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## The Age Discrimination in Employment Act Amendments of 1978: A Legal and Economic Analysis

*American workers who are fast approaching the age of sixty-five may find that recent amendments to the Age Discrimination in Employment of 1967 (ADEA) have greatly reshaped their employment prospects. Examining these recent amendments from both a demographic and an economic point of view, the author provides a thorough analysis of the pros and cons of increasing the coverage of ADEA to persons up to seventy years of age. Against a backdrop of case law and legislative history, the author scrutinizes the amendments to the ADEA in search of the nature of age discrimination and the amendment's effect, both current and potential, upon the way of life of the American worker.*

In Jonathan Swift's famous satire, *Gulliver's Travels*, the hero encounters the Struldbrugs, a tribe of people gifted with long life, living in the Kingdom of Luggnagg. Gulliver expects to find them respected for their experience and wisdom, but learns that society considers them as nuisances, as if they were cursed. "As soon as they have completed the term of eighty years, they are looked on as dead in law . . . After that period they are held incapable of any employment of trust or profit; they cannot purchase lands, or take leases." The Struldbrugs were forbidden from begging "because they [were] provided for by the public, although, indeed with a very scanty allowance."<sup>1</sup>

Today, 250 years later, the 23 million Americans who reach age sixty-five receive a treatment not dissimilar to that accorded to the Struldbrugs. "Held incapable of any employment of trust or profit," the older Americans have, until recently, been summarily relieved of employment and responsibility upon reaching age sixty-five.<sup>2</sup>

Under the mandatory retirement scheme, members of the work

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1. J. SWIFT, *THE WORKS OF JOHNATHAN SWIFT*, D.D. 183 (1880) (first published in Nov., 1726). This story is a terribly true prophecy of Swift's own hapless condition for some years before his death. Lord Orrey remarks that "the description of the Struldbrugs is an instructive piece of morality; for if we consider it in a serious light, it tends to reconcile us to our final dissolution. Death, when set in contrast to the immortality of the Struldbrugs is no longer the king of terrors; he loses his sting; he appears to us a friend, and we cheerfully obey his summons, because it brings certain relief to the greatest miseries." *Id.* at 184.

2. Drucker, *Thinking About Retirement Policy*, Wall St. J., Sept. 15, 1977 at 24. "Compulsory retirement is as good as dead. The only question now is how fast it

force are compelled to retire when they reach a given chronological age. Mandatory retirement is but one example of discrimination based upon age, however, it is not the most common form.<sup>3</sup>

Recently the demands of society have fostered an impetus to relieve, with legislation, the imposition thrust upon the elderly<sup>4</sup> to retire at age sixty-five.<sup>5</sup> In March, 1978, a joint House-Senate committee reached agreement on a measure to amend the Age Discrimination in Employment Act of 1967 (ADEA).<sup>6</sup> The amendment abolished mandatory retirement for most federal employees<sup>7</sup> and increased, to seventy, the age of individuals protected by the Act.<sup>8</sup> Further, it rescinded the exemption previously granted to existing pension programs containing provisions that expressly require retirement before age seventy.<sup>9</sup> The last provision is of importance because the majority of mandatory retirements result from limitations imposed by pension plans.<sup>10</sup>

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will be abolished, and all signs point to its going much faster than anyone would have thought likely." *Id.*

3. Statistics compiled by the Labor Department in 1972 indicate 36 percent of the businesses investigated had violated one or more provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621-633 (1967). The Act prohibits employers of 20 or more individuals from discriminating against employees or prospective employees on account of age. *See* U.S. Dept. of Labor Employment Standards Administration, Report on the Age Discrimination in Employment Act of 1967, 6 (1972).

4. The terms "elderly" and "aged" will not be used in this comment to designate any chronological age, but will refer, in a general way to people 60 years of age and older. The use of these terms is not intended to be pejorative, but will serve to recognize that the members of this group are those most severely affected by age discrimination in employment.

5. There are several bills recently introduced to Congress recognizing the employment needs of the aged. S. 1784 would gradually extend the age of retirement over a three year period. S. 177 would raise the age to 68 years in 1978, 70 years in 1980, 72 years in 1982, and finally eliminate mandatory retirement completely in 1985. S. 481 would immediately remove all age restrictions. S. 615 encourages seniors (65 and over) to continue working through the offerance of a tax incentive (a delayed retirement credit of 6 2/3% per year). H.R. 1981 would amend Title VII of the Civil Rights Act of 1964 to proscribe age discrimination as well as sex, race and religious discrimination (42 U.S.C. § 2001). H.R. 6861 and 7945 would eliminate the mandatory retirement imposed on federal employees. The intent of these bills was largely realized with the passage of H.R. 5383, Pub. L. No. 95-256, 29 U.S.C. § 631, extending the age for mandatory retirement to 70 in the private sector and entirely eliminating the retirement requirement in the public sector.

6. 29 U.S.C. § 621-634 (1968).

7. Pub. L. No. 95-256, *amending* 29 U.S.C. § 633.

8. Pub. L. No. 95-256, *amending* 29 U.S.C. § 631.

9. *Id.*, *amending* 29 U.S.C. § 623.

10. Accurate determinations of the number of persons in the U.S. subject to mandatory retirement is difficult. Private pension plans currently cover an estimated 31 million workers, 16 million of whom are subject to some form of mandatory retirement.

In 1974 private pension coverage was put at 29.8 million. Skolnik, *Private Pension Plans, 1950-1974*, SOC. SEC. BULL. 3-17 (1976). An extrapolation of this figure over the ensuing four year period would raise the figure to approximately 31 mil-

The bill, passed by the House and Senate with nearly unanimous votes, was signed into law on April 6, 1978, by President Jimmy Carter.<sup>11</sup>

The law became effective in three steps. First, it rescinded the exemption granted to pension plans under ADEA,<sup>12</sup> voiding the provisions in private plans that compelled the retirement of employees before age sixty-five.<sup>13</sup> Second, on September 30, 1978, mandatory retirement for federal employees was abolished. Finally, on January 1, 1979, the coverage of the ADEA was extended to persons up to seventy years of age.<sup>14</sup>

The new law provides several exemptions: persons subject to mandatory retirement under the terms of collective bargaining agreements are not covered by the amended act until the expiration of their existing agreement or until January 1, 1980, whichever comes first;<sup>15</sup> the amendment did not alter the provision in the original act that exempted from coverage those occupations for which age is a bona fide qualification;<sup>16</sup> an employer must have twenty or more employees before he is subject to coverage

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lion. In 1974 it was estimated, of those covered by pension plans, 45 percent were subject to mandatory retirement. Kittner, *Forced Retirement: How Common Is It?*, 100 MONTHLY LAB. REV. 60-61 (Dec. 1977). This figure may be contrasted with a 1971 estimation of 58 percent for those under pension plans were subjected to mandatory retirement. Davis, *Pension Provisions Affecting the Employment of Older Workers*, 96 MONTHLY LAB. REV. 41-45 (1973). A more reasonable estimation of 52 percent would account for, yet not fully recognize, the extent of the exaggerated decline mentioned in the Kittner study. 52 percent of the 31 million workers subject to a pension plan would indicate that 16 million persons in private pension plans are subject to mandatory retirement.

Federal Civil Service and other government pension programs extended like provisions to another 13 million, inasmuch as nearly all federal employees were subject to mandatory retirement prior to the passage of H.R. 5383. In addition, approximately 79 percent of state and municipal pension programs include such provisions. W. GREENOUGH & F. KING, *PENSION PLANS AND PUBLIC POLICY* 127 (1976).

Thus, there were 16 million persons in the private sector and 13 million persons in the public sector subject to rules mandating compulsory retirement at the time 5383 was passed.

11. Age Discrimination in Employment Amendment of 1978, Pub. L. No. 95-256 (approved April 6, 1978).

12. This provision excepts pension provisions in collective bargaining agreements that had been entered into as of September 1, 1977. All such provisions will fall under the Act, as amended, upon termination of the agreement or by January 1, 1980. *Id.*, amending 29 U.S.C. § 623.

13. *Id.*, amending 29 U.S.C. § 623.

14. *Id.*, amending 29 U.S.C. § 631.

15. See note 11, *supra*.

16. 29 U.S.C. § 623(f)(1). *E.g.*, police work (see Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)), or other jobs entailing unusual risk.

under the Act;<sup>17</sup> and, in addition, a "bona fide executive" or person in a "high policy making position" may still be required to retire at age sixty-five if he or she will receive \$27,000 or more in employer-financed retirement income.<sup>18</sup> Similarly, a college or university may retire a tenured professor at sixty-five until July 1, 1982.<sup>19</sup> And, of course, the new law will not prevent an employer from dismissing an older worker for good cause other than age.

## I. HISTORICAL PERSPECTIVE

Generally, there is no history of prejudice or discrimination based on dislike or intolerance for the older worker.<sup>20</sup> Instead, age discrimination was initially founded on erroneous assumptions adopted by businesses concerned about the effects of age on ability.<sup>21</sup> Unlike other forms of discrimination in employment based on race, creed, or bigotry, which result from feelings about a person unrelated to his ability to do a job, discrimination against the older worker arises because of assumptions made about the effects of age on performance.<sup>22</sup>

The inception of formal age discrimination came with mandatory retirement, initiated in 1889 by Germany's Iron Chancellor, Otto Von Bismarck. The seventy-nine year old chancellor's determination that sixty-five was to be the age of mandated retirement reflected the prevailing attitude of the period.<sup>23</sup> He could not have foreseen that his action would decide, for the first time, when "old age" would begin.<sup>24</sup>

The United States independently settled on the same retirement age for separate social, economic, and political reasons.<sup>25</sup> In

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17. 29 U.S.C. § 630(b) (1968).

18. 29 U.S.C. § 633(c) (1968).

19. 29 U.S.C. § 633(d) (1968).

20. U.S. Dept. of Labor Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964, 15 n.6, (1965) [hereinafter Secretary's Report].

21. U.S. Dept. of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964: Research Materials 67-69, 10-15, n.1 (1965) [hereinafter referred to as Research Materials].

22. 113 CONG. REC. 34742 (1967) (Rep. Burke); 113 CONG. REC. 34752 (1967) (Rep. Dwyer); 113 CONG. REC. 31254 (1967) (Sen. Javits).

23. *Controversy over Mandatory Retirement Age: Should Congress Prohibit*, 56 CONG. DIG. 258-88 (1977). The Chancellor adopted the policy in a political maneuver designed to thwart an impetus toward socialism. At the time the average life expectancy was from 40-45 years. Chancellor Bismarck initiated the policy with the understanding that very few individuals would be able to collect on this social insurance program. 113 CONG. REC. 31256 (1976).

24. *Retiring at 65: An Arbitrary Cut-Off That Started With Three Men*, 110 DUN'S REV. 31-32 (Oct. 1977).

25. *Id.*

1935 the Social Security Act<sup>26</sup> was passed without much consideration as to the eligibility age for benefits.<sup>27</sup> It was with the passage of this Act that sixty-five became uniformly institutionalized as the beginning of "old age." Private pension plans generally accepted this as the age at which a beneficiary would be eligible for benefits. Pension plans, both public and private, have, over the years, come to provide the primary incentive to retire.<sup>28</sup>

Mandatory retirement has developed recently as a political issue. Initially, the passage of the Social Security Act provided a tool with which management could gracefully release the older worker whose output had declined.<sup>29</sup> Unions also supported the concept because few of their blue collar workers wished to work past sixty-five. This allowed younger workers to find jobs, thus easing unemployment.<sup>30</sup> As the concept became increasingly accepted, the benefits of private pension plans were enlarged and made available to retirees at earlier ages.

During this period of time, man's average life expectancy increased significantly. Accordingly, there has been a marked increase in the proportion of a worker's life spent in retirement.<sup>31</sup> It is interesting to note that if the retirement age had increased with

26. 42 U.S.C. § 301 *et. seq.* (1970 and Supp. Vol. 1975).

