Age Discrimination Revisited

Peter H. Schuck
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I am tempted to contrive a clever title for this riposte to Dean Alexander’s paper. Self-defense, after all, is a justification available even to scholars afflicted with homonymous surnames. Unable to come up with anything more amusing than Alexander’s Ragged Stand, however, I have decided to leave the witticism, if not the wit, to others and get on with what it is I have to say about age discrimination. As recompense for my admirable self-restraint, however, I shall take a small liberty. I shall recall, mutatis mutandis, the experienced litigator’s advice to the novice: “If the law is against you, argue the facts. If the facts are against you, argue congressional intent. If congressional intent is against you, argue dissenting opinions in state court decisions, speeches inserted in the Congressional Record by a single member of the House, or authorities that no longer exist. If those, too, are unavailing, write law review articles.” As will become evident, Dean Alexander has carefully heeded the old lawyer’s counsel.

My paper consists of three sections. In the first section, I identify and dispute the central definitional, philosophical, legal, and empirical premises and claims that Dean Alexander advances. In the next section, I briefly respond to Alexander’s specific criticisms of my earlier article on the subject of age discrimination. In the concluding section, I attempt to place the question of age discrimination in the larger context of social policy toward the elderly.

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3. Although the elderly seemed to have been the primary object of Congressional concern, the Age Discrimination Act, 42 U.S.C. §§ 6101-6107 (1976 & Supp. III 1979) [hereinafter cited as the ADA or the Act], applies, and was intended to apply, to all age groups, not merely the elderly. Schuck, supra note 2, at 29, 89. This universality of coverage creates insuperable difficulties for devising a sensible, coherent meaning for the Act. See Schuck, supra note 2, at 75; Teitelbaum, The Age Discrimination Act and Youth, 57 CHI. KENT L. REV. 969, 973 (1981) [hereinafter cited as Teitelbaum]. In the remainder of this article, I shall assume—contrary to fact—that the Act was intended to protect only the elderly, and I shall address only its effects upon the elderly.
THE CONCEPTUAL UNDERPINNINGS OF A DEFINITION OF AGE DISCRIMINATION

If one is to discuss the question of age discrimination in an intelligent, coherent manner, one must first develop a defensible definition of what it is, or at least what it is not. This requirement seems plain enough, but it is even clearer that neither Congress nor the Department of Health and Human Services has ever met it. Legal scholars should endeavor to fill that void.

Any act of invidious age discrimination is deplorable, an affront to human dignity. When committed by the government or by others with its connivance, such an act ought to constitute a violation of law. This much, I trust, can be taken as axiomatic. The difficulty, however, is that age discrimination is not ipso facto invidious. "Discrimination" is a morally neutral concept; indeed, in certain common usages, discrimination connotes desirable qualities of perspicacity and judgment, the ability to perceive and isolate those features of a situation that properly distinguish it from other situations that to the less acutely discerning eye seem similar. In other equally common usages, however, discrimination bears a morally reprehensible connotation: the refusal to evaluate people or situations on their merits, to accord them the respect to which their individuality ought to entitle them.

Both of these usages, of course, beg all of the important questions. So does the word "invidious," which I used to lubricate my axiom only a few sentences ago. What features of a situation ought to be the basis for distinguishing it from another? What principles or criteria ought to animate the selection of those features? What do we mean by "merit" and how are we to recognize it when we see it? What makes a discrimination "invidious"? I do not for a moment suggest that these questions are readily answered. They are not. My point, rather, is that these are the questions that we ought to address. These questions bring us to the task with which we must begin: the fashioning of a coherent definition of age discrimination, one that enables us to distinguish between "good" discrimination and "bad" discrimination.

In my earlier article on this subject, I maintained that Congress had utterly failed to perform, or even to essay, this elementary task

4. See Schuck, supra note 2, at 83-84.
when it designed the original Act, or afterwards. I also suggested that
the subsequent Civil Rights Commission report, proceeding on the ba-
sis of a palpably deficient methodology, very nearly succeeded in foist-
ing off upon the Congress a definition of age discrimination that can
only be accurately characterized as preposterous.\(^9\) This definition was
of truly oceanic breadth; if taken seriously, it would have rendered in-
valid, or at least seriously suspect, under the Act the National Council
on Senior Citizens, family planning programs targeted upon women in
their childbearing years, and age-targeted subsidized adoption pro-
grams.\(^{10}\)

In addition, I argued for a point that a moment's reflection con-
irms—that society employs age ubiquitously as a criterion for distin-
guishing between people in public and private programs, and I
concluded, somewhat more controversially, that its reasons for doing so
are usually quite sound; indeed, these reasons are often grounded not
merely in policy considerations but in fundamental morality.\(^{11}\) Al-
though this theme has been recapitulated by several of the papers
presented to this conference,\(^{12}\) Dean Alexander does not appear to re-
sonate sympathetically to it. I shall discuss in a moment why this is so.

