

CONSTRUCTING AGE THROUGH BONA FIDE OCCUPATIONAL QUALIFICATIONS: DE JURE DISCRIMINATION'S LAST STAND?

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ABSTRACT

This article examines how the design of current age discrimination policy, particularly employer use of the bona fide occupational qualification (BFOQ) defense, affects the social construction of age in America. Using a series of federal cases involving truck drivers, airline pilots, and police officers, I argue that the use of the BFOQ defense in Age Discrimination in Employment Act cases originates in and ratifies inter-subjective stereotypes. Managerial and governance implications emanate from the way policy design associates aging with degeneration and incapacity.

In the past twenty years, a growing interpretive policy analysis literature has shown how one consequence of policy design--that is the content of particular statutes, regulations and court decrees--is to socially construct income, racial, and ethnic groups in American society. Not only do policy rules and rationales differ based on the perceptions elites have of various target populations but rules effectuated by given policies assert claims about group identities and the shared meanings society uses to understand groups (e.g., Schneider and Ingram 1997, Yanow 2003, Julnes 2012).

Policy, an essential feature of governance, both reflects and solidifies social prejudice (Lopez 1994). It stereotypes subpopulations as "deserving" or "undeserving" of aid and frames how the population-at-large is supposed to understand a given community's access to public benefits (Schneider and Ingram 1997). Once in place, people tend to take the policy and its

consequences for granted as a preexisting objective reality rather than a socially constructed artifact of a particular culture. Only by examining how we constructed a given policy recipient's identity frame, can we become aware of alternative frames and the benefits and costs of each disparate understanding (Schon 1979). Critical study is then useful to show how a given policy privileges one interpretation over others that also have credibility (Dodge, Ospina and Foldy 2005).

This article extends interpretive analysis to examine how the design of current age discrimination policy, particularly employer use of the bona fide occupational qualification (BFOQ) defense, affects the social construction of age. The BFOQ defense is a legally sanctioned exception from the general obligation of employers to evaluate each job seeker or employee on individual qualifications. Successful use of the defense generally entails showing that even though an employer treated a member of a protected group differently than other workers, the action is legal because, in this case, all or substantially all members of this particular protected group are unable to perform job duties essential to the business.

I argue that current policies surrounding this defense in Age Discrimination in Employment Act (ADEA) suits originate in inter-subjective stereotyping of older people. Use of the defense amounts to residual *de jure* discrimination against qualified older workers (or job seekers) and ratifies acceptance of stereotypes about them. In other words, I argue that systemic acceptance of the defense shapes peoples' perceptions about older workers' capabilities; it sustains a notion of age bound to degeneration and incapacity.

If allowed to continue, such age-based exclusion will have increasingly important management repercussions in the next two decades. A greater percentage of workers is likely to be subject to differential treatment protected by BFOQ reasoning as the percentage of the American population aged 65 and up increases from approximately 12 to 20 percent (Eglit 2009). To the extent that these older people can perform tasks our policies prevent them from doing companies will lose even more services from potentially competent employees than at present. Particularly troublesome is that companies will lose the services of many

employees with long, irreplaceable historical memories of organizations.

Extended deference to BFOQs will also have governance implications outside the employment relationship (e.g., in jury selection) as some political officials and administrators may be tempted to treat older Americans in accord with the stereotypes that the BFOQ concept fosters. To change how administrators conceptualize older people and whether they consider differential treatment by age an important issue requires cultural shifts.

The Age Discrimination in Employment Act

In 1967, Congress passed the ADEA "to promote the employment of older persons based on their ability rather than age" with the aim being "to prohibit arbitrary age discrimination" (29 U.S.C. 621 (b) 1967). Substantial research indicates that age-related prejudice is a factor in hiring and retention decisions (Neumark 2008). Even though studies have not established any consistent patterns of superior job performance for any one age group (Henry and Jennings 2004), labor markets discriminate against older workers. Stereotypes present older employees as sedentary, technologically ignorant, resistant to change and physically ailing and weak (Shultz 2001).