27. Robert J. Meyers, author of the bill, indicated that he wanted to set at 70, the age at which benefits would begin to accrue. However, age 65 was determined to be more potentially expedient in an effort to satisfy the Townsendites (followers of Francis Townsend, an eccentric California physician advocating that \$200 be given monthly to each person over the age of 60. The selection of age 65 was consistent with the existing corporate pension plans of several large corporations, including Standard Oil, Kodak, and General Electric. *Retiring at 65: An Arbitrary Cut-Off That Started With Three Men*, 110 DUN'S REV. 31-32 (Oct. 1977).

28. Skolnik, *Private Pension Plans, 1950-74*, 39 SOC. SEC. BULL. 3-17 (1976).

61 percent of workers with pension plans were subject to mandatory retirement. 80 percent of those with mandatory retirement came under a pension plan. Reno, *Compulsory Retirement Among Newly Entitled Workers: Survey of New Beneficiaries*, 35 SOC. SEC. BULL. 4 (1972).

29. *Big Fight Over Retirement at Age 65*, 83 U.S. NEWS AND WORLD REP. 30-32, Oct. 3, 1977.

30. *Id.*

31. In 1900 the average life expectancy for men was 46 years while women lived an average of 48 years. In 1940 these figures had increased to 60 years and 65 years, respectively. Ten years later men were averaging 65 years and women, 71 years. In 1975, the average male lived for 68 years while, at the same time, women average a lifespan of 76 years. Since the inception of Social Security, the average American male's lifetime has increased by 10 years, the woman's has increased 13 years. *Retiring at 65: An Arbitrary Cut-Off That Started With Three Men*, 110 DUN'S REV. 31-32 (Oct. 1977).

longer life expectancies, today's equivalent retirement age would be between seventy-five and eighty years.

Responding to the impact of the increasing average age of employees<sup>32</sup> and the recognition of the problem of age discrimination and mandatory retirement, Congress enacted several provisions between the early 1960's and the recent amendment to the ADEA. In 1964, the Civil Rights Act<sup>33</sup> was passed. This act did not proscribe employment discrimination<sup>34</sup> based on age, but directed the Secretary of Labor to make a study assessing the magnitude and effect, if any, of age discrimination.<sup>35</sup> The Secretary's study, presented in 1965, declared there was "no evidence of prejudice based on a dislike or intolerance for the older worker."<sup>36</sup> Instead, age discrimination was found to be generally based on assumptions and adopted by businesses concerned with efficiency and the effects of age on ability.<sup>37</sup> A general correlation was found between the incidence of race discrimination and other factors such as past discrimination, cultural deprivation, history, or the like.<sup>38</sup> Additional factors were found, but dismissed, as prejudices unrelated to the ability to perform a particular task.<sup>39</sup> For example, an employer hostile toward blacks cannot legally refuse employment to a Negro exclusively on the basis that he is black. Age discrimination was found to be different because it is initially related to ability;<sup>40</sup> a fact which was specifically noted in the ADEA<sup>41</sup> and

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32. The numbers of employees covered under the ADEA has increased as the size of the age group increased. In 1974, 948,113 (40.0 percent) of federal employees were under 40 years of age; 1,392,787 (58.8 percent) of federal employees were between the ages of 40-64, while 29,087 (1.2 percent) were over age 65. 1974 December Central Personnel File, listing all federal employees. Of nearly 86 million employees in non-government related jobs, 47,493,000 (55.3 percent) were 40 years old or younger; 35,622,000 (41.4 percent) were between the ages of 40 and 65; and 2,821,000 (3.3 percent) were over age 65. Bureau of Labor Statistics, January 1975, listing all civilians in the U.S. labor force, age 16 and over. This represents a total of 91 million employees, 51,394,000 (56.5 percent) of whom were under age 40; 36,696,000 (40.3 percent) of whom were aged 40 to 65; and 2,921,000 (3.2 percent) of whom were over the age of 65.

33. 42 U.S.C. § 2000e-*et seq.* (1964).

34. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000h-6 (1964, 1970 and 1974) proscribes employment discrimination on the basis of race, sex, religion, or national origin but specifically excluded age as a protected classification.

35. Section 715 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-14, mandating a study, by the Secretary of Labor, of concerns relative to age discrimination.

36. Secretary's Report, note 15, at 6, *supra*.

37. Research Materials, note 21 at 10-20, *supra*.

38. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. LAW REV. 235, 257-63 (1971).

39. *Id.* at 238-39.

40. Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 384 (1976).

41. 29 U.S.C. § 631 (1970) covering age discrimination in employment only for ages 40 to 65; and 29 U.S.C. § 623 (1970) providing an exception where age is a bona fide occupational qualification.

the legislative history pertinent to the field of law.<sup>42</sup> Where age discrimination was found, it was less likely to have been based on feelings of general hostility than it was to have been founded on ill-conceived, inaccurate, and often erroneous assumptions about the effect of older age on abilities and productivity.<sup>43</sup> The Secretary's Report concluded by generally recommending legislation to eliminate age discrimination.<sup>44</sup>

#### A. *The Age Discrimination in Employment Act of 1967*

In 1967, President Johnson publicly called for the elimination of age discrimination in employment.<sup>45</sup> His proposal became the ADEA in 1968.<sup>46</sup> The Act expressly provided for the elimination of age discrimination against workers between the ages of forty-five and sixty-five,<sup>47</sup> and specifically exempted from coverage employees over sixty-five.

Initially, the ADEA was viewed as a mere expansion or extension of Title VII of the Civil Rights Act.<sup>48</sup> In fact, the ADEA was established independently of the Civil Rights Act and incorporated the enforcement provisions of the Fair Labor Standards Act.<sup>49</sup> One of the reasons for choosing to implement a separate anti-age discrimination measure instead of amending Title VII, was to ease the work load placed on the Equal Employment Opportunity Commission (EEOC), which had been created to ad-

42. H.R. REP. NO. 805, 90th Cong., 1st Sess. 6, n.1 (1967) (message of Pres. Johnson); and S. REP. NO. 723, 90th Cong., 1st Sess. 6 (1967) (Sen. Javits).

43. See *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A. L. REV. 549, 555-56 (1976); *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, n.2 (1975).

44. See note 36, *supra*.

45. *The Background of Present Age Retirement Practices*, 56 CONG. DIG. 258-88 (Nov. 1977).

46. 29 U.S.C. § 621-633 (1968).

47. Section 12 of the ADEA specifically stated the Act's provisions "shall be limited to individuals who are at least forty years of age, but less than sixty-five years of age." 29 U.S.C. § 631 (1970). This provision was expanded in the 1978 amendments to include those less than 70 years of age. See note 5, *supra*.

48. *Age Discrimination in Employment: Hearings on Age Discrimination Bills before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*. 90th Cong. 1st Sess. 22 (1967) [hereinafter 1967 Senate Hearings]. In fact, as late as 1974, there were two bills pending to amend the Civil Rights Act to include age as a protected classification. H.R. 16972, 93d Cong., 2d Sess. (1974) and 120 CONG. REC. H. 10598 (Oct. 15, 1974). Both bills died in the House Education and Labor Committee.

49. 29 U.S.C. § 211(b), 216(b) & (c), 217, 626(b), (1970).



ministrate the complaints arising from the Civil Rights Act.<sup>50</sup>

The enforcement of the provisions of the two acts has varied to some degree. Title VII has been strictly construed to provide the greatest degree of protection for groups falling within its provisions.<sup>51</sup> The ADEA has been applied with a lesser and more varied range of protection. In some actions, the results reached were consistent with the outcome of most Title VII cases.<sup>52</sup> In other situations, however, the courts found that the existence of a separate statute acted as their signal that a dissimilar degree of protection was to be applied.<sup>53</sup>

The scope and magnitude of the ADEA are enormous. Over 64 million persons are employed by more than one million employers subject to the provisions embodied in the ADEA.<sup>54</sup> Labor force data indicates that 37 million employed persons were in the forty to sixty-five year age group in 1975.<sup>55</sup> The impact of the Act has the potential to affect virtually every worker in the labor force.

The original Act provided for three primary exceptions. First, the Act was designed to apply only to employers of twenty or more persons.<sup>56</sup> Second, jobs with a certain age requirement as a bona fide occupational qualification were also exempted from coverage.<sup>57</sup> Finally, the ADEA also approved exceptions for pension

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50. Congress apparently felt that a more adequate administration of complaints arising out of the ADEA could be achieved by allowing the Wage and Hour Division of the Department of Labor to handle the actions. The Wage and Hour Division was created under the Fair Labor Standards Act. *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 90th Cong., 1st Sess. 7 (1967).

51. See *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1969); Hill, *The New Judicial Perception of Employment Discrimination—Litigation under Title VII of the Civil Rights Act of 1964*, 43 U. COLO. L. REV. 243, 253-54 & n.40 (1972); Note, *Employment Discrimination: A Title VII Symposium*, 34 LA. L. REV. 540 (1974).

52. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Hodgson v. First Federal Savings & Loan Assn.*, 455 F.2d 818, 822 (5th Cir. 1972); *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976).

53. *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975), *cert. denied*, 422 U.S. 1045 (1976). See also, *Massachusetts v. Murgia*, 427 U.S. 307 (1976), an action instituted prior to the passage of the ADEA. In *Murgia*, the Court found that the standard requiring strict scrutiny (the Title VII standard) could not be applied in age discrimination cases inasmuch as age was not a suspect classification and employment was not a fundamental interest.

54. *Employment Standards Administration*, U.S. DEPT. OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967: A REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1974, at 17 (1975).

55. *Id.*

56. 29 U.S.C. § 630(b) (1967).

57. 29 U.S.C. § 623(f)(1) (1967).

and retirement plans mandating early retirement.<sup>58</sup> Again, an employer was not enjoined from differentiating between employees on factors other than those incident to age.

The courts were encouraged to construe the ADEA liberally to achieve the provision's primary remedial purposes; to protect the older worker from discrimination<sup>59</sup> and to promote the employment of older persons "based on their ability rather than age."<sup>60</sup> In practice, however, the courts took a more narrow view of the provision.<sup>61</sup> The Supreme Court initially refused to apply the more stringent level of protection given to similar cases arising under the Civil Rights Act of 1964.<sup>62</sup> It indicated that given a clear opportunity, it would refuse to expand the categories of fundamental interest or suspect classifications in order to provide sanctions against age discrimination.<sup>63</sup> The favorable treatment of provisions requiring mandatory retirement dashed the hopes of those wishing that the Supreme Court would either strike down or narrowly construe such provisions.<sup>64</sup> It became clear that the impetus to eliminate mandatory retirement provisions would have to come through legislative, rather than judicial action.

Responding to the need for further legislative regulation, the Age Discrimination Act in 1975 was enacted to prevent discrimi-

58. 29 U.S.C. § 623(f)(2) (1967).

59. *Nabors v. United States*, 568 F.2d 657, 659 (9th Cir. 1978); *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam*, 434 U.S. 99 (1977), *rehearing denied*, 434 U.S. 1042 (1976); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93 (8th Cir. 1975); *Curry v. Continental Airlines*, 513 F.2d 691, 693 (9th Cir. 1975).

60. 29 U.S.C. § 621(a)(2) & 621(b) (1970).

61. *See United Airlines v. McMann*, 434 U.S. 192 (1977). This first Supreme Court test of the ADEA, holds the bona fide occupational requirement exception should be given a narrow construction resulting in a greater degree of protection. *See also Moses v. Falstaff Brewing Corp.*, 550 F.2d 1113, 1114 (8th Cir. 1977); *Marshall v. Hills Bros.*, 432 F. Supp. 1320, 1325 (N.D. Calif. 1977); *Fellows v. Medford Corp.*, 431 F. Supp. 199, 201 (D. Ore. 1977).