Let us set aside for now an analysis of the circumstances under
which age distinctions are commonly used and countenanced,\(^{13}\) and
consider instead the more general criteria (usually implicit) that we em-
ploy in deciding whether or not any particular use of age should be
regarded as legitimate or as illegitimate ("invidious"). Evidently, Dean
Alexander has one such criterion in mind,\(^{14}\) for he asserts unequivo-
cally that age discrimination (and here he clearly means invidious dis-
crimination) "necessarily" occurs when an age classification is
employed in a way that "stereotypes" an individual.\(^{15}\) He does not
clarify precisely what it is about stereotypes that makes them so invari-
ably odious. A close reading, however, reveals that he has two prin-
cipal objections. First, stereotypes are "stigmatizing."\(^{16}\) Second, they

9. Age discrimination was defined as "any act or failure to act, or any law or policy that
adversely affects an individual on the basis of age." Id. at 2.
10. Schuck, supra note 2, at 49-50.
11. Id. at 34-35.
12. See, e.g., Teitelbaum, supra note 3; Neugarten, Age Distinctions and Their Social Func-
13. See Schuck, supra note 2, at 31-32; Teitelbaum, supra note 3, at 971-72.
14. Whether it is the only such criterion that he has in mind is difficult to say. Certainly, it is
the only one that he advances.
15. Alexander, supra note 1, at 1011-16.
16. Id. at 1112-13.
fail to "individualize treatment." I shall consider each of these objections in turn.

The Question of Stigma

Despite the central importance of the notion of stigma to his position, Alexander does not trouble to define it but rather contents himself with asserting it as a self-evident phenomenon. In truth, its sociological meaning is not at all obvious or easily grasped. We can perhaps agree that it refers to a negative quality or opprobrium that attaches to the one who is said to be stigmatized. Its etymological derivation, from a word meaning a scar left by branding with a hot iron, captures that quality even more vividly.

The relationship of stigma to disadvantage is complex. Clearly, one who is stigmatized suffers a loss of reputation and dignity in the eyes of others, as well as more palpable injuries at their hands. Stigma, however, is not merely the antecedent of disadvantage; in addition, the opprobrious sources of stigma are often seen as justifying such treatment, thereby confirming, reinforcing and entrenching both the stigma and the disadvantage. The stigmatization of blacks as lazy or uneducable often led to refusals to hire or train them, not merely disadvantaging them but also depriving them of the employment and education necessary to escape from their stigmatized status. Stigma and disadvantage, then, display strong causal and correlative affinities. Their propensity to converge depends upon a number of factors, including the ability of the disadvantaged group to form political alliances, the durability of the disadvantage, the extent to which disadvantaged persons are "grouped" with others who possess stigmatized attributes rather than being treated simply as disadvantaged individuals, the kinds of reasons that are imputed to account for the disadvantage, the distribution of stigmatized attributes among the disadvantaged population, and others. But stigma and disadvantage are not isomorphic—empirically, conceptually, or morally. American Jews, for example, are often stigmatized but are not, in conventional terms, a disadvantaged group. American women are often disadvantaged but are not, again in conventional terms, stigmatized.

The factors mentioned above may help us to identify the presence of stigma when only disadvantage is apparent. But in doing so, several other questions must be addressed. One is locational. Is stigma, like beauty, in the eye of the beholder or does it reside instead in the heart

17. Id. at 1014.
of the stigmatized? Is stigma present when one person (B) holds an unfavorable opinion of another (A), quite apart from the feelings that A may hold toward himself? Is it present only when a third person (C) who knows nothing of A’s situation nevertheless imputes discredit or shame to A on the basis of something that B has done to A, such as having classified A in a particular way?

The second set of questions involves the measurement of stigma. How do we know whether a person (or, more precisely and relevantly, a class of persons such as the elderly or children) feels stigmatized or is stigmatized by others? Does any feeling or imputation of disadvantage or loss to a person or group amount to stigma? Or, as suggested above, are there more objective criteria for evaluating claims of stigma?

These are exceedingly difficult questions, but we do not wholly lack tools for beginning to answer them. It seems plain enough that discrimination, in the conventional pejorative sense, is inescapably a sociological category; it can be defined and verified only by recourse to social norms and perceptions. Inevitably, society must make countless choices that differentially affect individuals and groups of individuals, choices that therefore create feelings of loss, disappointment, and relative deprivation. If social choices could be invalidated simply because they disadvantaged a particular group, few such choices could be implemented. Social choices only rarely make everybody better off, and the transaction costs of exacting compensation from the winners would be prohibitive. Yet a system that permitted that kind of veto power would be socially perilous in the long run, for even those who are disadvantaged by a particular social choice will usually stand to gain from a system that is hospitable to innovation and adaptation to new opportunities, circumstances and needs. Rigidity and marasmus serve the interests only of those who benefit from the status quo.