The ADEA's language suggests that the law's proponents intended to counter arbitrary behavior predicated on such stereotypes but that in some cases a refusal to hire, maintain or promote older people might be appropriate. If so, the question then becomes when is it appropriate for employers to refuse to hire or keep a worker solely because of age without evaluating the person's capabilities in any way? When can an organization interact solely with potential or actual employees on the basis of their group affiliation rather than their individual merit? When can organizations ignore the insight that

A 75-year-old who had outstanding capabilities when he was 30 and has aged slowly, not only may be immensely more capable than a 75-year-old who was mediocre at 30 and has aged rapidly; he may also...be more capable than a mediocre 30-year-old. (Posner 1995, p.20)

Passage of antidiscrimination laws presupposes that a majority of legislators profess to believe that at least some members of a group can perform certain jobs, but are excluded from their rightful employment because of pervasive and unjust employer prejudice. For age discrimination the problem for policy makers, has been to define who constitutes the group that has relevant skills but cannot get positions because of prejudice. In the original ADEA statute, Congress restricted the group in question to people between 40 and 65 working in private sector firms with 25 or more employees. Amendments in 1974 added federal, state and local employees with the exception of uniformed personnel and extended protection to people working in firms with 20 or more employees. A 1978 amendment raised the maximum protected age to 70 and banned mandatory retirement for federal workers at any age except for those in law enforcement and fire protection. The amendments of 1986 removed almost all mandatory retirement limits except for people working in a few categories, e.g., firefighters, law enforcement officers, and high-level policy makers. The 1996 amendments allowed mandatory retirement of state and local police and fire workers if the jurisdiction had used mandatory retirement before 1983 or if it promulgated new laws after 1996 and had a retirement age not younger than 55. (For discussion on the various amendments see Riccucci 2002 and Stock and Beegle 2004.)

While the trend has been to expand the class of protected people, age discrimination laws have never extended protection to all people over a certain age in the way that the 1964 Civil Rights Act protects people from any race or ethnic group. Although a 1978 Supreme Court decision noted similarities between the Civil Rights Act and the ADEA in aims and prohibitions, one difference is that age related policy contains explicit exceptions as to which older people get protection (*Lorillard v Pons* 434 U.S. 575). Federal law explicitly sets maximum age limits for certain jobs as, for example, with the current age 65 maximum for commercial airline pilots (age 60 maximum until 2007). Various state laws also set maximum age limits for certain occupations; thirty states mandate retirement ages for appointed judges (McFadden 2000). In 1991, the Supreme Court ruled these age-based restrictions on state judges are legal because the ADEA exempts high-level

policymakers from its protection (*Gregory v Ashcroft* 501 U.S. 452). As Eglit (2009) has noted, this acceptance of the idea that aging somewhat impairs workers contrasts with the Civil Rights Act stipulation that race has no relationship to performance ability.

A related contrast between the 1964 Civil Rights Act and the ADEA concerns the treatment of BFOQs. Congress discussed a race-based BFOQ in 1964 but rejected it as a loophole for prejudice in a type of discrimination that legislators considered particularly harmful. Title VII does allow a narrow BFOQ defense for gender and religion, categories which were less central to debates on the act's passage. For gender, however, successful defenses have hinged on the relatively restricted need for privacy, safety or authenticity (Manley 2009). Although the military restricts women from certain combat positions, in the civilian realm, courts have dismissed as pandering to stereotypes cases where employers stated they could not hire women to do heavy physical work because all or almost all women lacked the strength for such jobs (e.g., *Weeks v Southern Bell Telephone and Telegraph Co.* 408 F.2d 228).

