importantly, the age-plus-sex cause of action has not been considered viable under the ADEA, but courts have mixed views on viability of sex-plus-age claims under Title VII.[93] Some lower courts have considered sex-plus-age to be viable under Title VII, but

90. This does not mean that older women cannot show the statistical significance of 20 percentage point difference.

91. 29 U.S.C. § 621 (2018).

92. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964); *see also* Tracey Bateman Farrell, Annotation, Sex-Plus Discrimination Claims Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.) 51 A.L.R. Fed. 2d 341 (2010) ("Denomination of a Title VII Claim as a "sex-plus claim" refers to a situation where an employer classifies employees on the basis of sex-plus another characteristic. . . .").

93. *See, e.g.*, Cartee v. Wilbur Smith Assoc., Inc., No. 3:08-4132-JFA-PJG, 2010 WL 1052082, at *4 (D.S.C. Mar. 22, 2010) ("[T]he court finds that it lacks the authority to recognize an age plus [sex] claim under the ADEA . . . ."); Reap v. Cont'l Cas. Co., No. Civ. A. 99-1239(MLC), 2002 WL 1498679, at *n.15 (D.N.J. June 28, 2002) (distinguishing Arnett because it involved a Title VII claim and concluding that a "sex-plus-age" discrimination claim is not available under the ADEA); Smith v. Bd. of Cnty. Comm'rs of Johnson Cnty., 96 F. Supp. 2d 1177, 1187 (D. Kan. Mar. 31, 2000) ("No district court has explicitly adopted an age-plus-gender theory of liability under the ADEA . . . ."); Murdock v. Goodrich, No. 15654, 1992 WL 393158, at *3 (Ohio Ct. App. Dec. 30, 1992) "[O]lder females are not a separate protected class under state or federal law. Rather, they are part of two distinct protected classes which must be kept analytically separate in reviewing evidence of discrimination."); *But see* Arnett v. Aspin, 846 F. Supp. 1234, 1240 (E.D. Pa Mar. 29, 1994) (holding that age is an immutable characteristic upon which a Title VII plaintiff may base a sex-plus discrimination claim).

none of the federal courts of appeals or the Supreme Court have recognized such a cause of action.[94] Furthermore, *Gross v. FBL Financial Services Inc.*[95] has reinforced this distinction when the Supreme Court decided that a plaintiff must prove that age was the "but for" cause of employer's discriminatory behavior under the ADEA.[96] The key interpretation of this decision with respect to age-plus-sex claims is that the intersection of motives under the ADEA is not allowed.[97] The other difference is the comparator group plaintiffs can use to prove their claim. The following discussion analyzes (1) cases that recognize sex-plus-age claims, and (2) cases that do not recognize older women's intersectional discrimination.

The United States District Court for the Eastern District of Pennsylvania was the first court to recognize older women's sex-plus-age claim under Title VII in the 1994 case *Arnett v. Aspin*.[98] The plaintiff argued that she was discriminated against because she was a woman over the age of forty.[99] To support her claim, she explained that the job position was given to either women under the age of forty or men over the age of forty.[100] The defendants sought summary judgment by arguing that Title VII did not allow sex-plus-age discrimination claims, and therefore Arnett's complaint should be regarded as sex or age claims separately.[101] The court disagreed with the defendant's argument.[102] The court reasoned that age is an immutable characteristic and the "plus" classification is to be based on either immutable characteristics or the exercise of a fundamental right.[103] Further, the court acknowledged that the plaintiff could not establish a prima facie case of sex discrimination because candidates who were chosen for the position were women.[104] The court declined the defendant's motion for summary judgment and the court decided to accept sex-plus-age model, citing

94. *See* cases cited *supra* note 93.
95. Gross v. FBL Fin. Servs. Inc., 557 U.S. 167 (2009)
96. *Id.* at 176.
97. *See id.*
98. *See* Arnett, 846 F. Supp. at 1234.
99. *Id.* at 1236.
100. *Id.*
101. *Id.*
102. *Id.* at 1241.
103. *Id.*
104. *Id.* at 1237. The defendants also argue that "the plaintiff's Title VII claim for age discrimination must fail" because age discrimination is only covered under the ADEA.

Phillips v. Martin Marietta Corp. (1971),[105] *Sprogis v. United Air Lines, Inc.* (1971),[106] and *Jefferies v. Harris County Community Action Association* (1980).[107] Interestingly, the court explicitly expressed that the plaintiff's complaint contained a claim for sex discrimination under Title VII, but not age discrimination under the ADEA.[108] Thus, the remaining issues of the case were analyzed under Title VII.[109] There are two important messages from *Arnett*: (1) the court acknowledged the need for sex-plus-age theory to establish a prima facie case, and (2) the court differentiated a sex-plus-age cause of action under Title VII from age-plus-sex claims under the ADEA.[110]