Society, then, has strong reasons to insist upon satisfying itself that certain conditions exist before permitting disadvantage, coupled with an allegation of stigma, to overturn duly-adopted, collective decisions. At a minimum, two conditions seem appropriate. First, the stigma must be located in a widely-shared hostility toward the putatively stigmatized person or group, rather than in idiosyncratic or isolated atti-

18. Even these few "Pareto-superior" choices—that is, choices which can make at least one person better off without making anyone worse off—might be thought to stigmatize if this loose sense of the term were adopted. Indeed, even a choice that might make both A and B better off than before, might nevertheless be deemed objectionable by A on the ground that it makes B "more better off" than A and thus stigmatizes A.

tudes. Second, the animus and deprivation that are thought to fuel the stigma must rise to a level of intractability and systematic oppression that distinguishes them from the run-of-the-mill oppositions and struggles that are inherent in the turbulence of vigorous democratic politics. It is not too much to say that the success of a liberal polity, its ability to respond effectively to changing opportunities and perceived needs while assuring justice to truly stigmatized minorities, depends upon our ability to recognize and maintain this distinction between “ordinary” and “oppressive” politics, and to nourish the values that underlie it.

For these reasons, the Supreme Court, properly in my view, has been reluctant to find invidious discrimination where there is “only” relative disadvantage, political weakness, or disappointment. In my article, I adduced evidence that I find compelling to buttress the Court’s essentially unsupported conclusion that the elderly, somehow defined, are not in fact stigmatized or systematically disadvantaged, at least not in a manner that justifies “extraordinary protection from the majoritarian political process.” Recent events provide additional dramatic evidence for this proposition. Despite far-reaching reductions in federal expenditures proposed by the Administration in its fiscal 1982 budget and virtually adopted by the Congress in its reconciliation legislation, only two major demographic groups appear to be emerging from the budget process essentially unscathed: veterans and the elderly. Thus, the Medicaid program, which benefits the poor, is to be significantly limited, while Medicare, which benefits the elderly, is to remain relatively unchanged. The elderly are expressly exempted

20. This constrained definition of stigma is an important element of the conception of “discrete and insular minorities” first accorded constitutional status in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), though it does not, I think, exhaust that conception.


22. See Neugarten, supra note 12, at 818-20, for discussion of the definitional difficulties.

23. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976). See Schuck, supra note 2, at 64, n.190, discussing and criticizing this case (for its analysis, not its holding).


26. See id. It may be no coincidence that these are the two groups that have been most politically effective, for they overlap to a considerable extent.

27. The proposed cuts in Medicare would amount to about $1 billion in a program with current expenditure levels of almost $41 billion. Moreover, more than half of that reduction merely constitutes a “bookkeeping maneuver.” See, Two Panels Deepen Reagan Medicare Cuts, N.Y. Times, June 9, 1981, at B10, col. 1. In contrast, restrictions on Medicaid growth that have been proposed are drastic. See Budget Revisions, supra note 24, at 69.
from the severe cuts in the food stamp program that are being legislated. Perhaps the single most impressive piece of evidence in this regard, however, was the stunning, unprecedented, unanimous (by a vote of 96-0), and almost instantaneous repudiation by the Senate of President Reagan's proposals to reduce Social Security benefits.

Small wonder, then, that political commentator George F. Will has described the elderly as "the mightiest lobby in Washington." There are strong reasons to believe that Will is correct. The political success of the elderly is due to a number of factors: great and growing demographic strength, effective political leadership, and the natural sympathies and alliances that link the elderly to the rest of us.

I wish to stress this last factor both because of its intrinsic importance and because of the fervor with which Dean Alexander denies it. He asserts, for example, that "the prejudice against the elderly is psychologically deep-seated," and that "the elderly are an affront" to a culture that celebrates youth. These are serious, not to say reckless, charges to level at an entire society, as distinct from particular individuals. In support, however, he cites only Congressman Pepper's rhetorical excess, political hyperbole that should not be taken seriously by serious people.

Doubtless, one can cite studies—Dr. Robert Butler's book is an admirable example—that indicate that many younger people (and many elderly persons as well) prefer youth to old age, fearing the aging process as a harbinger of their declining power and mortality. Surely, erroneous impressions of the elderly are commonly held, impressions that often crystallize into stereotypes that, as applied to particular individuals, are distorting or downright inaccurate.

We hardly need social science to remind us of these fundamental human attitudes. These attitudes, however, are just that—aspects of

31. Schuck, supra note 2, at 40-42.
32. Alexander, supra note 1, at 1011.
33. Pepper, for example, asserts that prejudice against the elderly is demonstrated by "society's unwillingness to provide them with services which we believe other age groups are entitled to as a matter of right." H.R. Rep. No. 67, 94th Cong., 1st Sess. 15 (1975). Alexander, supra note 1, at 1011. The quotation does not indicate what services he has in mind, much less which services are legal entitlements of other age groups but denied to the elderly.
human nature. They reflect the immutable fact that we, all of us, harbor ambivalent feelings about aging. We approach old age with the same kind of mixed and confused emotional states of love and hate, of sympathy and revulsion, with which we confront success, failure, marriage, parenting, and many other conditions of a fully-lived and deeply-textured existence. One may regret these conflicting feelings. One should certainly seek to understand them better, and even attempt to resolve them. But the relevant and overwhelmingly significant consideration, the one that Dean Alexander utterly fails even to entertain, is that by acknowledging these attitudes we do not necessarily stigmatize the elderly or engage in invidious age discrimination. What we necessarily do is to concede our ambivalence toward one aspect of our existence. Ambivalence may, under certain circumstances, harden into bias, but these phenomena are by no means the same. By treating them as if they were, Alexander, and the Age Discrimination Act, seek to administer strong medicine to a remarkably healthy patient, thereby violating the first rule of social policymaking: “If it ain’t broken, don’t fix it.”