62. Note the similarity of the bona fide occupational requirements in 29 U.S.C. § 623(f)(1) (1970) and 42 U.S.C. § 2000e-2(e) (1970). The application of the requirement under the ADEA has been less narrowly construed than like actions under § 703(e) of Title VII. *See also Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1969); *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

63. *See generally, Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). *See also Barrett, Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89 (1976); Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). *See also note 139, infra.*

64. *See Note*, 4 PEPPERDINE L. REV. 369, 373 (1977).

nation in federally-funded programs or activities.<sup>65</sup> By that year, forty-three states had anti-age discrimination laws. Of those, the regulations in six states applied only to public sector employment. Fifteen states had no upper age limits specified, while the remainder prohibited discrimination up to, but not past ages varying from fifty to sixty-five years.<sup>66</sup> Thus, the state and federal limitations on discrimination were directed toward the middle-aged, and failed to provide any relief to those above sixty-five years of age.

The passage of H.R. 5383, amending the ADEA, marks a response to this omission. In recognition of the demands maintained over the ten year period since the passage of the ADEA, Congress amended the Act to provide the first measure of protection to older America.

### *B. Demographical Factors*

An impetus to the enactment of the ADEA amendment was the consideration given to several conflicting demographical factors. The numbers of older workers in the labor force has been steadily increasing. This is primarily due to two factors: Americans are living longer<sup>67</sup> and, since the mid-1950's, there has been a gradual decline in the birth rate.<sup>68</sup> The net effect is that the average age of all American citizens is getting progressively older<sup>69</sup> and there is a higher ratio of retirees to workers.<sup>70</sup>

During this same period of time there has been a marked tendency for Americans to retire at an earlier age.<sup>71</sup> In 1974, seventy-

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65. 42 U.S.C. § 6101-6107 (1975).

66. *Controversy over Mandatory Retirement Age: Should Congress Prohibit?*, 56 CONG. DIG. 258-88 (Nov. 1977).

67. See note 31, *supra*. The life expectancy in 1900 was 47 years, 54 years in 1920, 60 years in 1930, and 71 years in 1974.

68. The current birthrate is at 1.75 births per female. The figure reached 3.7 births in the 1950's during the baby boom. 2.1 is the birthrate needed to maintain a constant population growth. *Retirement at 70?*, 118 FORBES 62 (Nov. 11, 1976).

69. *Id.* In 1977, 18 out of every 100 people were aged 65 or older. In 2025, this figure will increase to 32 out of every 100 people. In 1930, 5.4 percent of the population was over age 65, 8.1 percent in 1950, 9.9 percent in 1970 and 11.1 percent in 1975. In addition, those reaching age 65 are living much longer. The average life expectancy of a 65 year old man is 13.2 years. 65 year old women will continue to live an average of 17.5 additional years. This period of time is one in which the individual is largely prevented from working.

70. *Id.* In 1977, there were 31 retirees to every 100 workers. By 2025, the ratio will be 2 active workers to each retired worker. This factor alone will account for a 40 percent increase in the cost of Social Security, discounting inflation. At current levels, the average worker, in 2025, will pay 31 percent of his income to retirement (15 percent to Social Security), disability, and Medicare. The average worker paid 13 percent of his income into these funds in 1977.

71. *Retiring at 65: It Started with Three Men*, 110 DUN'S REV. 31-2 (Oct. 1977); Colamosca, *Grey Rights Retirement Fight*, 110 DUN'S REV. (Oct. 1977).

two percent of all new Social Security recipients were early retirees<sup>72</sup> receiving reduced benefits.<sup>73</sup> The trend in the private sector is equally dramatic. For example, only 164 of the 7980 retirements at General Motors were at the firm's mandatory retirement age.<sup>74</sup> Despite this trend, from five to twenty percent of those persons age sixty-four or older who are currently working still indicate they would continue to work.<sup>75</sup>

The trend toward early retirement has fostered some adverse effects. It creates an undue strain on the various pension systems. The General Motors study, cited above, indicates the ratio of workers to pensioners has dropped dramatically and further drops are contemplated.<sup>76</sup> Similarly, the number of those supplementing the Social Security Trust Fund has diminished in relation to the numbers to whom payment is being made. To support the system, it may be necessary to increase the amount of the contribution from those in the labor market.<sup>77</sup>

### C. *The Application of Mandatory Retirement*

There is no uniform application of the concept of mandatory retirement. Although the majority of forced retirements do occur at age sixty-five, many retirements are compelled at both younger and older ages. Of those plans requiring earlier retirement, sixty-two is the most common age.<sup>78</sup> Most federal employees face

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72. Of the early retirees, 67.3 percent were male and 78.9 percent of this group were female. Age 62 was the most common age for early retirement. The rate of early retirements has been growing by two to three percent yearly. *Background of Present Retirement Age Practices*, 5 CONG. DIG. 258-88 (Nov. 11, 1977). The overall retirement age patterns for those aged 65 and over show a decline over 15 percent in almost every western nation. *Labor Force Estimates and Projections, 1950-2000*, INT'L. LABOR OFFICE, Geneva, (1977).

73. In 1952, reduced benefits became available to women retiring early. Male early retirees were, similarly given the opportunity to receive actuarially reduced benefits in 1962.

74. General Motors requires that its employees retire at age 68. See note 71, *supra*. See also note 75, *infra*.

75. Wysocki and Hyatt, *Mandatory Retirement at Age 65 is Likely to End: Business and Labor Wary*, 190 WALL ST. J. (Oct. 13, 1977).

76. In 1967, there were ten workers for every pensioner. The ratio had dropped down to 4 to 1 in 1977 and by 1990 there will be two workers contributing to the pension system for every retiree drawing on it. DUN'S REV., see note 71, *supra*.

77. Drucker, *Thinking About Retirement Policy*, 190 WALL ST. J. 24 (Sept. 15, 1977). See page 16, *infra*.

78. J. Prakken, *Mandatory Retirement: Issues and Impacts*, 3 FED. RES. BANK OF N.Y.Q. REV. 25, 26 (Spring 1978). Mandatory retirement at age 62 is not in dero-

mandatory retirement at age seventy.<sup>79</sup>

The retirement provisions found in private pension plans result in the vast majority of forced retirements.<sup>80</sup> Almost all plans designate an age of retirement, at which the rights to the pension are said to vest. Most plans will not, however, force the employee to retire at that age. At the election of the employer, some employees may continue to work until they reach the age of compulsory retirement.<sup>81</sup> In addition, many employers will seek to offer an incentive for early retirement by offering benefits that are only slightly reduced from the amounts given those retiring at age sixty-five.<sup>82</sup>

In 1973, a Bureau of Labor survey covering 63.4 million American employees disclosed that 31.1 million (49 percent) were covered by a plan or policy that had some type of compulsory retirement based upon an age limitation.<sup>83</sup> Roughly 20 percent of the plans had provisions for forced early retirement.<sup>84</sup> About 61 percent of the workers with pension plans were subject to mandatory retirement. Conversely, 80 percent of those subject to mandatory retirement were covered by some pension plan.<sup>85</sup> The provisions for mandatory retirement fell into two different groupings.<sup>86</sup> Compulsory retirement, most commonly found, does not force an employer to relinquish the discretion to release or retain the employee at retirement age. Automatic retirement allows no such discretion. Further, mandatory retirement is less commonly found in union bargaining agreements<sup>87</sup> but is more frequently used by manufacturing agreements.<sup>88</sup>

#### *D. Public Response to Mandatory Retirement*

In light of the divergent criteria, there was no clear message upon which Congress could act. Numerous surveys have at-

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gation of the ADEA if it is part of a qualified benefit, pension, or retirement program.

79. 29 U.S.C. § 633(a) (1967).

80. See note 78, *supra*.

81. *Id.*

82. *Scope of Mandatory Retirement in the U.S. Today*, 56 CONG. DIG. 258-88 (Nov. 1977).

83. *Background of Present Age Retirement Practices*, 5 CONG. DIG. 258-88 (Nov. 11, 1977).

84. Kittner, *Forced Retirement: How Common Is It?*, 100 MONTHLY LAB. REV. 60, 61 (Dec. 1977).

85. Reno, *Compulsory Retirement Among Newly Entitled Workers*, 35 SOC. SEC. BULL. 4 (March 1974).

86. *Id.*

87. A retirement clause is found in 60 percent of the sampled non-negotiated agreements and 40 percent of the negotiated plans. *Id.*

88. Mandatory retirement provisions are found in 40 percent of the manufacturing contracts and only 30 percent of the non-manufacturing contracts. *Id.*

tempted to measure the worker response to mandatory retirement provisions. A recent study indicates that 65 percent of those surveyed favor abolition of mandatory retirement, but 49 percent favored early retirement.<sup>89</sup> The same study showed 58 percent of the people surveyed felt that senior management personnel should be forced to retire, while 68 percent acknowledged that the exercise of that concept would deprive society of the benefit of the knowledge and experience of the older worker.

In another poll, a majority of workers indicated they had not wanted to retire at the time they were compelled to do so. Whereas 52 percent of those polled gave mandatory retirement as the reason why they retired at age sixty-five,<sup>90</sup> of that group, 56 percent had indicated they had not wanted to retire at that time.<sup>91</sup> Another study indicated that four million people over age sixty-five who were unemployed or "retired," indicated they would return to work if given the opportunity.<sup>92</sup>

Thus, the particular juxtaposition of the social demands for remedial legislation gave rise to H.R. 5383, amending the ADEA. Those demands and their impact are discussed below.

## II. THE INTERESTS IN OPPOSITION TO THE BILL

### A. *Productivity as Affected by Age*

There is a general presumption that the frailty of the physical and mental health of elderly individuals is not conducive to continued employment. Testimony before the U.S. House of Representatives indicated it was "likely that productivity would suffer" if the amendments to the ADEA were enacted.<sup>93</sup> A similar presumption is made by a large segment of American society. There is, however, no conclusive data to either support or dispute this contention. A study by *Industrial Gerontology* indicated factory work productivity generally decreased after age sixty-five. The same study noted that there was a slight decline in the productiv-

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89. Lederer, *Will Congress Put Mandatory Retirement Out to Pasture?*, 38 ADMIN. MGT. 28-33, (Sept. 1977).

90. Reno, *Why Men Stop Working At or Before Age 65: Findings from a Survey of New Beneficiaries*, 34 SOC. SEC. BULL. 10 (June 1971).

91. *Id.*

92. Hearings before the House Subcommittee on Equal Opportunity, Statement of Jack Ossofsky, Exec. Dir. of the National Council on Aging (Sept. 14, 1976).

93. Testimony before the House Select Committee on Aging, 95th Cong., Statement of George Skoglund, Bank of America Vice President (Feb. 14, 1977).

ity of postal workers. But the University of Illinois reported, in a study of 300 employees, that workers over age sixty-five were as good or better than younger workers.<sup>94</sup> The compilations of these studies on the capabilities of older workers are generally indicative of the results of other similar studies.

The courts have generally held that "age has an inevitable and definite relationship with the ability to perform work."<sup>95</sup> The courts have stopped short of contending that older citizens are handicapped by a diminished capacity to work productively. Some courts have, however, recognized declining capabilities necessitate or justify a cutoff age for employment.<sup>96</sup>

The American Medical Association has stated the older citizen is capable and competent to perform meaningful work beyond the age of sixty-five,<sup>97</sup> but recognizes that there is a generally decreasing capability attendant with age.<sup>98</sup> Thus, there is no firm indicator of an age of incapability,<sup>99</sup> causing most opponents of mandatory retirement to favor some form of physical assessment of the worker's capability prior to forcing him to retire.

#### *B. Business Economics and Administration of Mandatory Retirement*

The proponents of mandatory retirement point out that the medical profession is not able to make accurate individual assessments of physical and psychological competency as required in the alternative to mandatory retirement. Generally, the medical profession is able to categorize workers into three groups. The first group is comprised of those workers that can, without doubt, continue to work. The second group includes those workers definitely unable to work. The final group contains those persons who have a diminished capacity to work effectively. The problem

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94. *Retiring at 65: It Started With Three Men*, 110 DUN'S REV. 31-2 (Oct. 1977).

95. *Armstrong v. Howell*, 371 F. Supp. 48, 51 (D. Neb. 1974).