In *Arnett*, the plaintiff was allowed to use younger women under age forty (rather than older men over age forty) to prove the fourth prong of the *McDonnell Douglas* framework.[111] Since the *Arnett* decision, there have been other types of sex-plus claims—like those in *Coleman v. B-G Maintenance Management* (1997),[112] *Gee-Thomas v. Cingular Wireless* (2004),[113] and sex-plus-age claim in *DeAngelo v. DentalEZ, Inc.* (2010)[114]—that have clarified which group the plaintiff should use as comparator as evidence of discrimination in sex-plus claims. Courts generally view sex-plus discrimination claims to be premised on sex, and are therefore considered like any sex discrimination claim under Title VII.[115]

In *Coleman*, the U.S. Court of Appeals for the Tenth Circuit ruled that in order for sex-plus claims to be actionable, they must be premised on sex and "when one proceeds to cancel out the common characteristics of two classes being compared (e.g., married men and married women), as one would do in solving an algebraic equation, the cancelled-out element proves to be that of married status, and sex remains the only operative factor in equation."[116] This analysis makes an important distinction between sex-plus-age and age-plus-sex. If older

105. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
106. *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971).
107. *See* Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025 (5th Cir. 1980).
108. *Arnett* 846 F. Supp. at 1241.
109. *Id.* at 1240–41.
110. *Id.*
111. *Id.* at 1241.
112. Coleman v. B-G Maint. Mgmt., 108 F.3d 1199 (10th Cir. 1997).
113. Gee-Thomas v. Cingular Wireless, 324 F. Supp. 2d 875 (M.D. Tenn. 2004).
114. DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572 (E.D. Pa. 2010).
115. *Id.* at 584–85.
116. *Coleman*, 108 F.3d at 1203.

women's intersectional discrimination claims are classified as sex-plus-age, then the comparison group of older women would be older men. However, if these claims are considered as age-plus-sex, then the comparison group of older women would be young women.[117] This point was made clearly in *DeAngelo v. DentalEZ, Inc.*,[118] where the court noted that the plaintiff:

> [C]onfuses the type of evidence she needs to establish sex-plus age discrimination under the *McDonnell Douglas* framework. Because [the plaintiff] claims [that the defendant] discriminated against older women, [the plaintiff] must present evidence that older men, *the relevant comparator*, were treated more favorably. [The plaintiff's] evidence regarding . . . alleged preference for hiring younger women is not on point for this claim. If [the defendant] favored younger women, that would be evidence of age discrimination, not gender discrimination.[119]

Some sex-plus-age claims, like those in *Coleman* and *DeAngelo*, have been viable under Title VII, but not all sex-plus-age claims have had such success. Notably, in an unpublished opinion, the court in *Sherman v. American Cyanamid Co.* (1999)[120] emphasized that no federal court of appeals or the Supreme Court have recognized sex-plus-age as a cause of action.[121] The *Sherman* court had the opportunity to discuss the sex-plus-age discrimination cause of action, but it declined to do so.[122] There are numerous cases that do not recognize older women's intersectional discrimination cases, including *Thompson v. Mississippi State Personnel* (1987),[123] *Murdock v. Goodrich* (1992),[124] *Best v. GTE Directories Service Corp.* (1993),[125] and *Schatzman v. County of Clermont* (2000).[126] Some cases do not discuss the viability of sex-plus-age for various reasons even though they had the opportunity to do so, including: *Flaherty v. Metromil Corp.* (2002),[127] *Poteat v. PSC Automotive Group Inc.*

117. *DeAngelo*, 738 F. Supp. 2d at 585.
118. *Id.*
119. *Id.*
120. Sherman v. American Cyanamid Co., No. 98-4035, 1999 U.S. App. LEXIS 21086 (6th Cir. Sept. 1, 1999).
121. *Id.* at *14.
122. *Id.*
123. Thompson v. Miss. State Pers. Bd., 674 F. Supp. 198, 204 (N.D. Miss. 1987).
124. Murdock v. Goodrich, C.A. No. 15654, 1992 Ohio App. LEXIS 6611 (Ohio Ct. App. Dec. 30, 1992).
125. Best v. GTE Directories Serv. Corp., No. 3:92-CV-0163-D, at *7 1993 U.S. Dist. LEXIS 21276 (N.D. Tex. Mar. 19, 1993).
126. Schatzman v. City of Clermont, No. 99-4066, 2000 U.S. App. LEXIS 25957 (6th Cir. 2000).
127. Flaherty v. Metromail Corp., 59 Fed. App'x 352 (2d. Cir. 2002).

(2006),[128] and *Gorzynski v. Jetblue Airways Corp*. (2010).[129] In *Thompson v. City of Columbus* (2014),[130] the court explicitly did not recognize age-plus-sex claim under the ADEA, while the court did not discuss the viability of sex-plus-age claim under Title VII. These cases show that courts do not always deem the older women's sex-plus-age claims to be actionable and they do not treat them equally across different courts.