The Question of Individualized Treatment

I have been considering Dean Alexander’s first objection to age classifications: that because they reflect stereotypes, they necessarily stigmatize the elderly. I should now like to turn to his second objection: that as stereotypes, they fail to “individualize treatment.” As an empirical proposition, this statement is incontrovertible. Age classifications do in fact reflect stereotypes; that is, they impute to those within the class certain attributes to which the particular classification is thought to be relevant. Those who devise the classification may be unaware of whether or to what extent that imputation is accurate. On the other hand, they may know the imputation to be inaccurate to some degree but decide, for reasons of policy, to engage in it nonetheless. In either event, age classifications, as stereotypes, do reject individualized judgments; generalization, after all, is what classification is all about. To observe that a classification fails to permit individualized judgment is to say nothing about whether that classification is, all things considered, justified or desirable. To criticize a classification because it fails to individuate makes no more sense than to condemn a nose because it fails to hear.

35. For an illuminating exploration of ambivalence in the medical field, and its relationship to legal structures, see R. Burt, Taking Care of Strangers (1979).
The second response to Alexander’s “individualized treatment” objection is that it applies equally to all uses of age, the benign as well as the malignant, the suspect as well as the universally accepted. Indeed, this objection applies equally to all uses of any other conventional classifying criterion, such as income, geographic location, or family size. If the fact that a classification fails to individuate constitutes a fatal deficiency, then it is difficult to comprehend how any classification, age-related or otherwise, can be employed in social policymaking. Merely to state this implication of Alexander’s position is to reveal his fundamental error.36

We must presume that he knows this. If he nevertheless considers age classifications to be objectionable, therefore, it must be for some reason other than their failure to individuate. It must be because that failure is far more pernicious in the case of age classifications than with respect to other classifications. If this is true, as Alexander evidently believes, it would be important, indeed crucial to his argument, to know why it is true. Yet he fails to adduce a single reason to support it. In fact, as I have demonstrated, there are strong reasons to believe precisely the opposite—to believe that age is a relatively sound criterion for classifying people for a bewildering variety of legitimate and desirable social purposes.37

Alexander’s passion for individualized treatment—a passion that one might readily share in the best of all possible worlds—puts one in mind of the little boy who insisted that he knew how to spell “banana” but that when he got to the “na,” he could never remember where to stop. Individuation is, of course, a highly valued social objective, reflecting our belief in the ultimate uniqueness of each human being and our desire to do justice to that uniqueness. But this value, precious as it is, must be accommodated to other social values that conflict with it. In particular, it must, within constitutional limits, accept the cost constraints applicable to public programs that can confer benefits on many, but not on all, citizens. As the Supreme Court has observed, “There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are

36. Alexander implicitly concedes as much without realizing it when he asserts that age classifications are “necessary” and therefore permissible “in insurance and annuity provisions and perhaps in retirement compensation schemes.” Alexander, supra note 1, at 1021. But these uses of age, no less than those that he denounces, fail to provide “individualized treatment.” See, e.g., Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978). They are not “necessary,” but are merely more cost-effective than individuation in those contexts.
37. Schuck, supra note 2, at 31-35. See also Teitelbaum, supra note 3, at 995-96; Eglit, supra note 12, at 859-61.
appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.”

A world in which one could directly and unequivocally measure those ineffable qualities or conditions such as “need” toward which social policy is ultimately directed, rather than having to resort to crude proxies such as age or income, would be a policymaker’s nirvana. It is not, however, the world that we inhabit or that we can, at any reasonable cost, readily contrive.

It is, of course, entirely plausible, perhaps even probable, that policy choices exist in which the costs of individuation, while significant, may nevertheless be outweighed by the resulting social benefits—choices, that is, for which age classifications simply cannot be justified on utilitarian grounds. Certain age-based mandatory retirement rules and age-limited admission to medical schools may be examples. The costs of such rules—in magnifying deficits in the Social Security trust fund or in limiting individual work opportunities—may plausibly be thought to dwarf their benefits. There may also be situations in which age classifications, although perhaps supportable on utilitarian grounds, offend widely shared notions of distributive justice. Limiting access to certain life-saving medical procedures on the basis of age might be an example. Nevertheless, age classifications that are, for one or another of these reasons, socially repugnant appear to be uncommon. That being the case, a sensible approach for Congress would have been to focus the Act’s prohibitions upon particular practices, conditions, or contexts in which individuation, or at least the exclusion of age-related classification, would seem justified.