96. *Townsend v. City and County of Los Angeles*, 49 Cal. App. 3d 263, 122 Cal. Rptr. 500 (1975). "While many persons over 65 years of age are capable of performing in accordance with standards required by industry, many are not and almost all persons over 85 are not. If a cutoff date was not specified, a burden of proving that a 68 year old employee was not satisfactorily fulfilling the requirements of his job . . . would fall on the employer."

97. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, (1976). *Brief Amici* of the American Medical Association; *Brief Amici* of the Older and Middle Age Worker Ombudsman Pilot Project of United Communities of Southeastern Philadelphia and of the Public Interest Law Center of Philadelphia.

98. *Id.*

99. *Id.* The AMA brief asserted that two criteria should be used to determine the age of retirement for each worker individually. Those criteria are whether the worker desires to continue working and whether his or her physical capabilities should allow him or her to continue working.

facing medical science is to develop the criteria to definitively determine whether an individual in the third group can or cannot continue to work. The difficulty involved in making an accurate assessment is complicated by the reluctance of those in a decisionmaking position to make a determination that would deny a person his right to his livelihood.

Such determinations would involve a substantial cost of administration, in addition to the costs already incurred by maintaining the wages of an employee who has suffered a decline in productivity.<sup>100</sup> Further, the employer is faced with the prospect of incurring legal costs to defend his actions against disappointed employees.<sup>101</sup> A move to avoid all of these difficulties by permitting the continued employment of workers whose productivity had fallen would also prove to be costly.<sup>102</sup>

By administering mandatory retirement, the employer must pay the consequences of losing capable trained employees as well as contributing to the pensions of retiring workers.<sup>103</sup> Nonetheless, mandatory retirement may be one of the most cost efficient methods of dealing with retirement. Not only is it possible for the employer to replace aging workers without humiliating them; he may also avoid the onus of dealing with the particulars of each individual retirement. Mandatory retirement, when combined with pension plans and Social Security, may provide the most economical and efficient method for promoting younger workers while providing for the orderly and dignified retirement of older workers.

Corporations faced with the prospect of having to decide which employees to retain and which employees to retire would have to

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100. The steel industry now has such a plan that applies only to blue collar workers. This policy requires each worker to pass a yearly physical examination. If he passes, he is allowed to keep his job. *The Ax for Forced Retirement*, BUS. WEEK 38-39 (Sept. 19, 1977).

101. In reality, if an employer reduced the wages of aging workers whose productivity had fallen, he would undoubtedly damage the morale of his employees and risk criticism from the public for his treatment of the elderly. The alternative to reducing wages is to better utilize the employee's deteriorating skills by assigning him to a less demanding position or to fire him. Prakken, *Mandatory Retirement: Issues and Impacts*, FED. RES. BOARD OF N.Y.Q. REV. 25, 27 (Spring 1978).

102. *Id.* Raising the age of mandatory retirement to seventy greatly increases the costs of employing until retirement those workers whose capabilities are waning. Many older workers would have to be dismissed unless employers adopt a policy of retaining workers who have a diminished productivity.

103. *Id.*



make tough decisions about who is still able to do their job. A continuing policy of mandatory retirement would "eliminate unequal treatment stemming from individual judgments as to who should and should not continue to work after a certain age."<sup>104</sup> Such judgments about performance become almost as difficult to make as those regarding physical capabilities.<sup>105</sup>

If an individual refused to retire, then the company would have to make the judgment he was no longer able to work effectively. "The disputes and problems created between the employer and employee would cause more grievance and concern" and would be more disruptive than a uniform policy for all.<sup>106</sup>

Management has resisted efforts to do away with mandatory retirement entirely, but seems to feel the only adverse effect of the new amendment to the ADEA is that it will increase costs by maintaining a payroll of individuals characterized by a declining productivity.

A policy of mandatory retirement is beneficial inasmuch as it allows both management and the employee to plan ahead and make decisions for the future. Management can accurately calculate the projected number of vacancies during a year and plan accordingly. Similarly, employees can more accurately plan emotionally, psychologically, and financially for their future if they expect retirement at a specified age.<sup>107</sup>

The new law will force some firms to adopt a new retirement policy. Firms have often allowed employees to work two or three years in declining productivity rather than firing them, knowing they would retire upon reaching age sixty-five. In this sense, mandatory retirement serves as a painless method to weed out employees who have lost their effectiveness. Knowing the process may take an additional five years, some companies may be forced to deal with the problem earlier by firing the inefficient employee, rather than letting age take its course.

Mandatory retirement programs serve to remind employers and employees of the inevitability of retirement and of the need to plan and save for it. It also provides a means for management to forecast labor needs and costs and offers a rational way to whittle down high levels of unemployment.

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104. House Select Committee on Aging, 95th Cong., Testimony of G.F. Jankowski, V.P. Administration, CBS, Inc. (Feb. 10, 1977).

105. *Forced Retirement: An Issue That's Riling Older Americans*, 83 U.S. NEWS & WORLD REP. 75-76 (July 4, 1977).

106. *Id.* Reporting a statement of H.J. Lartigue, Jr., Exxon's manager of employee relations before a House committee.

107. Senate Subcommittee on Labor of the Human Resources Committee, Statement of AT&T Co., and the Bell System Associated Companies (1977).

The employee is also given the opportunity to plan ahead. The knowledge that one is to retire on a certain date in the future allows the individual to plan his activities and finances more accurately. He or she would be less likely to be caught in financial straits because a sudden illness struck between the ages of sixty-five and seventy.

Objectors to the new law contend the less effective worker is usually the type that would choose to work past age sixty-five. They argue that if the employee had failed to be aggressive on the job and had not been promoted, he probably had not been aggressive in managing his money either. He will probably have few assets and will want to augment his retirement income.

Management can, however, restructure careers to conform to the needs of management and the capabilities of the employee. This gradual withdrawal from the labor force by older employees makes possible the luring and promotion of other workers. A postponed retirement would be more graceful for the older employees and would not seriously aggravate unemployment among the young.

The speed with which the new law was passed seems to have caught management by surprise.<sup>108</sup> The current feeling is the provision was "steamrolled" through Congress and management had little time to assess its impact.<sup>109</sup> Some management experts claim the country's economy will be endangered and that "the long term price of the legislation will be a slower growth in real income for Americans."<sup>110</sup> They also predict older workers will be less productive than young ones, and this will contribute to the deterioration of America's competitive position in the world's economy.

The concept of mandatory retirement saves face for the employee who would otherwise be forced out of work. Workers under mandatory retirement programs are retired with dignity, rather than being fired or compelled to accept a lower paying job. Protracted disputes over a worker's capability are avoided, as are extended court or administrative battles over the abilities of a dis-

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108. *The Ax for Forced Retirement*, BUS. WEEK 38-39 (Sept. 19, 1977). Statement of John Post, executive director of the Business Roundtable.

109. *Id.*

110. *New Retirement Rules: Their Impact on Business Workers*, 83 U.S. NEWS & WORLD REP. 71-73 (Nov. 7, 1977).

charged employee.<sup>111</sup>

### C. *Impact on Maintenance and Income Programs*

The cost of maintaining an older work force is likely to increase with the new provision. Although this expense is difficult to estimate, Social Security pensions and life and health insurance plans will probably cost more with a larger work force of older employees.<sup>112</sup> Pension costs will presumably decline initially, but medical insurance costs would be increased.<sup>113</sup> The savings in pension costs would probably be offset by an increase in benefit costs.<sup>114</sup> Thus, much of the opposition to the measure was based on the devastating impact on the actuarial based pension plans and other employee benefit programs.<sup>115</sup>

In testimony before the House of Representatives, it was indicated the measure would shift the tax burden from Social Security to unemployment or other social welfare programs.<sup>116</sup> The government presently bears the financial burden of compulsory retirement. Currently, the agency's funds are not keeping up with the increase in the numbers of retired workers. The fight to keep Social Security payments in line with inflation has, already, fostered a deficit. In addition, the taxable wage rate is being adjusted upward annually. That means although presently retired persons' benefits go up with the cost of living, workers still in the labor force will not only get the cost of living hikes once they retire, but also the advantages of the higher wage base on which they will be paying taxes by that time. In some cases, the benefits will be higher than the level of the pensioner's salary.<sup>117</sup>

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111. Prakken, *Mandatory Retirement: Issues and Impacts*, 3 FED. RES. BANK OF N.Y.Q. REV. 25, 26 (Spring 1978).

112. *Retiring at 65: An Arbitrary Cut-Off That Started With Three Men*, 110 DUN'S REV. 31-32 (Oct. 1977).

113. Corporations are currently spending 133 million to support 35 million pensioners. This represents an increase of 300 percent over the last ten years. There are currently 23 million Americans aged 65 or older (11 percent of the population). Within 30 years this figure will rise to 51 million (17 percent of the populace). The growing number of elderly has, accordingly, seriously taxed the nation's pension systems. Ten years ago General Motors had a ratio of ten workers for every pensioner. It now has one pensioner supported by four workers, a figure which should be halved by 1990. *Retiring at 65: An Arbitrary Cut-Off That Started With Three Men*, 110 DUN'S REV. 31-32 (Oct. 1977).

114. Wallace, *How Retire-at-70 Would Effect Banks*, 69 BANKING 16 (Nov. 1977). Pensions are determined on the salary level for the five years preceding retirement. On the assumption that the last five years of employment would be at an average higher scale of pay, the level of benefits would also be higher.

115. *Controversy over Mandatory Retirement Age: Should Congress Prohibit?*, 56 CONG. DIG. 258-88 (Nov. 1977).

116. House Subcommittee on Aging, *supra* note 93.

117. In addition, there will be fewer taxpayers paying into the system that supports the retired generation. As the ratio of workers to beneficiaries rises, those

Currently, there are 22 million Americans age sixty-five and over, who are poorly cared for by Social Security and pension benefits. Ninety percent of the aged rely on these benefits as their primary income. As such, an analysis of the poor, aged and pensioned Americans reveals that the unemployed, pensioned aged are the poor aged.<sup>118</sup>

#### D. Impact on Employment

One concern over the new provision, shared by management and union alike, is that it creates a problem in finding jobs for new and younger workers. Promotions would be postponed and young aggressive managers-to-be would avoid companies with a sedentary upper echelon.<sup>119</sup> It is claimed the new law will discriminate more against those in the physically demanding blue collar positions while those in white collar jobs demanding more intellectual exercise would be able to continue working.<sup>120</sup> Some blacks are concerned that the affirmative action efforts of the 1960's would be retarded as fewer opportunities for advancement would open.<sup>121</sup>

The impact of the new bill on promotion and new openings is expected to have a five year delaying effect. For the next five years, it is estimated that 125,000 workers will choose to remain in their jobs<sup>122</sup> while an additional 75,000 may attempt to re-enter the work force.<sup>123</sup>

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employed will have to pay higher payments. Seixas, *Evidence Mounts That Mandatory Retirement Costs Too Much, Wastes Talent, and May Be Hazardous to Your Health*, 6 MONEY 43-45 (April 1977). See also, note 70 *supra*.

118. Bixby, *Income of People Aged 65 and Older: Overview From 1968 Survey of the Aged*, 33 SOC. SEC. BULL. 3, 8-10 (April 1970); See also Antonucci, *Discrimination Against the Elderly*, 7 SUFF. U.L. REV. 917 (Summer 1973).