The 1996 case *Luce v. Dalton*[131] clearly explained the issue of intersectionality and age-plus under the ADEA. The specific causes of action in *Luce* were age-plus-religion and age-plus-disability.[132] The U.S. District Court for the Southern District of California decided that no such age-plus theory of liability existed under the ADEA, although sex-plus theories exist under Title VII.[133] The court revisited previous Title VII sex-plus cases and once more pointed out that a sex-plus-age claim was recognized under Title VII, but not the ADEA.[134] The focus underlying this distinction was that Congress drafted two separate statutes: the ADEA and the Americans with Disabilities Act ("ADA"), which govern employment discrimination based on age or disability, respectively.[135] Therefore, the court stated if Congress had intended to allow plaintiffs to "mix and match" theories of discrimination then Congress could have amended Title VII to include protections against age or disability discrimination.[136] Instead, Congress passed entirely separate legislation for age or disability discrimination, thus an extension to support age-plus theories of discrimination would amount to judicial legislation.[137]

The landmark Supreme Court case *Gross v. FBL Financial Services, Inc.*[138] increased the difficultly for older women's age-plus-sex claims to be viable under the ADEA. In *Gross*, the Court found that the ADEA

128. Poteat v. PSC Auto. Grp., Inc., No. 3:03CV129, 2006 U.S. Dist. LEXIS 71491 (W.D. N.C. Sept. 29, 2006).
129. Gorzynski v. JetBlue Airways Corp., 596 F.3d 93 (2d. Cir. 2010).
130. Thompson v. City of Columbus, No. 2:12-cv-01054, 2014 U.S. Dist. LEXIS 63119 (S.D. Ohio May 7, 2014).
131. Luce v. Dalton, No. 93-1687-BTM(AJB), 1996 U.S. Dist. LEXIS 12266, at *4 (S.D. Cal. Apr. 1, 1996).
132. *Id.* at *5.
133. *Id.* at *6.
134. *Id.*
135. *See id.* at *3–6, *7–13.
136. *Id.* at *7–13.
137. *Id.*
138. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

does not authorize a mixed motive argument.[139] This ruling had an immediate impact on older women's age-plus-sex claims. In the 2010 case *Cartee v. Wilbur Smith Assocs.*,[140] the plaintiff sought an age-plus-sex claim under the ADEA.[141] The *Cartee* court ruled that "*Gross* appears to prohibit claims asserting 'an intersection of motives' brought pursuant to the ADEA, as only the age motive truly matters."[142] In *DeAngelo v. DentalEZ, Inc.*,[143] the court had a similar interpretation regarding the effect of *Gross* on age-plus-sex claims. The *DeAngelo* court stated that "*Gross* certainly prohibits plaintiffs from alleging, in the same count, a combined age/gender discrimination claim. However, where, as here, a plaintiff has pleaded two independent causes of action, *Gross* is not directly implicated."[144] The precedent case law clearly demonstrates that the ADEA has not acknowledged age-plus-sex cause of action. The *Gross* decision also frustrates the ability of older women to bring intersectional discrimination claims under the ADEA.

IV. Stronger State Laws

As discussed above, there are clear and important distinctions between the ADEA and Title VII. It is important to recall that these are two independent statutes. Therefore, age-plus-sex or sex-plus-age claims involve a lengthier discussion of whether such a cause of action exists under either statute. In *Gross*, when courts discussed the "mixed motive" theory under the ADEA, the Supreme Court stated that:

> [W]hen conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." . . . [W]e cannot ignore Congress'[s] decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.[145]

139. *Id.* at 175.
140. Cartee v. Wilbur Smith Assocs., Inc., No.: 3: 08-4132-JFA-PJG, 2010 U.S. Dist. LEXIS 26674 (D.S.C. Mar. 22, 2010).
141. *Id.* at *7.
142. *Id.* at *8.
143. DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572 (E.D. Pa. 2010).
144. *Id.* at 579.
145. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174–75 (2009).

There is a similar emphasis on the independence of the two statutes in *Luce v. Dalton*.[146] In comparing these two statutes, courts are either reluctant to opine or recognize the viability of age-plus-sex claims because these claims are governed under two independent statutes.[147] However, this type of reluctance is not necessarily evident under state anti-discrimination laws.[148]

Some states still have two separate statutes for age discrimination and sex discrimination, but many states have a single statute to prohibit discrimination based on age, sex, and other groups.[149] For example, in California, the Cal. Gov. Code § 12940 provides the following:

> It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.[150]

Similarly, in North Carolina, the N.C. GEN. STAT. § 143-422.2 provides the following:

> § 143-422.2. Legislative declaration: (a) It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.[151]

In these states, because age and sex are listed under one statute, the court cannot expand the same rationale from *Gross* or *Luce* to state discrimination claims.