It is rather ironic, then, that Alexander, who would evidently condemn almost any age classification that stereotypes and fails to individuate, notes with evident approval that “the apparent purpose of the Age Discrimination Act was to provide a generic prohibition against age discrimination that would make an individual act by act attention

39. See discussion in Schuck, supra note 2, at 71-72, 89.
41. For an elaboration of this point, see Schuck, supra note 2, at 89-90.
43. “When stereotypes are employed, discrimination necessarily results.” Alexander, supra note 1, at 1015 (emphasis added).
unnecessary." He seems unaware that Congress' choice in the Act to generalize rather than to tailor its remedy to the particular context offends some of the same values that he elsewhere celebrates in the name of individuation.

This congressional choice can be justified, if at all, only on the ground that invidious age discrimination is so pervasive, so firmly entrenched in our law and in the practices of recipients of federal assistance, that the evident risks of statutory over-breadth—risks to the integrity of legitimate collective choice and programmatic design—are minimal. Congressman Pepper advances precisely this claim, and Dean Alexander, as I have noted, gives every sign of agreeing with him. Yet the evidence that Alexander cites in support of this position is so frail that it disintegrates, like a leaf in winter, at the merest touch. Thus, he begins with a statement by a judge indicating stereotyped attitudes toward the elderly, a statement presumably offered to demonstrate how deeply "ageism" is etched in our law. Yet as Alexander himself acknowledges, that statement appears in a dissenting opinion, one in which no other judge joined and one that evinces a paternalistic, if arguably misguided, benevolence on the judge's part rather than an invidious intent. Alexander's next offer of proof for the pervasive ageism hypothesis is a provision that establishes several alternative bases for eligibility of veterans for disability benefits, one of which mandates that the applicant be found eligible if he or she is 65 or older. It is not clear why Alexander finds this provision objectionable, as it is obviously designed to benefit the elderly by assuring them of disability benefits without requiring each to prove, as younger applicants must, that their disability has rendered them unable to engage in "substantial gainful employment." Next, Alexander calls our attention to a provision permitting recomputation of compensation payments for work injuries suffered by elderly federal employees. Unfortunately for his argument, however, the provision was repealed back in 1974. Finally, Alexander offers a quotation from an article on protective services for the elderly. In fact, the article merely documents the unremarkable, and in my view unobjectionable, fact that many juris-

44. Id. at 1018.
45. Id. at 1011.
46. Id. at 1012-13.
50. Alexander, supra note 1, at 1015.
dictions list old age as *one of a number of factors that may be relevant* to a determination as to one's competence and need for a court-appointed guardian.\(^{51}\)

It may well be that ageism is widespread in our society and, more particularly, in federally assisted activities. If so, Alexander's inability to identify offending laws and practices is all the more remarkable. Perhaps the explanation is that ageism, while pervasive, is difficult to prove, and that its presence is concealed beneath the surface of ostensibly reasonable laws and practices. If this is the case, then Alexander has an obligation to tell us how we can go about unmasking it without at the same time undermining the vast edifice of benign arrangements that appear, on the face of things, to be indistinguishable from the pernicious ones. As we have seen, mere imprecations against "stigma" and "lack of individualized treatment" cannot, without more, perform this service.

**SOME RESPONSES AND CLARIFICATIONS**

Dean Alexander's paper levels a number of criticisms at my earlier article on the Act, criticisms that either mischaracterize my analysis or are otherwise mistaken. I should like very briefly to respond to each of them seriatim.

1. He states that I provided "an apology" for the legislative history of the Act.\(^{52}\) In fact, precisely the opposite is true, for I analyze that history as revealing a breakdown of the legislative process\(^{53}\) and propose a construction of the Act that will, in my view, minimize the damage that this process has created.

2. He states that I believe that the elderly are "less in need of legislative intervention than more traditionally protected groups."\(^{54}\) My argument, however, was only that the elderly are not entitled to the special legal protections conferred upon truly stigmatized minorities, such as blacks, and that as a policy matter, the Act is a decidedly poor instrument for advancing the interests of the elderly. Indeed, my distinction between allocative and nondiscriminative models of legislation was designed in part to illustrate that had Congress correctly defined the problem not as one of "ageism" but as one of inadequate program benefits for the

\(^{51}\) *Id.*
\(^{52}\) *Id.* at 1009.
\(^{53}\) See, e.g., Schuck, *supra* note 2, at 83-84.
\(^{54}\) Alexander, *supra* note 1, at 1010.
elderly, “numerous allocative options would have been available” for assisting them in a responsible, carefully tailored, needs-oriented fashion.\textsuperscript{55}