Policy is much more respectful of employer pronouncements that they need to exclude older workers without evaluating each person individually. Federal appeals courts have been widely split in setting BFOQ standards. While the majority of age-related BFOQ defenses fail, enough have succeeded to create age-based parameters for certain jobs, particularly those that affect customer safety or require strength of some kind (Fox 2000). A Supreme Court decision from 1976 considered dissimilar treatment based on age different from other types of discrimination for purposes of legal protection. In this view, age discrimination lacked animosity and pervasiveness, at least partly because younger people know that at some point they will become old. Differential employer treatment based on age, therefore did not rise to the level of an issue requiring the court to use "strict scrutiny"; a simpler "rationality" test could decide whether a particular instance of differential treatment was legal (see *Massachusetts Board of Retirement v Murgia* 427 U.S. 307). As Cooper (2011, p. 754) has noted "there is a perception that age discrimination is not only

different than other types of discrimination, but also less important."

This article aims to examine how this unique legal approach to age discrimination plays out in BFOQ policy. Key to the analysis is exploring how courts construct age-based categories for employment purposes. The article explores a set of BFOQ cases to show how court decisions bisect the population of older workers into "deserving" and "undeserving" segments with the former receiving ADEA protections. It explores which characteristics of older plaintiffs and the workers they represent are seen as salient and which are ignored in the drive to construct protection boundaries. The article will then show how this picture of age affects how people conceptualize older workers even in professions that have not been subject to BFOQ-related court proceedings such as medicine. It will explore how concepts constructed for employment law come to affect how public officials treat older people in areas outside employment such as in regard to the right to serve on juries. In other words it will give examples of how policy shapes the perceptions people have of older workers--and the perceptions they have about what constitutes socially permitted discourse on aging.

The narrative has three major sections. The first examines three sets of BFOQ cases involving truck drivers, pilots and police respectively to show the tenor of this branch of jurisprudence. I have seen all 49 appellate decisions from a 2012 LexisNexis search for cases where the terms "BFOQ" and "age discrimination" appeared at least five times. The cases examined in this article include both of the important types of disputes in this population: age cut offs for hiring and mandatory retirement provisions. In addition, they represent the two fields of employment--transportation and protective services-- that have been subject to a preponderance of court decisions and include the major issues and reasoning found in the entire body of court findings.

The narrative proceeds in the following way. The first subsection examines two bus driver cases in chronological order. In the following subsections on airline pilots and police officers, the narrative first examines in chronological order those decisions that support the BFOQ defense and then analyzes in chronological

order decisions finding a BFOQ defense inapplicable in that particular case.

The second section analyzes implications the cases have in constructing a social identity for older Americans. The third offers conclusions.

BFOQS IN COURT

Bus Drivers

While employers can assert age-related BFOQ defenses for many reasons, the greatest legal success comes to those companies who want to restrict employment for a perceived safety need or a requirement that workers have vigor and physical strength. The concerns appear clearly in two cases involving bus drivers.

In 1974 the federal government sued Greyhound Lines for violating the ADEA because the firm would not hire intercity bus drivers over 35. The company agreed with the government's recitation of the facts but responded that the age cut off met the ADEA's exception for a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business" [29 U.S.C. 623 (f) (1)]. The employer considered older drivers likely to be less safe, an important caveat in the normal operation of this business. Company records showed that Greyhound's safest drivers were between 50 and 55 years old with 16-20 years of experience. The company argued that the only way to produce such drivers was to hire young applicants and keep the drivers in the company.

Without questioning whether other methods existed to maintain safety, the appeals court agreed with the defendant's argument. The judges said that for Greyhound to prevail it only had to show that eliminating the policy might jeopardize the life of one more person than would occur under the existing rules. According to this court, the company did not even have to show that substantially all older drivers could not perform safely (Hodgson v Greyhound Lines Inc. 499 F.2d 859).

Two years later, a fifth circuit ruling used similar logic to accept Tamiami Trails Tours policy of not hiring drivers over 40 as a BFOQ. In its decision, the court cited with approval testimony from executives of other bus companies that they also refused to

hire older drivers for safety reasons (*Usery v Tamiami Trails Tours Inc.* 531 F.2d 224). The court allowed policy to emanate, at least in part, from a general societal sense that older drivers were less safe.