Some states explicitly allow for sex-plus-age causes of action. For example, in the 2014 case *Doucette v. Morrison County*,[152] the U.S. Court

146. Luce v. Dalton, No. 93-1687-BTM(AJB), 1996 U.S. Dist. LEXIS 12266, at *3–6 (S.D. Cal. Apr. 1, 1996).
147. *See id.*
148. *See* Alamo v. Practice Mgmt. Info. Corp., 148 Cal.Rptr.3d 151 (2012).
149. *See* CAL. GOV'T CODE § 12940 (West 2018).
150. *Id.*
151. N.C. GEN. STAT. § 143-422.2 (2018).
152. Doucette v. Morrison Cty., 763 F.3d 978 (8th Cir. 2014).

of Appeals for the Eighth Circuit stated that "we agree with the district court that a claim of sex-plus-age discrimination is likely cognizable under the [Minnesota Human Rights Act] MHRA."[153] In *Doucette*, the plaintiff failed to establish that the employer's proffered reason for her discharge was a pretext for discrimination, but the *Doucette* decision demonstrates that the state law, the MHRA, is more protective for older women's intersectional discrimination claims.[154]

While the Supreme Court's decision in *Gross* has impeded the viability of older women's age-plus-sex claims under the ADEA, some states explicitly allow mixed-motive theory under their individual state laws.[155] Some of these states include Alaska, California, Connecticut, and Missouri. In the 2010 case *Smith v. Anchorage School District*,[156] the court stated that "[t]he Supreme Court's holding in *Gross* substantially relied on the differences between the ADEA and Title VII—differences that do not exist in Alaska's anti-discrimination law."[157] In the 2012 case *Alamo v. Practice Management Information Corp.*,[158] the California Court of Appeals stated that "given these conflicting standards of causation that now apply under the federal anti-discrimination statutes, we *decline* to follow *Gross* in considering the proper standard of causation under FEHA [Fair Employment Housing Act]."[159] In *Wagner v. Board of Trustees for Connecticut State University*,[160] the Superior Court of Connecticut ruled that:

> The legislature's decision to include the protection against age discrimination in the same statute that includes protections against other forms of discrimination, without otherwise distinguishing such claims (as under federal law), indicates that it intended that all these claims would be subject to the same standard. Accordingly, Connecticut courts have applied the 'motivating factor' standard to employment discrimination claims brought under state law."[161] In *Daugherty v. City of Maryland Heights* (2007),[162] the Supreme Court of Missouri held that the Missouri Human Rights

153. *Id.* at 985.
154. *Id.* at 985–86.
155. *See* Smith v. Anchorage Sch. Dist., 240 P.3d 834, 842 (Alaska 2010).
156. *Id.*
157. *Id.*
158. Alamo v. Practice Mgmt. Info. Corp., 148 Cal.Rptr.3d 151 (2012).
159. *Id.* at 107–08 (emphasis added).
160. Wagner v. Bd. of Trs. for Conn. State Univ., No. HHDCV085023775S, 2012 Conn. Super. LEXIS 316 (Conn. Super. Ct. Jan. 30, 2012).
161. *Id.* at *33–34.
162. Daugherty v. City of Md. Heights, 231 S.W.3d 814 (Mo. 2007).

> Act is less demanding than the ADEA.[163] Under the Missouri Human Rights Act, a plaintiff can survive a motion for summary judgment by showing a genuine issue of material fact as to whether "age was a 'contributing factor' in the [employer's] termination decision.[164]

Although these cases do not directly rule on viability of age-plus-sex claims under each state's laws,[165] these cases illustrate the importance of allowing a mixed motive theory of proof structure and having a single statute that governs both age and sex discrimination, both factors improving the likelihood that courts will recognize older women's intersectional discrimination.

In addition, there are significant variations in damages allowed under state laws.[166] The ADEA is applicable to only employers with twenty or more employees, but some states have laws that are applicable to all employers, without specification to the number of employees.[167] The ADEA allows only for liquidated damages, but some states allow for compensatory damages, punitive damages, or both.[168] All these features make state laws effectively stronger than the ADEA and, hopefully, provide more adequate protection for older women.[169]

V. Evidence of Older Women's Intersectional Discrimination

There is widespread reported anecdotal evidence of older women's unequal treatment in the workplace.[170] A commonly shared experience amongst older women includes being forced out of the workforce, getting demoted, losing a job, being denied opportunities, earning lower compensation, and the inability to find a job.[171] These women, usually in their fifties and sixties, feel discriminated against because of their age and gender.[172] A Federal Reserve Bank of St. Louis

163. *See id.*
164. *Id.* at 820.
165. *See id.*; *see also* Smith v. Anchorage Sch. Dist., 240 P.3d 834 (Alaska 2010); Alamo v. Practice Mgmt. Info. Corp., 148 Cal.Rptr.3d 151 (2012).
166. David Neumark & Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, 108 J. PUB. ECON., Sept. 2013, at 10 n.7 (listing these features of state laws).
167. *Id.* at 24.
168. *Id.* at 21
169. *Id.* at 32.
170. *See* sources cited *supra* note 19.
171. *See* sources cited *supra* note 19.
172. *See* sources cited *supra* note 19.