119. Colamosca, *Grey Rights Retirement Fight*, 110 DUN'S REV. 31-32 (Oct. 1977).

120. *Id.*

121. Hicks, *Giving Retirement Five More Years*, 8 BLACK ENTERPRISE 33-36 (Dec. 1977).

122. *Id.*

123. 125,000 additional employees for five years would mean that 625,000 positions would not open for advancement during that period of time. Economists speculate that up to 375,000 persons above the age of 65 would attempt to reenter the labor force. After the expiration of the five year period, the additions to the work force would stabilize. These figures are based on statistics that reveal that there are 9.2 million Americans in the work force between the ages of 60 and 64. Approximately 10 percent of those over age 65 are expected to continue to seek employment. Currently, 1.6 million of the 8.3 million Americans over the age of 65 are employed. Hicks, *Giving Retirement Five More Years*, 8 BLACK ENTERPRISE 33-36 (Dec. 1977); *Controversy over Mandatory Retirement Age; Should Congress Pro-*

There is a general presumption that older persons are unable to learn new skills as quickly as their younger counterparts and that they are more inflexible with regard to work rules, seniority systems, and pay scales.<sup>124</sup> When coupled with the fact that older people typically have less formal education than younger workers, some employers find the better prospect is found by hiring the younger worker. To open a position for a younger worker often requires that an older worker be released.<sup>125</sup>

The Act could effectively put more money in the hands of the elderly, but could also stall efforts to reduce unemployment.<sup>126</sup> Supporters of mandatory retirement claim that the system provides a viable way to whittle down the high levels of unemployment. Proponents of the new legislation have claimed, however, that the bill will have little effect on unemployment patterns nationwide.<sup>127</sup> When an individual retires from the labor force, his former position is usually filled by someone from a subordinate position. There follows a chain of promotion until an entry level position is made available to a young and relatively inexperienced worker. These entry level openings, as a result of concerted action in recent years, have been made available to minorities. One claim frequently raised against abolition of mandatory retirement is that such action will jeopardize affirmative action advances by closing off job openings to young minority workers.<sup>128</sup> However, the better view is the number of entry level openings made available to minority workers will only be slightly diminished in favor of enhanced employment prospects for another minority, the older worker. In addition, this diminution will have an effect only for the next five years.<sup>129</sup>

Current figures indicate no more than 40,000 workers were involuntarily retired in 1977.<sup>130</sup> The effect of the legislation would

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hibit the *Mandatory Retirement of Workers Over Age 65?*, 56 CONG. DIG. 258-88 (Nov. 1977).

124. *Mandatory Retirement: The Social and Human Cost of Enforced Idleness*, REPORT BY THE SEN. COMM. ON AGING, 95th Cong., Comm. Pub. No. 95-91 (August 1977).

125. *Id.*

126. Wysocki & Hyatt, *Mandatory Retirement at 65 is Likely to End: Business and Labor Wary*, 190 WALL ST. J. (Oct. 13, 1977).

Note, however, that other indicators show that the legislation will probably have little or no effect on unemployment in light of the present trend toward early retirement.

127. Prakken, *Mandatory Retirement: Issues and Impacts*, 3 FED. RES. BANK OF N.Y.Q. REV. 25 (Spring 1978).

128. *Id.* at 27.

129. See note 121, *supra*.

130. United States Dept. of Health, Education and Welfare, Social Security Administration, *Reaching Retirement Age* (Washington, D.C. 1976). A 1968 survey of newly entitled beneficiaries of the Social Security system revealed that nearly 30

indicate, over a five year period, an estimated 200,000 persons could be affected.<sup>131</sup> These figures suggest the overall effect on unemployment will be minimal in the short run and almost negligible in the longer term. The figure of 200,000 represents only about 0.2 percent of the work force. Unfortunately, these figures do not consider the number of workers who were informally pressured into retirement and who subsequently withdrew from the quest for further employment.

There are other reasons why the suggested impact of the new legislation can be discounted. If a worker is mandatorily retired at the same time a new worker is hired into the opening, there is no net impact on the unemployment rate. If, however, the worker withdraws from the work force, the rate falls. But if the older worker remains in the work force, the unemployment rate will not be affected because the older worker will have made a de facto exchange of positions in the labor market and the overall age distribution of employment would increase.

The unemployment rate also fails to include those persons who, following a compelled retirement, withdraw from the labor force entirely. The number of these individuals is not reflected in the unemployment rate. Therefore, the official measure of unemployment understates the actual number of those willing to work. Any increase in the official figures would possibly be more reflective of an innovation in data-gathering methods than a change in the national unemployment picture. In this sense, a more accurate measurement of unemployment should be welcomed as a more useful indicator of the nation's well-being.<sup>132</sup>

Other indicators pose a somewhat different employment out-

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percent of the men and 27 percent of the women who retired at age 65 were compulsorily retired despite their wishes to continue working in their former jobs. When these percentages are applied to the number of workers retiring in 1977, they suggest that 40,000 workers were involuntarily retired from their work that year. The figures cited in the Social Security Administration's study are somewhat smaller than those reported in a 1974 survey conducted by Louis Harris and Associates. The Harris poll found that 37 percent of retired employees were compulsorily retired.

This estimated effect may be multiplied by five (the number of years of anticipated effect) to determine the number of total employees affected.

131. *Id.* Thereafter, workers will be mandatorily retired at age seventy. A slight increase in the numbers of workers between age 65 and 70 would be found as the percentage of the population over sixty-five increases. See note 121, *supra*, at 33-36.

132. See note 127, *supra* at 29.

look. A recent study<sup>133</sup> indicated up to one-third of non-management employees would work past age sixty-five if the mandatory retirement age were raised, by law, to seventy. Such a decision by a large contingent of the labor force would raise real unemployment by one-half of one percent in 1979 and would increase to one percent by 1982. Once stabilized, the trend could increase unemployment by nearly 5 percent, if workers chose to continue working.

In summary, the probable long-term effects of the new law's impact on unemployment may increase slightly as the percentage of the population over sixty-five rises. The immediate effects will be minimal. Barring any significant or dramatic change in the employment patterns of the elderly, the bill will have only a nominal economic effect on the unemployed labor force.

### III. THE INTERESTS IN FAVOR OF THE BILL

#### A. *The Consideration Given Mandatory Retirement by the Courts*

Broadly stated, there are a multiplicity of social concerns that decry the impositions of mandatory retirement. The courts have been repeatedly called upon for recourse in this matter, but they have generally been unwilling to grant relief.<sup>134</sup>

The keystone case, *Massachusetts v. Murgia*,<sup>135</sup> upheld a law requiring a state policeman to retire at age fifty. The Court held there was no denial of procedural due process,<sup>136</sup> equal protection,<sup>137</sup> or a violation of any other pertinent statutes.<sup>138</sup>

In *Murgia*, instituted prior to the enactment of the ADEA, the plaintiff claimed the statute compelling retirement violated his fourteenth amendment right of equal protection. The Supreme

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133. *Big Fight Over Retirement at Age 65*, 83 U.S. NEWS & WORLD REP. 30-32 (Oct. 3, 1977), citing a report by Sears, Roebuck and Company.

134. *Massachusetts v. Murgia*, 427 U.S. 307 (1976); *Weisbrod v. Lynn*, 420 U.S. 940 (1975), *aff'd* 383 F. Supp. 933 (D.D.C. 1974); *Brennan v. Taft Broadcasting*, 500 F.2d 212 (5th Cir. 1974); *McIlvaine v. Pennsylvania*, 454 Pa. 129, 309 A.2d 801, *dismissed for want of substantial federal question*, 415 U.S. 986 (1974).

135. 427 U.S. 307 (1976).

136. *Id.* at 309, citing *Weisbrod v. Lynn*, 420 U.S. 940 (1975), *aff'd* 383 F. Supp. 933 (D.D.C. 1974). The Supreme Court in *Weisbrod* affirmed a three judge district court decision requiring a man to retire at age 70 with 15 years of service.

137. *Id.*

138. *Id.*, citing *Bradley v. Kissinger*, 418 F. Supp. 64 (D.D.C. 1976). See also Behar, *Restrictive Age Covenants*, 52 L.A. BAR J. 30 (1976) stating that "when judicial aid is sought to enforce restrictions which are clearly discriminatory, the courts will refuse to permit such discrimination practices if it is determined that (a) there is no compelling need or interest on the part of the state to enforce discriminatory practices, and (b) the rights involved are deemed fundamental" in reference to age based exclusions from housing. *Id.* at 31.

Court reversed the appellate court's holding. They held that the state had a legitimate interest in the fitness of the state police force, but that it had failed to establish a rational basis<sup>139</sup> for the imposition of mandatory retirement by finding that age was not a suspect classification.<sup>140</sup> Additionally, the Court failed to find the

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139. 477 U.S. 307, 310 (1976). The Supreme Court has established two principal approaches for use in determining the constitutionality of state statutes on Equal Protection grounds. Under the traditional rational basis test, *United States v. Carolene Products*, 304 U.S. 144, 152, n.4 (1937), the court held unconstitutional only those statutes containing provisions which lack any reasonable relation to a legitimate government objective.

In *Murgia*, the Supreme Court reinforced its exclusive reliance on the two tier system for resolution of equal protection questions. The three judge district court concluded that the statute requiring mandatory retirement at age 50 was not reasonably related to any state interest and was therefore an unconstitutional violation of the Equal Protection Clause. *Murgia v. Massachusetts Bd. of Retirement*, 376 F. Supp. 753 (D. Mass. 1974), *rev'd*, 427 U.S. 307 (1976). *See also* U.S. Const. amend. XIV, § 1. The U.S. Supreme Court reversed and held that the rationality test is the standard used to determine the constitutionality of a statute that neither disadvantages any suspect class nor infringes on any fundamental interests. 427 U.S. 307 (1976).

Originally, the Supreme Court held that the 14th amendment permitted statutory classification systems that were rationally related to the legislative purpose of the statute and treated everyone within the classification equally. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Courts would employ a more stringent test only when a statute used race as a classification factor. *Korematsu v. United States*, 323 U.S. 214 (1944); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

The Warren Court developed the two tier analysis of challenged statutes, in which the strictness of review depended on the classification created and the individual interest affected. *Compare* *McDonald v. Board of Election Comm'rs.*, 394 U.S. 802 (1969); *McGowan v. Maryland*, 366 U.S. 420 (1961); *with* *Weber v. Aetna Cas. Sur. Co.*, 406 U.S. 164 (1972); *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Court continues to apply the traditional rational basis test to most statutory classifications, *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). The test works under the presumptive validity of the statute and will assume that any, perhaps unarticulated, legislative purpose will be rational. Nearly every challenge has been deficient in proving that the statute is entirely invalid or irrational. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Dandridge v. Williams*, 397 U.S. 471 (1971); *McDonald v. Board of Election Comm'rs.*, 394 U.S. 802 (1969).

Modernly, the rational basis test has been more vigorously applied in those cases involving suspect classifications which are close to being held "suspect" or involving interests which, although not judicially as "fundamental," are recognized as very important. *See* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 11-48 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

140. When a judicially defined "suspect class" serves as the basis of a statutory classification, or where statutory provisions infringe upon a "fundamental interest," the Court has invoked a more critical level of review. In such cases, the presumption of constitutionality is inverted, and a compelling state interest must be



right to continued government employment as a fundamental interest.<sup>141</sup> Applying the rational basis standard,<sup>142</sup> the Court found that age did have some debilitating characteristics and that mandatory retirement was rationally related to the state's interest in maintaining a vigorous police force.<sup>143</sup>

Dissenting, Justice Marshall argued the Court had applied a too lenient standard of review.<sup>144</sup> While agreeing with the majority's conclusion that the strict scrutiny used in the compelling state interest test was inapplicable based upon past precedent, Justice Marshall felt that certain classifications, while not "suspect," are deserving of a greater level of protection than afforded by the traditional "rational basis" standard. This intermediate level of review, Justice Marshall opined, was warranted in this context in light of the "repeated and arbitrary discrimination in employment" to which the class of older workers is subject and the importance of the liberty interest involved.<sup>145</sup> Marshall did,

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demonstrated to justify the challenged state action. This classification was given a higher level of protection, known as strict scrutiny, because those classifications were unduly burdened by statute with an impermissible purpose denying a specific right. *Shapiro v. Thompson*, 394 U.S. 618, 634-35 (1969). *See also* *Lochner v. New York*, 198 U.S. 45 (1934). Absent a compelling state interest, the Court will find the statute unconstitutional. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Rarely did a statute survive this higher level of review. As a result, the level of review, rational basis or strict scrutiny, often became determinative of the outcome of an equal protection case.

141. *See* note 140, *supra*.