3. He states that I argued that the use of age classifications is “entirely reasonable.”\textsuperscript{56} In fact, I made a more limited and more complicated claim consisting of three parts. I maintained, first, that Congress, the Department of Health, Education and Welfare, and the U.S. Commission on Civil Rights had failed to identify any actual age classifications that are so clearly unreasonable that they could not be plausibly defended on utilitarian or distributive justice grounds, a failure in which Alexander now joins. In addition, I argued that if any palpably unreasonable age classifications exist, the elderly possess ample political resources to eliminate them through the conventional political process without needing an extraordinarily sweeping nondiscrimination law such as the Act. Finally, I contended that under these circumstances, Congress should have targeted its prohibition of age classifications upon any “discrete practices, such as age-limited medical school admissions practices, thought to be invidious.”\textsuperscript{57}

4. He imputes to me a view that textual disparities between the “normal operation” exception to the Act and its precursors in other legislation imply a narrower ambit for the former than for the latter.\textsuperscript{58} Although not a model of clarity on the point, I conceded that such a view was “arguable,”\textsuperscript{59} but contended that this unexplained textual disparity was trivial compared to other differences militating in favor of a broader interpretation of the ADA exception.\textsuperscript{60}

5. He states that “cost-benefit analysis is not [intended] to provide the basis for age discrimination,” implying that I disa-

\textsuperscript{55} Schuck, supra note 2, at 89.
\textsuperscript{56} Alexander, supra note 1, at 1010.
\textsuperscript{57} Schuck, supra note 2, at 89. As I have demonstrated, above, see note 3, Alexander has not managed to identify a single age classification that the elderly would (or at least should) find objectionable. He does, however, raise “the specter of subtle state interference of some sort.” Alexander, supra note 1, at 1018. Nevertheless, in view of his rather guarded approval of plans providing reduced benefits for those taking early retirement (they are, in his view, “probably” valid), \textit{id.}, one may well suspect that few actual age classifications would survive Alexander’s scrutiny. Obviously, we disagree on this. I think that the court in Seanor v. United States, slip. op. May 30, 1980 (Ct. Cl.), properly characterized plaintiff’s claim as “absurd”. See Alexander, supra note 1, at 1018.
\textsuperscript{58} Alexander, supra note 1, at 17-19.
\textsuperscript{59} Schuck, supra note 2, at 66 n.202.
\textsuperscript{60} Id. at 68-72.
In fact, I stressed that cost-benefit or cost-effectiveness "considerations" were intended by Congress to be relevant to, though not determinative of, the applicability of the Act's exceptions, and that (with all due respect to Congressman Pepper) the targeting of scarce program resources where they could most fully achieve the program's purposes could not, in light of the other safeguards against unfair treatment of the elderly and the applicability of the Act to all age groups, sensibly be characterized as invidious age discrimination. 62

6. In criticizing my interpretation of the "statutory objective" exception, he cites an amendment that was defeated in Congress, arguing that such an amendment is necessary to prevent program administrators from fabricating any objective needed to justify an age classification. 63 His argument, of course, depends upon a rather curious use of legislative history. It also implies that "statutory objective" can be equated with any objective that an administrator can dream up. Needless to say, such an interpretation would pervert congressional intent and would surely be unacceptable to the courts.

7. He objects to my view that when Congress allowed the use of age classifications that bear a "reasonable" relationship to a program's "normal operations" or "statutory objective," it required only that that relationship be rational rather than "direct and substantial." He contends that by failing to define "reasonable," Congress left regulators free "to formulate their own standards." 64 By conflating these standards, however, Alexander ignores the fact that they are importantly different in both formulation and substantive effect. Indeed, the Supreme Court has distinguished these standards sharply (perhaps too sharply) in its recent equal protection decisions, explicitly noting the crucial effect of this difference upon the outcome of decisions. 65

8. Finally, he begs the crucial questions in asserting that the

61. Alexander, supra note 1, at 1022.
62. Schuck, supra note 2, at 75-76. On the important but limited role that cost-benefit and cost-effectiveness considerations ought to play in the design and evaluation of programs of social legislation, see Schuck, A Tool for Assessing Social Legislation, Reforming Regulation 119 (Clark, ed. 1980).
63. Alexander, supra note 1, at 1023. He makes similar argument and criticism, based upon the same rejected amendment, with respect to the "reasonable factors other than age" exception. Id. at 1025.
64. Id. at 23; Schuck, supra note 2, at 79-80.
construction of the Act that I propose would be "harmful."66 One must insist upon asking those questions—harmful to whom, and in what sense? As we have seen, the age classifications cited by Alexander are either designed to advance the interests of the elderly or are apparently irrelevant to them. Even if one assumes, as Alexander evidently does and as I do not, that the interests of the elderly, rather than the interests of society as a whole, is the appropriate touchstone of public policy, and that the interests of the elderly can usefully be regarded as being unitary, it does not follow that the elderly would be better off if these classifications were invalidated. I have endeavored to demonstrate that in the long run they, as well as the rest of us, would almost certainly be worse off in that event.67

AGE DISCRIMINATION: A SOLUTION IN SEARCH OF A PROBLEM?

I conclude by raising again the questions with which the Congress, the Department of Health, Education and Welfare, and Alexander should have begun, but did not: What is invidious age discrimination, and how significant a problem is it in federally assisted programs?