2015 report found that older women experienced the most dramatic increase in their long-term unemployment ratio since the Great Recession.[173] This reported high long-term unemployment to short-term unemployment ratio is concerning because this type of evidence was presented as evidence of discrimination and was the primary motivation behind the drafting of the ADEA in the 1960s.[174]

There are many descriptive statistics that are consistent with a claim of discriminatory behaviors against older women, but direct empirical evidence of older women's age and sex discrimination is sparse. A central explanation for scarce direct evidence is that it is empirically challenging to fully disentangle the difference in labor market outcome due to discrimination from workers' unobserved productivity. Social scientists often rely on regression models to study discrimination, but the limitation in these models is that they can only control for *observed*, or quantifiable, productivity measures. Regression models can be especially problematic in studying age discrimination because age is correlated with productivity (both observed and unobserved) and tastes for leisure (unobserved).[175] In addition, since age is continuous it is unclear how best to define group boundaries.[176]

The most compelling evidence of discrimination results from research experiments of hiring practices.[177] In these experimental studies, researchers create a set of fictitious applicants where there is no average difference in qualification between protected and unprotected groups.[178] Therefore, any measured differences in outcomes likely reflect employer discrimination.[179] Some studies use people trained to act like job applicants and measure job offers (i.e., audit studies), while

173. *See Long Term Unemployment Affected Older Women Most Following Recession*, FED. RES. BANK OF ST. LOUIS: ON THE ECON. BLOG (Nov. 17, 2015), https://www.stlouisfed.org/on-the-economy/2015/november/older-women-recession-long-term-unemployment.

174. U.S. DEP'T OF LAB., 89TH CONG., THE OLDER AMERICAN WORKER AGE DISCRIMINATION IN EMPLOYMENT, REP. OF THE SEC'Y OF LAB. TO THE CONG. UNDER SEC. 715 OF THE C. R. ACT OF 1964 3 (1965).

175. David Neumark & Wendy A. Stock, *Age Discrimination Laws & Labor Market Efficiency*, 107 J. POL. ECON. 1081, 1087 (1999) [hereinafter Neumark & Stock].

176. Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study*, 43 J. HUM. RES. 30, 35 (2008) [hereinafter Lahey].

177. *See generally* David Neumark, *Experimental Research on Labor Market Discrimination,* 56 (3) J. OF ECON. LITERATURE 799 (2018).

178. Neumark et al., *supra* note 20, at 3–4.

179. *Id.*

other studies send out fictitious resumes to real job openings and measure callback rate for interviews (i.e., correspondence studies).[180] Correspondence studies have some advantages over audit studies in that correspondence studies can be implemented at a larger scale providing more power while avoiding experimenter effects that can affect the behavior of the applicants.[181]

Implementing correspondence studies to detect race or sex discrimination is much more straightforward than audit studies. Researchers assign similar education or experience to multiple resumes but differ in names that signal race or sex.[182] However, this cannot be easily extended to age discrimination because age is highly correlated with experience and therefore can make older applicants appear to be less qualified and result in a biased estimate of age discrimination.[183]

To mitigate this inherent limitation in correspondence studies of age discrimination, Lahey (2008)[184] restricted her experiment sample to women arguing that intermittent labor force participation is common for women and sent the resumes to female-dominated jobs.[185] She found evidence of age discrimination against older women in job interview offers.[186] However, this experiment cannot measure gender differences because she did not include men in her sample.[187] Therefore, we cannot conclude that older women experienced more discrimination than older men. Another compelling evidence of older women's intersectional discrimination could be found in the study by Neumark et al.[188] Neumark et al. conducted a large-scale experiment assigning experience commensurate with applicant's age.[189] They argued that this

180. *Id.*; *see also* Lahey, *supra* note 176.
181. Neumark et al., *supra* note 20, at 4.
182. *Id.* at 20.
183. *Id.* at 1.
184. Lahey, *supra* note 176, at 31.
185. *Id.* at 40.
186. *Id.* at 31.
187. *Id.*
188. Neumark et al., *supra* note 20.
189. Another contribution of Neumark et al. is that the authors also corrected for bias that could be driven by differences in variance of unobservable factors in experimental studies. *See id.* at 3; *See also* James J. Heckman & Peter Siegelman, *The Urban Institute Audit Studies: Their Methods and Findings*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 187, 190 (Michael Fix & Raymond J. Struyk eds., 1993); *see also* James J. Heckman, *Detecting Discrimination*, 12 J. ECON. PERSP. 101, 109 (1998).

is more realistic and consonant with legal standards.[190] If equal experience is used, it would be easier for employers to provide defense of RFOA.[191] Therefore, for older applicants, they assign experience commensurate with age of the applicant.[192] Their results are remarkable. They found robust evidence of age discrimination in hiring against older women, but did not find robust evidence for men.[193] All these results are consistent with age-plus-sex discrimination argument of older women.