Commercial Airplane Pilots

In 1997 similar safety concerns based on possible mid-flight illnesses of older pilots led the sixth circuit appeals court to accept as a BFOQ the Federal Aviation Administration's (FAA) (pre-2007) mandatory retirement age of 60 for commercial pilots (*Coupe v Federal Express Corp.* 121 F.3d 1022). The BFOQ defense was accepted even though the FAA had never demanded mandatory retirement for younger pilots who had heart attacks or cardiovascular disease. These younger pilots were temporarily grounded and then recertified after they regained capacity. In other words, the FAA did not apply the same safety concerns to older and younger workers although presumably midflight illness of any pilot would be equally problematic.

However, not all flight-related BFOQ requests have passed judicial muster. A 1977 appeals court decision did not accept McDonnell Douglas' BFOQ defense for its mandatory 50 year retirement age for test pilots--a retirement age that was ten years younger than the FAA standard at the time (*Houghton v McDonnell Douglas* 553 F.2d 561).

A 1985 Supreme Court decision rejected Western Air Lines' mandatory retirement of 60 for flight engineers. The court stated that the key was to consider whether it was "reasonably necessary," in the ADEA's words, to use age as a proxy for safety. The justices, in this case, decided that the company did not prove this need; the court considered engineers less critical than pilots to a flight's safety (*Western Air Lines v Criswell* 472 US 400).

Police Officers

A set of cases involving police officers serves as a good example of lack of consensus on court standards and decisions regarding age-related BFOQs in similar circumstances. In the 1980s, Missouri's state highway patrol enforced a hiring cut-off at

32 for troopers. An eighth circuit decision in 1984 accepted the policy as a BFOQ which meant that it met the ADEA's prescription to be reasonably necessary for running the organization. The judges said troopers needed vigor in the field and medical evidence substantiated decrease in this regard with increasing age (*EEOC v Missouri State Highway Patrol* 748 F. 2d 447).

A first circuit decision from 1984 accepted as a BFOQ a Massachusetts state police agency policy of mandatory retirement at 50 even though the individual plaintiff in the case had a sedentary job as a telecommunications specialist. In this case the dispute centered on what the ADEA meant by an occupation. The court said the a desk job could not be considered the plaintiff's occupation because the agency might reassign him to the field in emergencies. The court did not inquire why this employer, the Division of State Police, needed to use a mandatory retirement age of 50 while the other three Massachusetts state police agencies--the Metropolitan District Commission Police, Registry of Motor Vehicle Law Enforcement Division, and Capitol Police--used mandatory cut offs of 65. No attempt was made to compare performance among these four police departments and see if, in fact, a higher mandatory retirement age decreased performance (*Mahoney v. Trabucco* 738 F.2d 35).

In another first circuit case in 1986, the court accepted as a BFOQ East Providence, Rhode Island's police mandatory retirement age at 60. The judges cited the need for physically strong and vigorous officers in finding that the mandatory retirement provision fell within the ADEA's requirement that a BFOQ be reasonably necessary to running the business. The court accepted the BFOQ defense even though the judges conceded that the agency did not test patrol officer physical fitness and even occasionally hired former troopers over 60 for temporary "on-call" assignments (*EEOC v the City of East Providence* 798 F.2d 524).

New York state civil service law prohibited people over 35 from becoming police officers. In 2006, a second circuit decision sustained a district court opinion that the practice was legal although it used age rather than ability to see who received police

employment (*Feldman v Nassau County Civil Service Commission* 434 F.3d 177).

Yet, in other police cases the courts ruled that age-related policies were not reasonably necessary to the department's work. In 1983, district and circuit courts rejected Allegheny County Pennsylvania's BFOQ defense for a 35 maximum age cut off in hiring police officers based on a need for strong and vigorous recruits. While the circuit court explicitly said it would not necessarily bar all age limits on police hiring, the judges believed that in this case the department could deal with applicants on an individual basis rather than use a blanket age-based ban. Here the court did not find that the age cut off met the ADEA's requirement that a BFOQ be reasonably necessary to running the business (*EEOC v County of Allegheny* 705 F.2 679).