142. *Weisbrod v. Lynn*, 420 U.S. 940 (1975), *aff'g* 383 F. Supp. 933; *McIlvaine v. Pennsylvania*, 454 Pa. 129, 309 A.2d 801, *dismissed for want of substantial federal question*, 415 U.S. 986 (1974). *See also* note 139, *supra*.

143. *See* 427 U.S. at 315-16 and nn.7 & 10.

144. *Id.* at 319.

145. *Id.* at 319, 320. In the late 1960's the Court began to seek a mid-level of review that would overcome the rigidity of the two tier approach. *Shapiro v. Thompson*, 394 U.S. 618 (1969). It expanded the definitions of fundamental interest and suspect class. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), and began to utilize a sliding scale of review. In 1973, in *San Antonio v. Rodriguez*, 411 U.S. 1, 109, 124-25, the Court indicated that it would no longer use this intermediate level of review. Continuing to search for a mid-level review, the Court variously employed the irrebuttable presumption doctrine, *Dunn v. Blumstein*, 405 U.S. 330 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972) and the enhanced rational basis test, *Reed v. Reed*, 404 U.S. 71 (1971); *Maher v. Roe*, 432 U.S. 464 (1978); *Craig v. Boren*, 429 U.S. 190 (1976).

The latter, while not widely followed, requires a fair and substantial relationship between the means chosen to effectuate the legislative purpose and the objective itself. *See Reed v. Reed*, 404 U.S. 71, 76 (1971). The advantages to the challenger who invokes this level of review are twofold:

1. The Court will restrict itself to the object of the legislation, curbing the ability to speculate to an acceptable reason for the classification. *McGowan v. Maryland*, 366 U.S. 420 (1961); and

2. The Court will not recognize administrative inconvenience as a legitimate objective of the statute. *Reed v. Reed*, 404 U.S. 71 (1971).

In essence, the courts are required to more sharply focus on the legitimacy of the

however, note that the holding was not dispositive to all mandatory retirement statutes and that successive applications of the rational basis test would determine the varying ages to be singled out for forced retirement.

Comparing age discrimination with racial discrimination,<sup>146</sup> the Court found three significant differences. First, older persons had not been subjected to a history of purposeful, unequal treatment.<sup>147</sup> Second, the Court found older individuals had been discriminated against and forced to retire on criteria based on ability. In contrast, race-related discrimination was frequently

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articulated legislative intent. The Court should use the enhanced rational basis test on sex-based classifications and close-to fundamental rights. LeVein, *The Age Discrimination in Employment Act, Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227, 230 (1974).

The Court, in *Murgia*, specifically signalled an end to the irrebuttable presumption doctrine. *Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975) (*per curiam*); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *See generally*, Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Comment, *Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis*, 58 MINN. L. REV. 965 (1974); Note, *Irrebuttable Presumption: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine; Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); *The Supreme Court, 1974 Term: Irrebuttable Presumptions*, 89 HARV. L. REV. 49, 77 (1975).

The Court has also indicated that it will not, given a clear opportunity, expand the categories of fundamental interest or suspect classification. Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89; Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court, A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

146. The Supreme Court's recognition of the difference between constitutional race and age discrimination definitions need not necessarily color the statutory interpretations of the same issues. The ambiguity inherent in definition of the Equal Protection Clause will often force the courts to evaluate those claims deserving societal protection and, where warranted, afford special constitutional recognition and protection to certain interests. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1103-04, 1162-1163 (1969); *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). It may be inferred that Congress had taken the initial step of identifying these interests deserving a special standard of scrutiny by passing remedial legislation to specifically protect their interests. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109-110 (1949); *Construction Industry Association v. City of Petaluma*, 522 F.2d 897, 908-09 (9th Cir. 1975).

*Washington v. Davis*, 426 U.S. 229 (1976), explicitly held that the standard of proof to be applied in employment discrimination cases under the 14th amendment is different than that applicable to Title VII actions. It may be inferred that the ADEA is also not entitled to scrutiny similar to that afforded constitutional actions.

147. 427 U.S. 307, *supra* n.135 at 314-315.

based on factors other than job-related characteristics.<sup>148</sup> This suggested that age is more of a job-related characteristic than race. Finally, the Court did not find that older people comprised a "discrete and insular" minority deserving of "extraordinary protection from the majoritarian political process" since the effects of aging encompass all of society.<sup>149</sup>

The immediate effect of *Murgia* was to dispel the hopes of those who thought the Supreme Court would strike down a mandatory retirement statute considered on its merits.<sup>150</sup> Other courts have indicated their willingness to find a mandatory retirement statute unconstitutional, however, they have been constrained by the restraints imposed by *Murgia* and other cases.<sup>151</sup>

The Court, in the application of the ADEA, has been able to use a more protective standard than in the constitutional cases. The articulated intent of the ADEA was to promote employment of older persons "based on their ability rather than age."<sup>152</sup> The ADEA finds age discrimination permissible only if age is a "bona fide occupational qualification reasonably necessary to the operation of the particular business."<sup>153</sup> In the "protection" of age/employment concerns, the courts have attempted to use the broadest interpretation possible.

Initially, the similarities between the ADEA and Title VII<sup>154</sup> led the courts to refer to the interpretations of the Civil Rights Act in defining similar ADEA provisions.<sup>155</sup> As the judicial interpreta-

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148. *Id.* at 315.

149. *Id.*

150. Note, 4 PEPPERDINE L. REV. 369, 373 (1977).

151. *Gault v. Garrison*, 523 F.2d 205, 209 (1975), *dismissing* appeal from 454 Pa. 129, 309 A.2d 801 (1973), *citing* *McIlvaine v. Pennsylvania*, 415 U.S. 986.

"Our conclusion must be that if we were to decide this appeal today, we would be constrained to honor the aforementioned Supreme Court summary judgment dispositions as being persuasive precedents, if not binding . . ." *See also* *Weisbrod v. Lynn*, 420 U.S. 940 (1975), *aff'g* 383 F. Supp. 933 (D.D.C. 1974); *Pilots Assn. v. Quesda*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961). For an excellent discussion of a mandatory retirement statute, *see* Note, *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A. L. REV. 549 (1975).

152. 29 U.S.C. §§ 621(f)(1) & 621(b) (1970).

153. 29 U.S.C. § 623(f)(1) (1970). The bona fide occupational qualification (BFOQ) must be construed very narrowly in a similar manner to the interpretation given the similar Title VII provision. 29 U.S.C. § 623(f)(1) (1970); 42 U.S.C. § 2000e-2(a) (1970); *see also* *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

154. Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-*et seq.* (1964).

155. *Dartt v. Shell Oil Co.*, 539 F.2d 1265, 1259 (10th Cir. 1976), *aff'd per curiam*, 434 U.S. 99 (1977), *rehearing denied*, 434 U.S. 1042 (1978); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 94 (8th Cir. 1975); *Curry v. Continental Air Lines*, 513 F.2d 691, 693 (9th Cir. 1975). *But see*, *Fellows v. Medford Corp.*, 431 F. Supp. 199, 201 (D.C. Ore. 1977); *see also* *Moses v. Falstaff Brewing Corp.*, 550 F.2d 1113, 1114 (8th Cir. 1977); *Marshall v. Hills Bros.*, 432 F. Supp. 1320, 1235 (N.D. Calif. 1977).

tion of the ADEA has developed, a difference in the manner and tenacity with which the acts are enforced becomes readily apparent. The Civil Rights Act has been construed to provide the maximum protection for the groups encompassed by the statute.<sup>156</sup> At the same time, a dichotomy has evolved in the enforcement of the ADEA. Some courts have reached results consistent with Title VII decisions.<sup>157</sup> Other courts, failing to provide a constant level of protection, have held the existence of a separate statute implied a different degree of protection was to be afforded.<sup>158</sup>

One area where there is a difference in the methods of enforcement in Title VII and the ADEA is in the allocation of the burden of proof. In most civil cases, the plaintiff is responsible for presenting a quantum of evidence to sustain a favorable judgment. That quantum is said to preponderate over the evidence produced by the defendant.<sup>159</sup> Title VII cases, however, recognize a presumption in the plaintiff's favor, easing the burden of proof placed on the plaintiff.<sup>160</sup> The plaintiff need only show a prima facie case of employment discrimination, *e.g.*, that a qualified applicant was rejected and that an employer continued to seek applications from individuals with the rejected applicant's qualifications.<sup>161</sup> Some courts maintain the view that the burden of proof has shifted entirely to the defendant.<sup>162</sup>

The allocation of the burden of proof has been undertaken in a somewhat different manner in cases involving the ADEA than in Title VII cases. Some circuits dealing with cases initially brought under the ADEA held that the standard for the burden of proof should be examined in the application of the ADEA, and the burden should entirely shift to rest upon the defendant to justify any

156. *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); Hill, *The New Judicial Perception of Employment Discrimination—Litigation Under Title VII of the Civil Rights Act of 1964*, 43 U. COLO. L. REV. 243, 253-54 & n.39 (1972); Note, *Employment Discrimination: A Title VII Symposium*, 34 LA. L. REV. 540 (1974).

157. *Hodgson v. First Federal Sav. & Loan Assn.*, 455 F.2d 818, 822 (5th Cir. 1972); *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976).

158. *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975). See also note 146, *supra*.

159. C. McCORMICK, *HANDBOOK ON THE LAW OF EVIDENCE* §§ 337, 338 (2d ed. 1972).

160. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-03 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

161. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

162. James, *Burdens of Proof*, 47 VA. L. REV. 51, 58-60, 62-63 (1961).

age disparity.<sup>163</sup> Other circuits refused to recognize the shifting burden of proof upon the presentation of prima facie evidence showing employment discrimination.<sup>164</sup>

A policy consideration must also be regarded at this point. Similar to Title VII, it is likely that the presumption of discrimination in favor of those allegedly discriminated against under the ADEA would demand that an employer govern his actions watching for possible discrimination each time he is faced with a hiring or firing decision. As a practical matter, these considerations would probably dictate preferences toward older workers whenever there was some doubt.<sup>165</sup> Social policy would demand the extraordinary measures utilized under Title VII not be widely applied, so as to avoid the loss of the desired impact of those laws. Currently, a priority or greater justification is generally recognized in favor of women and racial minorities.<sup>166</sup> Again, the Secretary of Labor found there was little hostility directed at older workers as a group, unlike the hostility directed toward other dis-

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163. *Hodgson v. First Federal Savings*, 455 F.2d 818 (8th Cir. 1972).

164. *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975).

In reviewing the precedent set by *McDonnell Douglas*, the Court in *Laugesen* refused to apply the Title VII precedent to the ADEA in light of their existence as separate acts with distinct legislative histories. The Court noted three factors distinguishing the two acts. First, an ADEA case might be tried to a jury unlike a Title VII action. The Court didn't reach a decision as to whether the ADEA affords a right to a jury. *Id.* at 312, n.2. *See also* 113 Cong. Rec. 31255 (1967) (remarks of Sen. Javits, assuming the right to jury trials would be afforded under the ADEA). *But see*, *Brennan v. International Harvester, Inc.*, 7 Empl. Prac. Dec. ¶ 9171, at 6904 (N.D. Ill. 1973) which held that there was no jury right since the requested remedies were essentially equitable. It was assumed that jury prejudice against a defendant in Title VII action was likely, warranting the exclusion of the right to a jury trial. Comment, *The Right to Jury Trial under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167, 167-168 (1969).

Second, the Court distinguished *Laugesen* from *McDonnell Douglas*, a Title VII case involving racial discrimination in a refusal to hire, where the suit involved age discrimination in the discharge of an employee. 510 F.2d at 312 & n.3.

Finally, the Court held that the allocation of the burden of proof in *McDonnell Douglas* simply did not apply to ADEA cases. *Id.*

These justifications are not overtly persuasive. The Court failed to discuss the significance and reasoning behind the distinction disallowing juries in Title VII cases. 510 F.2d at 312, n.2. The Court also failed to distinguish between race and age classifications. *Id.* at 312, n.4; *McDonnell Douglas* at 802-03. Finally, the Court was unclear as to why there should be a distinction between the failure to hire and discharge. *See generally*, 411 U.S. 792, 802, n.13 (1973).

165. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 256 (1971).

166. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1116-1117 (1971). Employers' decisions with regard to women and blacks will generally be suspected as being affected by stereotypes unrelated to ability. *Korematsu v. United States*, 323 U.S. 214 (1944). There is a greater reason to suspect that women and racial groups were disadvantaged on the basis of sex and race than it is to assume that older people were discriminated against because of their age.

criminated-against groups.<sup>167</sup>

The bona fide occupational qualification (BFOQ)<sup>168</sup> and the retirement provisions<sup>169</sup> of the ADEA are the most frequently litigated exceptions to the Act. Because the Act is liberally interpreted so as to more effectively realize its remedial purpose, both exceptions must be narrowly construed.<sup>170</sup>

*United Airlines v. McMann*<sup>171</sup> held a retirement plan could not be used as a subterfuge to avoid the purposes of the Act.<sup>172</sup> However, the Court recognized that retirement plans existing prior to the institution of the Act would continue to be recognized as valid and a more stringent construction of the Act would apply only to those plans instituted after its inception.<sup>173</sup>

167. U.S. DEPT. OF LABOR REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965).

168. 29 U.S.C. § 623(f) (1979). It shall not be unlawful for an employer, employment agency or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the term of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

(3) to discharge or otherwise discipline an individual for good cause.

See also note 187, *infra*.

169. There are 3 primary exceptions to the Act. The first exemption is found where retirement is mandated by a lawful benefit pension or retirement plan. The second exemption is allowed where retirement is required because of factors other than age. Finally, the BFOQ exception allows forced retirement where the job demands that certain age related qualifications be met.

170. *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93 (8th Cir. 1975).

171. *United Airlines v. McMann*, 434 U.S. 192 (1977).

172. *Id.* In *McMann v. United Airlines, Inc.*, 542 F.2d 217 (4th Cir. 1976), it was asserted that a retirement plan could not be viewed as a subterfuge to the ADEA if it had been established in 1944 and that the employee voluntarily joined the plan. The Circuit Court relied on *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) to conclude that what was forbidden by the Act is not a subterfuge to evade the Act, but a subterfuge to evade the purposes of the Act. Thus, although the mandatory retirement provision predated the Act, it could still be construed as a discriminatory practice that the Act was designed to eliminate. The Court concluded by asserting that avoidance of condemnation as a "subterfuge" could only be found where the retirement provision was founded on a bona fide economic or business purpose. 542 F.2d at 221-22.

173. The Court attempted to resolve the apparent difference between the contradicting opinions found in the 4th Circuit *McMann* case and *Zinger v. Blan-*

The BFOQ exemption must be narrowly construed in a manner similar to that accorded to § 707(e) of the Civil Rights Act of 1964.<sup>174</sup> In the absence of a high court determination, two circuit courts have created the tests to be used in determining the criteria for a bona fide occupational qualification sufficient to justify discriminatory practices.<sup>175</sup> In each case, the courts were dealing with issues where sex had been asserted as a bona fide occupational requirement.<sup>176</sup> The courts have been reluctant to broadly extend their rationale recognizing sex as a BFOQ to cases under the ADEA involving age as a BFOQ.<sup>177</sup> Cases relying on the assertion of a BFOQ defense under an ADEA action have sought evidence of a factual basis or a reasonable necessity for the assertion of this defense by the employer.<sup>178</sup> The two leading cases under the ADEA have rejected the factual basis test and, instead, have required a BFOQ defense meet either the less stringent rational basis test<sup>179</sup> or, in the alternative, that a factual basis test

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chette, 549 F.2d 901, *cert. denied*, 98 S. Ct. 717 (1974), a holding in the 6th Circuit. In *Zinger*, the Court preferred to apply a relaxed standard to find that a pre-Act standard was bona fide. In seeking a resolution to this conflict, the Supreme Court had to address the question of whether the intent of section 4(f)(2) was to encourage the hiring of older persons without being obligated to pay full retirement benefits or whether it was intended to provide for lawful mandatory retirement under benefit or pension plans.

The majority held that the clause was designed to perpetuate existing benefit plans which compelled retirement. Marshall's dissent points out the anomaly of the fact that an employee forced to retire could reapply for the job and as the most qualified applicant, regain his job under the ADEA. Legislative intent seems to be in accord with the dissent. Congress specifically disapproved of the findings in the *Taft* and *Zinger* cases and approved of the 4th Circuit's *McMann* decision. S. REP. NO. 95-493, 95th Cong., 1st Sess. (1977).

174. Compare 29 U.S.C. § 623(f)(1) (1970) and 42 U.S.C. § 2000e-2(a) (1970). See *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

175. See *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) and *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).

176. *Id.* In *Weeks*, the Fifth Circuit Court found a standard requiring the employer to prove a factual basis for the assertion that all or substantially all members of a protected class under Title VII were unable to perform at the specific type of job. 408 F.2d at 235. The *Diaz* Court expanded this reasoning to find that evidence of a reasonable necessity for the discriminatory practice must be shown. 442 F.2d at 387-88.

177. 408 F.2d at 236.

178. *Id.* See also *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.) *cert. denied*, 434 U.S. 966 (1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). *Hodgson* and *Usery* are the two leading cases discussing a BFOQ defense in refusals to hire. Both cases involve bus lines that established maximum ages for the initial employment of bus drivers. Maximum ages were 35 for Greyhound (*Hodgson*) and 40 for Tamiami (*Usery*).

179. 499 F.2d at 865. In *Hodgson*, the 7th Circuit Court of Appeals overturned the decision of the lower court applying the "factual basis" test by using the less demanding rational basis test.

be met if applicants could not be individually screened.<sup>180</sup> This second test is probably the more rigorous of the two, requiring close judicial scrutiny.<sup>181</sup> To date, no clear test has evolved upon which the assertion of a BFOQ defense may be adequately reviewed.<sup>182</sup>

The third exception to the ADEA is found in what the statute refers to as "reasonable factors other than age."<sup>183</sup> The judicial interpretation of this phrase has been limited to factors described as bona fide economic judgments or as valid economic necessities which justify discriminatory activity.<sup>184</sup> A narrow interpretation of this clause is consistent with the expressed intent of the Act to promote employment on ability rather than on age.<sup>185</sup>

Within the third exception to the ADEA, many factors may have importance in an assertion of this claim as a defense.<sup>186</sup> The Secretary of Labor determined reasonable factors that may be allowed to influence an employer's decision and mandated the plaintiff demonstrate that age was a determinative factor in the

180. In the *Usery* case, the 5th Circuit rejected the rational basis test and found there was insufficient data to meet the factual basis test. 531 F.2d at 236. The Court then proceeded to bifurcate the *Weeks* holding into alternative standards. The Court required the defendant to show either a factual basis for believing that all or substantially all of the job applicants would be incapable of driving buses safely, 531 F.2d at 237, or that individualized examination would ineffectively screen out the nonqualified applicants. *Id.*

181. See generally Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 406-07 (1976).

182. In *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976), the court refused to apply the rational basis test. The court found the presumed disqualification of firemen older than 62 not rationally founded. The court found the employer's legitimate concern should be met by the institution of periodic examinations.

*Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977), required a firm factual basis must be outlined to justify the assertion of a BFOQ. 553 F.2d at 564 Cf., *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

183. 29 U.S.C. § 623(f)(1) (1970). See note 168, *supra*.

184. *Laugesen v. Anaconda Co.*, 510 F.2d 307, 316 (6th Cir. 1975); *Bishop v. Jelleff Associates*, 398 F. Supp. 579, 593 (D.D.C. 1974); *Gill v. Union Carbide Corp.*, 368 F. Supp. 364, 366 (E.D. Tenn. 1973).

185. 29 U.S.C. § 621(b) (1970).

The early interpretations of this clause seem to have taken a narrower interpretation of the exception than did later interpretations. Compare, *Bishop v. Jelleff Associates*, 398 F. Supp. 579, 593 (D.D.C. 1974); *Schulz v. Hickok Mfg. Co.*, 358 F. Supp. 1208, 1214 (D.C. Ga. 1973) with *Moses v. Falstaff Brewing Corp.*, 550 F.2d 1113, 1114 (8th Cir. 1977); *Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299, 1309 (E.D. Mich. 1976); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir. 1975).

186. B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 403 (1976).



discharge.<sup>187</sup> This mandate has been interpreted as meaning that

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187. Regulation 29 C.F.R. § 860.103 (1976) provides:

Differentiations based on reasonable factors other than age:

(a) Section 4(f)(1) of the Act provides that "[I]t shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited under paragraphs (a), (b), (c) or (e) of this section . . . where the differentiation is based on reasonable factors other than age; . . ."

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition, or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age.

(1)(i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: *Provided, however*, that such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, whereas another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiation based

age may be legally included in the factors considered in a termination decision, but that it cannot be the exclusive determining factor.<sup>188</sup>

In summary, the statutory and constitutional provisions protecting the aged against discrimination in employment, and in particular, mandatory retirement, have fallen somewhat short of the intended legislative purpose. The ADEA and Title VII have, however, provided more protection than does the fourteenth amendment. The new amendment to the ADEA will be subject to the same interpretations and limitations, within the new parameters, as the original Act.

### *B. Economic Advantages to Employers*

Chronological age is generally conceded to be a poor indicator of one's ability to perform. Although an individual's energy and physical resources generally decline as he reaches an advanced age, his skills and accumulated experience still represent valuable assets. The passage of the amendments to the ADEA will compel employers to better evaluate the varying abilities of their older employees.<sup>189</sup>

Some employers foresee a decrease in training costs and speculate that,<sup>190</sup> although the bill will force management to make af-

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on reasonable factors other than age, and do not constitute a complete or exhaustive list of limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do not have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of this Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

188. *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975); *Bishop v. Jelleff Associates*, 398 F. Supp. 579, 592 (D.D.C. 1974). The Court in *Laugesen* stated that a plaintiff would be able "to recover if one such factor was . . . age and if, in fact, it made a difference in determining whether he was to be retained or discharged." 510 F.2d 307, 317.

189. See O'Meara, *Retirement*, 14 ACROSS THE BOARD 4, 5 (Jan. 1977).

190. *Id.*

firmative decisions,<sup>191</sup> the net effect will be positive. There is no conclusive evidence confirming productivity is significantly impaired once one reaches age sixty-five. Productivity, with regard to advancing age, has been seen to either increase<sup>192</sup> or to only slightly diminish,<sup>193</sup> in various studies. Proponents of the Act argue that inasmuch as ability levels and productivity remain high, there should be no reason to arbitrarily limit employment.

Proponents also argue that, as employees grow older, their commitment to their job and their reliability increases.<sup>194</sup> Older workers have demonstrably fewer accidents on the job, less absenteeism, and less difficulty withstanding stress than do younger persons.<sup>195</sup> Except for jobs imposing heavy demands, older employees perform as competently and productively as younger employees. In addition, educational psychologists indicate that there is no significant decline in learning ability.<sup>196</sup>

### C. Adverse Medical Impact

There is considerable evidence to indicate the most significant decline in mental<sup>197</sup> and physical ability comes after retirement, regardless of the age at which the employee chooses to leave the

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191. Wood, *Mandatory Retirement and Equal Protection*, 28 LAB. L. J. 142 (Mar. 1977), quoting Dr. Arthur S. Flemming, HEW Administrator on Aging.

192. Schwab & Heinemann, *Effects of Age and Experience on Productivity*, INDUSTRIAL GERONTOLOGY 113 (Winter 1977).

193. Bartley, *Compulsory Retirement: A Reevaluation*, PERSONNEL 62 (Mar-April 1977). See also, Proper, *Study of Physiologic and Psychologic Aging in Professional Pilots*, 40 AEROSPACE MEDICINE 557 (1969), indicating among professional pilots there are virtually no change in circulation, stroke volume, blood pressure at rest, cardiovascular function, work capacity or grip strength in the spectrum of ages examined.