VI. Rationale for Differential Treatment Based on Age and Sex

Both anecdotal and experimental evidence show that older women are discriminated in the labor market.[194] However, this evidence does not independently explain why employers would discriminate against older women. One theory is that physical attractiveness matters in the workplace,[195] and the perception of attractiveness is more important for women.[196] Jackson has demonstrated the importance of physical appearance and illustrated that its effect depends on sex.[197] Moreover, the negative correlation between physical changes from aging and attractiveness is stronger for women than men.[198] Using data from job advertisements in China and Mexico, where it is legal to show preference for certain groups in job advertisements, Helleseter, Kuhn, and Shen (2014)[199] reported some evidence consistent with this theory. They found that employers' gender requests in job advertisement shifts away from females to males as workers age.[200]

190. Neumark et al., *supra* note 20, at 2–3.
191. *Id.* at 14.
192. *Id.* at 13.
193. *Id.* at 36.
194. Rikleen, *supra* note 2, at 1 (discussing stories of older women who have been "phased out of the workplace"); Neumark et al., *supra* note 20, at 36.
195. *Beauty and the Labor Market*, *supra* note 25, at 1192.
196. *See* Porter, *supra* note 63, at 107 ("[I]t is far more common for older women to be victims of appearance-based discrimination than for older men or younger women to fall victim to this phenomenon.").
197. *See generally* JACKSON, *supra* note 26 (examining the importance of physical appearance and the differing impact it has on perception of men and women).
198. *See* Henss, *supra* note 27, at 940.
199. *See* Miguel Delgado Hellester et al., *Employers' Age and Gender Profiling in the Chinese and Mexican Labor Markets: Evidence from Four Job Boards*, THE INST. FOR THE STUDY OF LAB., http://ftp.iza.org/dp9891.pdf (last visited Nov. 28, 2018).
200. *Id.* at 18.

When examining the evidence presented by plaintiffs in intersectional discrimination cases, many discriminatory remarks against older women are related to age and attractiveness. In *DeAngelo v. DentalEZ, Inc.*, the plaintiff alleged one reason for her employer's discrimination against older women was that her employer preferred working with "young pretties."[201] Psychology studies argue that stereotypes of older people are not uniform and society has stereotypes about subgroups of older people, like older women.[202] Some of these troubling stereotypes of older women include that older women are more likely to be perceived as disabled than older men.[203] Additionally, a larger share of older women are portrayed as eccentric, foolish, having a lack of high esteem, and are treated less courteously than older men.[204]

There are theories and evidence exemplifying a strong correlation between older women and aging that may lead to unfavorable treatment toward older women.[205] The ineffectiveness of age discrimination laws in protecting older women from discrimination in the workplace is another reason to use this type of evidence to bolster older women's intersectional discrimination claims.

VII. Empirical Evidence on the Effect of Age Discrimination Laws

Despite the compelling evidence of discrimination against older women,[206] the ADEA does not recognize older women's age-plus-sex claims as a cause of action.[207] In addition, the studies that examine the effect of age discrimination laws are limited.[208] Limited research is due

201. Deangelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 585 (E.D. Pa. 2010).

202. *See* BRUCE E. BLAINE, UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY 34–38 (2007).

203. Paula W. Dail, *Prime-Time Television Portrayals of Older Adults in the Context of Family Life*, 28 THE GERONTOLOGIST 700, 705 (1988) ("Sex differences which appeared on the positive cognitive behavior variable favored males over females, and seem to have supported a social stereotype of a stronger, more involved male and weaker female . . . .").

204. George Gerbner, *Gender and Age in Prime-Time Television*, *in* PERSPECTIVES ON PSYCHOLOGY AND THE MEDIA 69, 84 (Sam Kirschner & Diana Adile Kirschner eds., 1997).

205. *See* Porter, *supra* note 63, at 95; Neumark et al., *supra* note 20, at 36.

206. *See* sources cited *infra* note 208.

207. *See* Porter, *supra* note 63, at 102–05 (discussing sex plus age theory in ADEA lawsuits).

208. *See* Joanna Lahey, *State Age Protection Laws and the Age Discrimination in Employment Act* 51(3) J. OF LAW ECON. 433 (2008) [hereinafter *State Age Protection Laws*]

in part to a lack of sufficient variation in laws over time and across states.[209] To isolate the effect of policy from other factors that impact labor market outcomes, economists implement quasi-experimental research designs where they rely on variations that will generate "treatment" and "control" groups affected by the policy.[210] The variation in changes of law plays a crucial role in disentangling the effect of the laws from other time-series changes that affect the labor market outcomes.[211] The ADEA is a federal law, and effectively covers all older workers across all states since its enactment in 1967.[212] Therefore, there is no variation in laws that researchers can rely on. There are a few studies that use the variation in passage of state laws in 1965 and the enactment of the ADEA in 1967 to estimate the effect of the age discrimination laws.[213]

Neumark and Stock (1999)[214] and Adams (2004)[215] use the variation in states laws in 1965 and found that state age discrimination laws were effective in improving the labor market outcomes of older men.[216] Comparing the older workers' retirement and employment outcomes in states that enacted the state age discrimination laws to the states without such laws, these two studies found that state laws lowered the retirement rate and increased the employment rate of older workers.[217] Adams also used the enactment of the ADEA in 1967 and found similar results.[218] However, this study restricted the sample to white men so

("This paper is the first to examine the impact of the ADEA from its earliest years through a significant time period after its enforcement.").

209. Neumark and Song report lack of sufficient variations in state laws over time in the last 30 years. Their identification did not come from variations in laws, so this was not a main concern for their study. *See* David Neumark & Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, 108 J. PUB. ECON. 1, 11 (2013).