In 1988 sixth circuit judges ruled that Kentucky's mandatory retirement age of 55 for state troopers was not a BFOQ reversing a district court decision. The appeals court noted that while the agency said its troopers needed aerobic fitness, the employer did not test any worker's fitness regularly. It kept on the roster younger officers who suffered heart attacks or underwent bypass surgery (*EEOC v Kentucky State Police Department* 860 F.2d 665).

In 1993, a first circuit decision found that when Massachusetts consolidated its four state police agencies in 1991, three having a mandatory retirement age of 65 and one of 50, the state could not use the BFOQ defense to require one mandatory retirement age of 55. The court suggested the agency should ensure adequate performance through fitness tests (*Gately v Commonwealth of MA* 2F.3d 1221).

INTERPRETATION

The overall impression from reading the decisions is a characterization of aging as a time of disintegration. Interestingly, even among similar agencies--say two or three police departments-- differences arise on when this disintegration starts or becomes noticeable enough to terminate employment. Most of the employers involved in BFOQ court cases thought it occurred

by the time a person became 50 or 60 at the latest. The court in *Hodgson v Greyhound* said that physical degeneration starts in the late thirties with changes that are not detectable by physical exam. The court affirming the FAA's pilot mandatory retirement policy said that at some age every person becomes too infirm to pilot a plane (*Coupe v Federal Express Corp.* 121 F.3d 1022).

But the different standards as to when a person becomes too old for a given job makes it difficult to credit any of the cut-offs even granted that court cases are fact intensive and work may vary somewhat from one police department to another. A 1985 Supreme Court decision noted that a mandatory retirement age of 55 for federal firefighters did not necessarily mean that this age cut-off was a BFOQ for state and local fire personnel (*Johnson v Mayor and City Council of Baltimore* 72 U.S. 353). But is it likely that all or almost all police officers in one agency will be unable to perform their duties after 50 while across the state border officers perform effectively until 65? Is it not much more likely that in both agencies individual officer capabilities at 50 will vary widely? Here is an example of a place where policy purports to be scientific and yet its assumptions contradict the actual lived experience of older people.

At any rate, by the 1990s some scientific studies already challenged the notion that increasing age correlated with inability to perform the tasks of a pilot or a public safety officer. A 1980s study from the National Academy of Sciences' Institute of Medicine found that age 60 was not a useful cut-off point for commercial pilot productivity (Edwards 1993). A Penn State report concluded that police fitness depended more on lifestyle, particularly exercise and diet, than chronological age. It recommended mandatory fitness programs rather than forced retirement to improve agency performance (Landy 1992). Pynes' (1995) study of on-the-job accidents in a fire department found higher rates among younger workers although she noted that older workers might transfer out of the most difficult jobs thus skewing the results. In many of the BFOQ cases, both plaintiffs and defendants had their own experts, each testifying that the evidence supported a different conclusion about fitness and age.

Indeed, if you look at the evidence employers bring to support their claims, you will see that the facts they submit can be

interpreted in multiple ways some of which suggest that safety increases with age. Greyhound, for example, used the fact that the safest drivers were experienced workers in their fifties to argue that the company needed to hire young drivers who could accrue 16-20 years of experience. But the same evidence might also suggest that experienced drivers when they enter their 50s are particularly careful. In this interpretation, an age of 50+ leads to better work outcomes; age enhances useful responses to work life. That neither Greyhound nor the appeals court reached this conclusion emanates not from its lack of plausibility but from their already assuming that aging is a form of degeneration. Their inability to see alternative interpretations stemmed from their having imbibed preexisting stereotypes rampant in the culture.