I have attempted to answer the first question, albeit indirectly. I have tried to show that invidious age discrimination is not established merely by demonstrating that a particular age classification is arguably based upon a stereotype, or that a program fails to provide for individualized assessment of each person who seeks to enjoy its benefits, or that the elderly, somehow defined and homogenized, receive a percentage of program benefits lower than their percentage of the eligible population. But while my analysis may establish what invidious age discrimination is not, that is not the same as defining what such discrimination is. This is a more problematic task. Nevertheless, I am emboldened to attempt it by the definitional void that now exists, and by the knowledge that error can better be extirpated when it is out in the open. I therefore propose that if the current broad-brush approach is to be retained, age discrimination should be defined as follows: an explicit use of an age factor, or of a non-age factor having a substantially disproportionate and adverse effect on the elderly, that cannot be shown to be rationally related to achieving legitimate operational and programmatic objectives of the federally assisted activity in question,

66. Alexander, supra note 1, at 1027.
67. Schuck, supra note 2, at 89-93.
objectives that include targeting program resources where they will do the most good.

Such a definition, of course, bears a striking resemblance to the construction of the Act for which I contended in my article.\textsuperscript{68} It neither provides a bright-line standard nor can it decide all cases without the need to resort to further factual inquiry and analysis. Nevertheless, if one is resolved to impose a generalized, Title VI-type prohibition of age discrimination that applies across-the-board to all federally assisted activities, a resolution that in my view is misguided, such a definition is probably as appropriate to that task as any that can be devised.

To the question of the extent of such discrimination in federally assisted programs, the short, accurate answer is that nobody knows for sure. One is impressed, however, by the paucity of evidence that much age discrimination exists outside the employment area, which has been covered for almost fifteen years by the Age Discrimination in Employment Act\textsuperscript{69} (a remedy much strengthened in 1978).\textsuperscript{70} Certainly, no substantial evidence of non-employment age discrimination was presented to Congress before it enacted the Age Discrimination Act, and the Civil Rights Commission's subsequent indictment was, as we have seen, singularly unconvincing.\textsuperscript{71} Despite Dean Alexander's labors, he too has failed to identify a single age classification in the law or practices of a recipient of federal assistance that is not (1) benign toward the elderly, (2) at least arguably defensible on utilitarian grounds, or (3) already prohibited under other statutes, such as the Age Discrimination in Employment Act. The Department of Health, Education and Welfare, marshalling far greater resources than any mere scholar could muster in a desperate search for such laws or practices, also drilled a dry hole.\textsuperscript{72}

In contrasting these substantial quests with their paltry results, I am not asserting that there are no laws or practices that fail to meet the three criteria mentioned above and are therefore suspect. Rather, I only wish to emphasize that institutions with a powerful political incentive to find them have so far come up empty-handed. This failure of proof becomes especially striking when one considers the little that we do know concerning the perceptions of those who are presumably in

\textsuperscript{68} Id. at 58-80.


\textsuperscript{71} Schuck, supra note 2, at 49-54. Teitelbaum, supra note 3, at 974.

\textsuperscript{72} Here, I rely upon personal observation and participation. See also Schuck, supra note 2, at 42-49 and 55-58.
the best position to identify widespread invidious discrimination if it exists: the elderly themselves. The elderly, it appears, do not regard age discrimination in federally assisted programs as a very common or significant problem. Thus, Kahana and collaborators report survey data showing that “when respondents did report problems [in dealing with public agencies], they seldom attributed them to their age,” and they conclude from their study that “actual instances of age discrimination, while admittedly unfair and destructive, in fact may be relatively rare.”

David Marlin reports that complaint activity under the Act has been “exceedingly low,” amounting to only 83 filed complaints in almost 1½ years—or an average of about one complaint per state per year. This, in an elderly population of some 25 million! Moreover, despite the creation of a private cause of action under the Act, only a few cases appear to have been filed and, although I have not conducted an exhaustive search, I am unaware of any case in which a court has upheld a claim of age discrimination under the Act.

This summary of the fragmentary evidence bearing upon the extent of age discrimination in federally assisted programs is of course not conclusive one way or the other. Nor is conclusive proof likely to be forthcoming. Nevertheless, this evidence does strike me as quite suggestive, raising the distinct possibility (in fact, I believe that it is a strong probability) that age discrimination—in such programs and as I have defined it—is at most an isolated phenomenon. If this is true, it may not be unfair to characterize the Act, especially as Alexander and the Civil Rights Commission would interpret it, as a solution in desperate search for a problem.

Perhaps, then, the Act is merely one more instance of legislative overkill, taking its place in the United States Code next to hundreds of other laws that make grandiose promises that will not be kept. If this is all it is, it hardly merits the attention that I and others have devoted to


74. Marlin, Enforcement of the Age Discrimination Act of 1975, 57 Chi. Kent L. Rev. 1049 (1981), [hereinafter cited as Marlin]. Marlin’s summary description of the allegations in these complaints indicates that many seem to be rather undifferentiated grievances against agencies, evincing no obvious relationship, even on their face, between the denial of benefits and the complainant’s age.