210. *See generally* Bruce d. Meyer, *Natural and Quasi-Experiments in Economics*, 13 J. BUS. & ECON. STAT. 151 (1995) (discussing research designs in economic studies).

211. *See id.*

212. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–24 (2018).

213. *See generally* Scott J. Adams, *Age Discrimination Legislation and the Employment of Older Workers*, 11 LAB. ECON. 219 (2004) [hereinafter Adams]; *State Age Protection Laws*, *supra* note 208; *see also* Neumark & Stock, *supra* note 175.

214. Neumark & Stock, *supra* note 175.

215. Adams, *supra* note 213.

216. *See id.*; *see also* Neumark & Stock, *supra* note 175.

217. Neumark & Stock, *supra* note 175.

218. Adams, *supra* note 213.

the results cannot be used to understand the gender difference of the effects of these laws.[219]

Lahey (2008)[220] used a different identification strategy where she used the variation in statutes of limitation (180 days as compared to 300 days) in the 1970s.[221] These differences depend on the enforcement agencies and whether the state had state laws.[222] Her results show that there was no effect of state laws on older women, but some negative effect on hiring of older men.[223] Her findings could be interpreted as having a different result than Neumark and Stock,[224] and Adams,[225] but strictly speaking, she was measuring the effect of the enforcement agency.[226] Therefore, Lahey's results cannot be directly compared to results from Neumark and Stock, or Adams. Whether these age discrimination laws had intended consequences or unintended consequences, Lahey did not find any effect for older women.[227]

Using the changes in state laws and the ADEA in 1965 and 1967, McLaughlin (2017)[228] directly tested the differential effect of the state age discrimination laws and the ADEA between older women and older men.[229] Using the Annual Social and Economic Supplement ("ASEC") of the Current Population Survey ("CPS") and the variation in state and the federal laws, McLaughlin implemented a quasi-experimental research design to estimate the effect of the laws.[230] Specifically, she formulated a difference-in-difference-in-differences ("DDD") estimator with sex difference embedded in the model.[231] Her research design separates the effect of the laws from any other state-year specific

219. *Id.*
220. *State Age Protection Laws*, *supra* note 208.
221. *Id.*
222. *Id.*
223. *See id.* Lahey's negative effect on hiring is in align with economic theory. Employment protection laws help workers retain their job, but it may deter hiring of new workers because employment protection laws increase hiring cost (or firing cost) from an employer's perspective.
224. *See generally* Neumark & Stock, *supra* note 175.
225. *See generally* Adams, *supra* note 213.
226. *See generally* David Neumark, *The Age Discrimination in Employment Act and the Challenge of Population Aging*, 31 RES. ON AGING 41 (2009) (discussing in length about these differences in results).
227. *See generally*, *State Age Protection Laws*, *supra* note 208.
228. *See generally* McLaughlin, *supra* note 29.
229. *See generally id.*
230. *Id.* at 3.
231. *Id.* at 9.

factors like economic conditions that might bias the results. She has reported striking results that while both the state and federal age discrimination laws improve the employment rate for men, these effects were much smaller for older women.[232] She also found that age discrimination lowered the retirement rate for older men, but she did not find such evidence for older women at all.[233] McLaughlin also restricted the sample to single women because if older women are secondary earners in the household, then they may choose to exit the labor force earlier.[234] She reports consistent and robust findings of smaller employment effects on older women than older men and found no effect on retirement for older women.[235] Her results are consistent with the concern that the ADEA cannot provide adequate protection for older women against their intersectional discrimination.[236]

One limitation of her study is the external validity of her findings. In other words, what can we learn about older women in today's labor market from results using data from the 1960s and the 1970s? Since there are no discernable changes in age discrimination laws, this remains a challenge to the study of the effect of age discrimination laws. However, if we assume that going from no law to having a law to protect older workers may have the biggest impact on the labor market, then we could argue that her findings can be used as the upper bound of effects of these laws. Therefore, we can still use the results found from the quasi-experimental setting in the 1960s to infer the differential effect of the age discrimination laws between older women and older men in a contemporary setting. Moreover, under the ADEA, older women's intersectional discrimination has never been recognized, so it would be difficult to assume that the ADEA has more favorable treatment for older women today than in the past.