Company policy and the court decisions sustaining BFOQs emanated from existing cultural assumptions about age. Each decision upholding a BFOQ also legitimated these stereotypes for other people thus reinforcing differential treatment. A recent article in an orthopedics journal, for example, advocated mandatory retirement for surgeons at 65 or 70. What was the evidence? Half the research cited by the author showed no correlation between surgical skill decline and increased age but the author narrated three anecdotes about bad older surgeons and moved the argument further by discursing with approval on the legal treatment of commercial pilots (Blaisir 2009). At the least, the FAA's rules helped reassure the writer that society accepts group treatment of older people and that he is not simply a bigot for suggesting society should extrapolate aviation's approach to the medical realm. But it is also likely that the legitimacy provided by pilot jurisprudence is one factor which allows him to be comfortable cracking a joke at the older surgeon's expense such as his adage that only wine and cheese improve with age.

Performance and Age

The question employers say they want to answer is whether the performance of employees deteriorates as workers get older. Such a query, however, can never be answered in the abstract but only within the confines of a particular culture. Regnant attitudes towards age may affect performance in two ways. First, older people who are cued by society to believe they are bound to fail

may internalize such expectations and actually do worse on tasks than people of the same age who are not aware of society's negative expectations.

Research has documented the power of "stereotype threat" to lower female work on difficult tasks (Cadinu et al 2005). It is plausible that older people also internalize negative vibes. If older workers perform poorly on a demanding physical task, this may say less about their potential skills than about the effects of a stereotype laden atmosphere on performance. In other words, mandatory retirement BFOQs may produce performance drops in the oldest workers who remain. The policy instrument creates a self-fulfilling prophecy. The performance of older workers would improve in a less hostile atmosphere.

In addition, supervisors may judge identical work differently depending on the age of the worker. A meta analysis of studies on age and performance found that objective performance measures showed performance increased with age on a variety of tasks particularly for professionals, but supervisory ratings showed a slight decline (Waldman and Avolio 1986). One interpretation of this finding is that the culture may influence supervisors to judge different items salient in evaluating younger and older workers thus contaminating ratings. Again, performance ratings would be different in a less hostile atmosphere; the supervisory ratings for older workers would most likely improve.

Supporters of America's federalist structure often argue that states are laboratories for innovation. In the case of learning about age and performance, the various hiring and retirement ages accepted by different agencies have provided a near perfect setting to test whether excluding older workers produces efficiency gains. In the last years of the twentieth century, retirement age for police varied between 50 and 65 depending on the particular employer. Yet no court case testimony compares department efficiency and effectiveness to see if any gains accrued to departments using the younger removal age.

Thirty states have retirement ages for appointed judges. Do experts rate justice in those 30 states higher than the justice found in their 20 peers? If mandatory retirement exists solely to improve performance, one would think such research would be a priority to help policy makers know how best to set age limits. The lack of

any research in this vein suggests that people promulgating mandatory retirement are not taking the most logical route to increase effectiveness. Instead, they are simply accepting a cultural formulation that a certain type of mandatory retirement is a good thing.

Two ways exist for employers to deal with the information that members of group X have a higher average score on some work skill than members of group Y. One is to say that regardless of that imbalance some members of both groups may have necessary skills and therefore members of either group can show up for job interviews and get evaluated. This is the only legal practice for evaluating male and female firefighters for skills requiring upper body strength. Men as a group have an advantage over women in upper body strength but the system recognizes that many individual female candidates surpass individual male applicants.

The other way is to eliminate all people in group Y from the selection pool without evaluations. This is the only legal practice at present for handling the question of whether a pilot can continue working past 65. The first practice gives fire departments the advantage of selecting the best people from a larger pool of qualified applicants. The only certain benefit of the second practice is the ease of administration in using group-based cut offs. Decisions can come quickly but lack much important information. The practice denies airlines the choice to keep highly productive pilots.