194. Bartley, *Compulsory Retirement: A Reevaluation*, PERSONNEL 62, 66 (Mar-April 1977). A study of 100 male workers' personnel records were examined after random selection among 2800 employees including both recent retirees and active workers. The study revealed absences were approximately doubled among the younger workers. The absences of the older workers were significantly increased by a small percentage of ailing employees. The older workers comprised 32 percent of the total number of visits to the infirmary and 39 percent of the total injuries occurring on or off the job.

195. *Id.*; Meier & Kerr, *Capabilities of Middle-Aged and Older Workers: A Survey of the Literature*, 3 INDUSTRIAL GERONTOLOGY 147, 151-54 (Summer, 1976). See also *Medical Aspects of Road Safety*, 14 LANCET 992 (May 5, 1960), stating that older persons have fewer accidents than do younger persons.

196. O'Meara, *Retirement*, ACROSS THE BOARD 4 (Jan. 1977), citing surveys conducted by the U.S. Labor Department, Canadian Labor Department, New York State Commission on Human Rights and the Gerontological Society.

197. Drevensedt, *Perceptions of Onsets of Young Adulthood, Middle Age and Old Age*, 31 J. OF GERONTOLOGY 53 (1976), determined that the most significant contributing factor to the mental and attitudinal changes of older people, far from being biological, is the role playing caused by acceptance of the stereotypes of society toward aging. See also A. COMFORT, A GOOD AGE 86-90 (1976).

work force.<sup>198</sup> Current studies by the American Medical Association indicate a sudden cessation of productive work and earning power of an individual caused by compulsory retirement often leads to physical or emotional deterioration and premature death.<sup>199</sup>

#### D. Economic Impact on Older Individuals

The new provision of the ADEA has the potential to ease some of the hardships created by mandatory retirement. Those hardships are found with the loss of position and income for the older individual where the retiree might have been forced to accept a lower level of Social Security or pension benefits, or with the difficulty imposed on women who enter the labor market at a relatively late point in life, or with the difficulty in meeting continuing financial obligations. All of these are in addition to the above-discussed physical hardship or impact.

Many lower paid workers would prefer to continue to work after age sixty-five in order to maintain a more dignified life-style than is economically possible on a fixed income during a high inflation era.<sup>200</sup> A significant portion of the low income retirees indicated they would like to return to work.<sup>201</sup> The amendment will afford these individuals the opportunity to acquire the benefits of continued employment for a minimum of an additional five year period.

The assertion that most workers over age sixty are eligible for Social Security and no longer need employment is completely without foundation.<sup>202</sup> Nearly 44 percent of the elderly are classed as poor, and 11 percent as near poor.<sup>203</sup> As previously

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198. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), see *amicus* brief submitted by the American Medical Association indicating that forced retirement may also cause a loss of status and may impair self-satisfaction, social relationships and self-respect.

199. *Id.*

200. *How Retire-at-70 Would Affect Banks*, 69 *BANKING* 16 (Nov. 1977).

201. J. Ossofsky, Executive Director, National Council on Aging in testimony before the Sen. Subcommittee on Equal Opportunity, 95th Cong. (Sept. 14, 1976), indicated that 43 percent of those retirees with income below \$3,000 desire employment.

202. See generally Bixby, *Income of People Aged 65 and Older: Overview from 1968 Survey of the Aged*, 33 *SOC. SEC. BULL.* 3 (April 1970). See also Antonucci, *Discrimination Against the Elderly: A Prospectus of the Problem*, 7 *SUFF. U. L. REV.* 917 (Summer 1973).

203. See note 202, *supra*.

mentioned, the unemployed pensioned aged, comprise the poor aged.<sup>204</sup>

The amendment will probably not have an immediate overwhelming impact on current unemployment trends.<sup>205</sup> The sharp rise in the ratio of retirement to pre-retirement earnings has been accompanied by an increase in the number of employees exercising an early retirement option. The continuing availability of a relatively high income under such retirement plans makes a reversal in this trend highly unlikely.<sup>206</sup> The net economic impact of the amendment indicates the vast majority of workers are not directly affected by mandatory retirement.<sup>207</sup>

### *E. Economic Cost to Society*

The actual cost associated with the passage of the amendment may possibly be such that the government will, to a degree, be able to cut costs. Two factors affect society's cost of supporting the retired portion of the population through Social Security or pension plans. First, the increasing ratio of pre-retirement earnings to post-retirement benefits indicates that the cost of maintaining America's retired population is increasing.<sup>208</sup> Cost reduction will occur as careers are lengthened in response to the ADEA. Second, contributions to Social Security and to pension plans will be higher because of lengthened employment at a higher wage scale and payouts will be lower because people who otherwise would have begun receiving benefits at age sixty-five will continue working longer.

The new provision will ease the burden mandatory retirement

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204. *Id.* at 8. Social Security and retirement benefits are the primary income of 90 percent of the 22 million Americans aged 65 and over.

A 1973 HEW survey found that 82 percent of the Americans older than 65 had incomes of less than \$5,000. One million of those people were living on less than \$1,500 annually.

205. Prakken, *Mandatory Retirement: Issues and Impacts*, FED. RES. BANK OF N. Y. Q. REV. 25 (Spring 1978). A trend toward early retirement has been noticeably underway in the United States since 1956. In that year women became eligible before age 65 to collect early retirement benefits under the Social Security program. 55 percent of those eligible now actually collect. In 1961, men were granted the same privilege and 48 percent now exercise that option. The number of private and other public retirement programs offering an early retirement option is also on the rise. *Id.* at 29-30.

206. *Id.* See also MANDATORY RETIREMENT: THE SOCIAL AND HUMAN COST OF ENFORCED IDLENESS, REPORT BY THE SENATE COMMITTEE ON AGING. Cong. Pub. No. 95-91 (Aug. 1977). Ford Motor Co. testified that only 2 percent of their employees waited until mandatory retirement at age 68, with 89 percent retiring at age 65. Exxon indicated that 20 percent waited until mandatory retirement at age 65 to retire, General Foods, 30 percent and IBM, 15.9 percent.

207. *Id.*

208. *Id.*

has placed on women who enter the labor market late in life because they had no opportunity to work until their children were raised. A late entry into the labor market resulted in a diminished opportunity to build an adequate level of pension benefits.<sup>209</sup> There is now a longer period available to increase those benefits.

Mandatory retirement also causes an economic hardship on workers who have continuing financial obligations that have, in the past, been primarily reserved for younger people (*e.g.*, home or automobile payments). In addition, more older persons are assuming responsibility for relatives who are financially unable to care for themselves. The ADEA amendment will provide an opportunity to those people faced with this imposition to gain the benefit of an additional five years of work.<sup>210</sup>

In a broad sense, the provision will serve to stem, in part, the loss of skills and output from the labor market. The older individual, given the ability to continue working at a productive level, will be able to make valuable contributions to an employer, based on the accumulation of knowledge and experience acquired over the length of his career.<sup>211</sup>

The demand for certain types of workers is expected to increase in the mid-term future requiring the skills of workers, now retiring, in the labor force. For example, blue collar workers are retiring in greater numbers than the numbers of those entering the market.<sup>212</sup> Employers speculate the labor supply of blue collar workers will be inadequate unless employers are willing to allow

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209. *Big Fight Over Retirement at Age 65*, 83 U.S. NEWS & WORLD REP. 30 (Oct. 3, 1977). Pensions are generally determined by the salary level average from the five years preceding retirement. If the last five years of work are at a higher level the pension benefits will also be higher. *How Retire-at-70 Would Affect the Banks*, 69 BANKING 16 (Nov. 1977).

210. *Forced Retirement: An Issue Riling Older Americans*, 83 U.S. NEWS & WORLD REP. 75-76 (July 4, 1977).

211. Bixby, *Retirement Patterns in the United States: Research and Policy Interaction*, 39 SOC. SEC. BULL. 3 (August 1976). The article goes on to indicate it is only since 1972 that the proportion of men, aged 65-69, working at some time during the year dropped below one-quarter. For that age group, the labor force, which was nearly three-fifths in 1955, had dropped to one-half in 1960 and to about one-third in 1975.

212. Drucker, *Thinking About Retirement Policy*, WALL ST. J. 24 (Sept. 15, 1977). Of every 100 people in the labor force who reach 65, approximately 80 are blue collar workers with a high school education or less. Of every 100 young people entering the work force, at least 50 have advanced education and are simply not available for the "traditional blue collar jobs." Employers have found an additional problem in finding and providing an incentive to encourage workers to stay.

older workers to stay on the job past age sixty-five.<sup>213</sup>

The new legislation will also ease what has become an untenable burden on Social Security and employer retirement plans. If fixed retirement continues at age sixty-five, 50 percent of every employee's wage and salary would have to be used to support older people on retirement by the turn of the century.<sup>214</sup> The amendment can serve as one of many factors needed to reverse the trend toward the bankrupting of Social Security.

#### IV. CONCLUSION

In summary, the recent amendments to the Age Discrimination in Employment Act of 1967 have spawned a great deal of criticism. Proponents favor the bill because it enhances the personal dignity of the older employee and offers a tangible economic benefit to employers. Opponents to the provision argue the benefit is offset by the costs and difficulty of administration.

The measure fell short of the goal expressed by the bill's sponsors and senior citizen groups. They will continue to press for open-ended retirement, arguing that the problems faced by older participants in the work force can be eased by the abolition of compulsory retirement. Seeking to emulate provisions in some foreign countries, the proponents of that last proposal will undoubtedly request a more flexible retirement program where a capable employee can designate his own retirement age, except in the more arduous occupations.<sup>215</sup> Any such program must, of necessity, be based on individual evaluations of the employee's capacity and ability to work. A company may be able to develop more subtle ways of discouraging an employee from continued employment than a formal evaluation process.<sup>216</sup> Whether a more "subtle" method of whether an evaluation system is employed,

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213. *Id.*

214. *Id.* It should be noted, however, that the amendment to the ADEA will not 'save' Social Security. At the inception of Social Security, there were between 9 and 10 employees in the work force to every retiree over age 65. In 1977, this figure had dropped to 3 workers for every retiree and it is expected that it will be 2.5 to 1 in 1980. The impact of this provision would push the ratio back only to 3.75 to 1. See also, *Retirement at 70?*, 118 FORBES 27 (Nov. 1, 1976), indicating in the year 2025 there will be 50 retirees to every 100 workers, a 2 to 1 ratio, requiring a 40 percent escalation in premiums, if the present trend continues. Today's worker, earning \$15,000 in salary, pays \$877.50 in Social Security premiums, retirement, disability and Medicare taxes and will have to pay \$2,300 in the year 2025. This represents 31 percent of his income compared to today's 13 percent. In 1950, this figure was at 1.1 percent and in 1960 at 5.9 percent.

215. Tracy, *Flexible Retirement Features Aboard*, 41 SOC. SEC. BULL. 18 (May 1978).

216. *Forced Retirement: An Issue that is Riling Older Americans*, 83 U.S. NEWS & WORLD REP. 75 (July 4, 1977).

there is a great likelihood employers will be subjected to added litigation regarding the enforcement of their selected retirement policy.

The problem hypothesized by Swift in 1726 has become a reality in the United States. The country has only begun to deal with the extent of the problem.<sup>217</sup> Swift, looking at the immortal Struldbrugs expected the "immortals would in time become proprietors of the whole nation, and engross the civil power . . . ." Instead, he found:

"the system of living . . . was unreasonable and unjust; because it supposed the perpetuity of youth, health, and vigour, which no man could be so foolish as to hope, however extravagant he be in his wishes. That the question therefore was not, whether a man would choose to be always in the prime of youth, attended with prosperity and health, but how he would pass the perpetual life under all the disadvantages which old age brings along with it."

At this point, modern society parts with Swift's analysis. Modernly, the "proprietors" of the nation have been aided by the ADEA in their quest to continue in active, fulfilling roles without the hindrance of failing health and vigour.<sup>218</sup>

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217. See note 1, *supra*.

218. *Id.*