232. *Id.* at 15.
233. *Id.* at 16.
234. *Id.* at 4.
235. *Id.*
236. *Id.*

VII. Conclusion

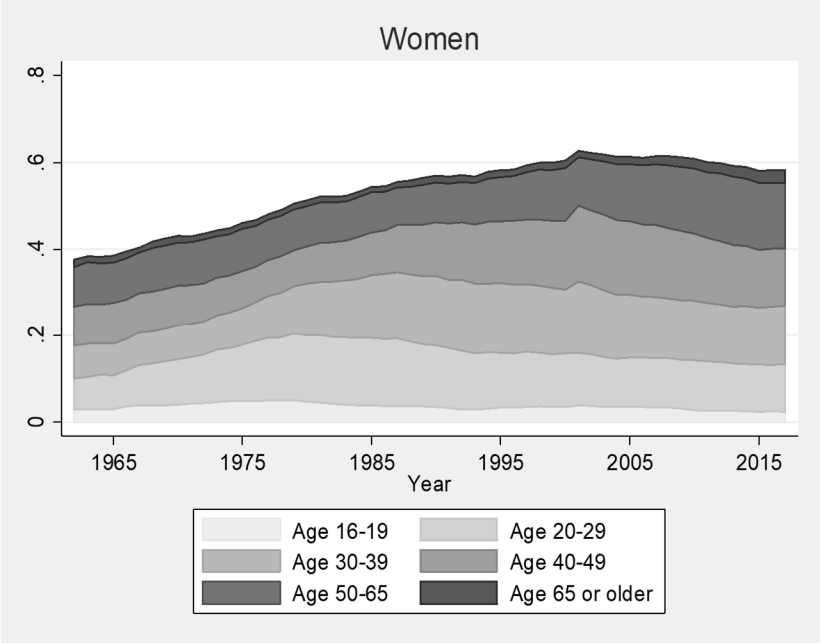
The share of older women in the labor force participation rate has increased and older women compose a large portion of the labor market.[237] The objective of this Article is to point out shortcomings in the ADEA and argue that it does not provide adequate protection of older women. Currently, without additional amendments to the current statute, age-plus-sex theory is not accepted in courts. This Article presented some theory and evidence that older women are more discriminated against in the workforce for being old and female, but lack of statutory law on viability of any age-plus classification under the ADEA leads older women to be more vulnerable in the workforce. Courts, in general, recognize the need for age-plus-sex theory, but they either refused or were reluctant to clarify this issue under the ADEA.[238]

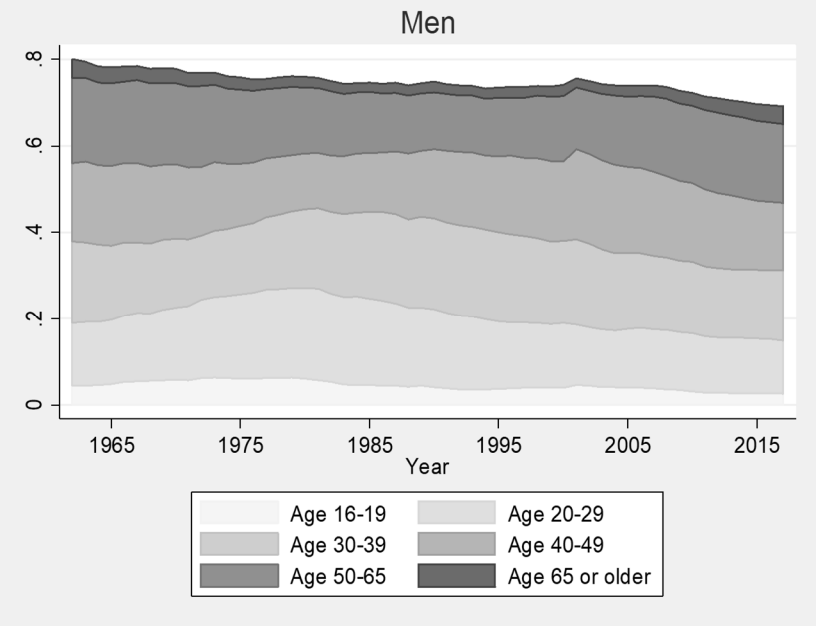
The main challenge is that the ADEA and Title VII are two independent statutes and applying age-plus-sex theory requires simultaneous use of these two laws. In addition, lack of clarification from the Supreme Court or any upper level court on this issue under Title VII also does not guarantee that Title VII can provide adequate protection for older women either. This has an important policy implication. What would it mean to have legislation that leaves out the half of population that it is intended to cover? This Article presented some evidence and arguments as to why older women are left out in getting equal employment opportunities under our current anti-discrimination laws. Older women face unique intersectional discrimination for being old and female, but their current legal recourse is severely limited under the ADEA and Title VII strictly due to legislative peculiarities in statutes intended to solve this exact problem in the labor market.

237. *See* Mercedes Garcia-Diez, *Compositional Changes of the Labor Force and the Increase of the Unemployment Rate: An Estimate of the United States*, 7 J. BUS. & ECON. STAT. 237 (1989).

238. Paul Grossman, *Employment Discrimination Law Update*, PAUL HASTINGS LLP (Mar. 2012), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/eeo/papers/grossman_paper.pdf.

FIGURE 1: TRENDS IN LABOR FORCE PARTICIPATION RATE BY GENDER AND AGE





Source: Author's calculation using Annual Social and Economic Supplement of the Current Population Survey 1962-2017. Respondents are defined to be in labor force if they were at work; held a job but were temporarily absent from work due to factors like vacation or illness; were seeking work; or were temporarily laid off from a job during the reference period.[239]

239. Sarah Flood et al., Miriam King, Steven Ruggles, and J. Robert Warren. Integrated Public Use Microdata Series, Current Population Survey: Version 5.0. (IPUMS-CPS). Minneapolis: University of Minnesota, 2017. https://doi.org/10.18128/D030.V5.0.