The interesting issue in studying safety or skill related BFOQs is to learn why society uses one method in some instances and not others. Risk is ubiquitous. Many personal qualities predispose to increased risk of heart attack or stroke in airline pilots. Genetic mutation might be one. Ethnicity or national origin might be another as it is not likely that members of all ethnic or national origin groups have the same propensity to get heart attacks in their 40s or 50s. Yet not even the most safety conscious administrators suggest using BFOQs to remove from the potential airline pilot pool all people bearing a certain gene or all members of national origin groups with a higher incidence of heart problems. The person who suggested such steps would get a very short hearing in the court of public opinion. Why then does our culture consider

it acceptable to remove an entire age group from certain jobs? Critical thinking requires reflection on this disparity in approach.

From the 1970s to our own era the trajectory has been to raise the mandatory retirement ages in contested fields such as police or piloting--an incremental change. Such a shift in policy design does not challenge the notion that age creates categories of individuals with whom employers can interact solely on the basis of group status. The barrier may change from 60 to 65 but the idea that a barrier is appropriate remains. The incremental approach to change addresses the management issues tied to BFOQs--it increases the number of competent workers with long historical memories that an agency can use--but it does not address the governance issues that arise from stigmatizing a category of people based on negative stereotypes. It does not stop the process by which creating an a priori inferior group for employment purposes influences differential treatment older Americans receive in their interactions with officials outside the workplace.

A good example of this differential treatment by age outside the employment relationship occurs in jury selection. Currently, federal appeals court rulings allow defense lawyers in age discrimination cases to use peremptory challenges, i.e., challenges without explanation, to remove jury candidates over 50 from consideration. A 1986 Supreme Court decision forbids such challenges if they are based on race (*Batson v Kentucky* 476 U.S. 79); a 1994 decision prohibits them when based on gender (*J.E.B v Alabama* 511 U.S. 127). However, under the assumption that age--unlike race or gender--is not a category requiring "strict scrutiny," courts do not restrict age-based challenges (e.g., *Weber v Strippit Inc.* 186 F.3d 907). The assumption that age related cases do not merit strict scrutiny, a policy constructed for employment issues, eventually also controls a key interaction between officials and older people in the justice system. Critical theory requires bringing to light these wider impacts of BFOQ-related jurisprudence as part of examining whether a necessity exists for any group-based employment barriers.

Current reliance on BFOQs based on ascribed safety or fitness concerns shows that an appreciable portion of our decision makers still want to use chronological age as a proxy for capability. That is why an article such as this one that identifies

systemic problems with BFOQs is useful as long as we can assume that “as people become aware of social inequities their demand for change will intensify” (Meyer-Emerick (2005, 554). Identifying problems can be a first step towards their amelioration--a necessary step even if not by itself sufficient to produce change.

CONCLUSIONS

Once critical analysis identifies a problem, the next step is to analyze how it might be mitigated. Employment attorney Raymond Gregory (2001) has suggested that one way to dispel the negative age-based stereotypes lingering in our society might be for older workers to take special care to be productive. While this advice is doubtless well meant, it is unlikely to precipitate massive change. The strategy might convince a few broadminded employers to retain older workers, but people's widespread use of selective perception and retention to reinforce their stereotypes means that even sterling performance by older workers is not likely to spur employers to reject negative images en masse.

More will be needed to bring significant change even at the de jure level. Many civil rights shifts have involved demonstrations and street action--tactics relatively absent from the quest to end age discrimination. The introduction of such tactics might unfreeze public perceptions about the importance of the issue and the need to confront its implications, but street actions are based at least partly on participants' sense that they are being denied what is justly coming to them. You only get such tactics when some affected workers believe that they are being treated unfairly and the demonstrations can persuade other people that an injustice has occurred.

As Schneider and Ingram (1993) have noted, social construction influences who participates in the policy creation process. If people believe they may be degenerating because of their age or if they believe no audience exists to sympathize with demonstrations, few are likely to lead protests. If pilots en masse staged slowdowns or refusals to work in solidarity with their colleagues of 65, the heart of the battle to change policy would already have been won. That such demonstrations do not occur shows how prevalent age-related stereotypes remain in our

society--and how they are held even by those they most directly affect. At present, age still remains one of the last ascriptive characteristics where de jure discrimination and social approval meet.

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