It should be emphasized that Marlin believes that this low level of complaint activity may simply reflect problems with the functioning of the federal enforcement machinery, rather than reflecting a lack of widespread age discrimination in federally assisted activities. I am quite dubious that this is the correct explanation, but the possibility cannot be entirely dismissed.

75. This fact may suggest that I overestimated the difficulties that the Act would actually create for the courts, although the jury is of course still out on the question. See Schuck, supra note 2, at 91-93.
The lineaments of political compromise, after all, cannot be expected to conform to the neat symmetries of which scholars are so fond. For those of us who care about the equity and efficiency of federal policy toward the elderly, however, the Act may be unfortunate for other, more substantial reasons. It represents a classic example of how social policy should not be made. My earlier article fleshes this proposition out in considerable detail and I do not propose to rehearse it. For present purposes, it suffices to say that the Act conferred upon the elderly a most hollow and possibly Pyrrhic victory. It constituted an empty gesture, a form of political prestidigitation. By defining the problem of the elderly as “ageism” rather than inadequately designed or poorly targeted program benefits, Congress was able to justify enacting a nondiscrimination law rather than an allocative one. Congress thereby earned political capital with the elderly without exposing itself to the tiresome and controversial tasks of appropriating funds, redesigning programs, or reducing the allocations to other, less favored age groups.  

The Act would be less disturbing, I suspect, were we not so obviously at a point in time at which some hard choices must be made concerning social policy towards the elderly. The necessity for such choices was plain enough when the Act was considered in 1975 and 1978; it is even more compelling today. Yet the Act serves to bemuse Congress, the general public, and perhaps even the elderly themselves, distracting their attention from the real and substantial problems that confront many elderly people. These problems relate principally to that small fraction of the elderly that continues to live in poverty, and to that even smaller fraction that lives in institutions.

I stress that these fractions are small, not in order to minimize the importance of these problems, but rather to focus attention on them by isolating their true dimensions. New data concerning the elderly suggest that in relation to even the recent past, the vast majority of elderly people are living reasonably secure and contented existences. Thus, Rabushka and Jacobs, drawing upon government housing studies, report that 70% of all elderly live in houses; 70% of these own their own homes; over 80% of these make no mortgage payments; the quality of the housing is generally adequate and improving by conventional standards; and the elderly are generally satisfied with their housing.  

76. See id. at 89-91.

77. These data, especially those relating to housing, are collected and discussed in A. Rabushka and B. Jacobs, Old Folks at Home (1980) [hereinafter cited as Rabushka and Jacobs].
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1974 Harris survey found that of all older Americans with living children, 80% had seen them within the past week and over half within the last day. Some 80% of the elderly say that their health is excellent, good or fair. As of 1977, about 94% of the elderly were above the poverty line (at least if in-kind services and transfer payments are included); this represents a dramatic improvement in their income position since 1960. The growth in the equity values of housing during this period has also substantially enhanced the asset holdings of the elderly. Attitudes toward the elderly on the part of young people appear to have improved considerably in recent years. All of these changes partly reflect the impressive structure of transfer payments, service benefits and special tax benefits for the elderly that have been established during the last 15 years.

These achievements, extraordinary and widely distributed as they are, have nevertheless eluded a small minority of the elderly. Approximately 1½ million of them, many in rural areas, continue to live in poverty despite Social Security, Supplemental Security Income, food stamps, and other programs. Five percent of the elderly live in nursing homes and other institutions, many of them in conditions that can only be described as execrable. Even those who are more fortunate often find themselves with cash flow difficulties because their only assets consist of the equity in their homes.

I enumerate these problems of poverty, institutionalization, and lack of asset liquidity among the elderly not in order to propose particular remedies to them, but to stress that it is these conditions, and not the phantom of widespread age discrimination in federally assisted programs, that ought to engage the passion, energy, and imagination of those who purport to speak for the elderly. These are truly problems in search of solutions. Happily, they also appear to be problems that a prosperous society should be able to address effectively.

78. See generally Kahana, supra note 73.
79. See Schuck, supra note 2, at 41-42; Rabushka and Jacobs, supra note 77, at 30-31.
80. See sources cited in Schuck, supra note 2, at 41 n.59.
81. See discussion in Rabushka and Jacobs, supra note 77, 122 and app. C.
82. Poverty among the elderly could probably be alleviated most readily by increasing the level of Supplemental Security Income (SSI) benefits, assuming that we are prepared to spend the necessary funds. Deinstitutionalization is in many ways a more difficult problem, involving numerous uncertainties and complexities in financing, organization, regulation and coordination of benefits. Nevertheless, there is no dearth of imaginative proposals. See, e.g., Vladeck, Unloving Care: The Nursing Home Tragedy (1980). To increase liquidity for the elderly, at least for the majority that owns homes, requires some relatively straightforward changes in credit arrangements, some of which are already being instituted. See Rabushka and Jacobs, supra note 77, at 157-58.