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Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment

*Irving Kovarsky**
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GENESIS

Since antiquity, man has been faced with the fact that his bodily functions deteriorate with age and he must eventually die. A fascinating variety of reactions have sprung from this basic realization. Witness man's search for eternal youth, a prominent literary theme throughout recorded history. Alchemists once attempted to discover a means of prolonging youth; ancient Chinese prophets preached that the way to a longer life was to eat off gold plates; and the "fountain-of-youth" concept can be found in the writings of the 4,000-year-old Edwin Smith Papyrus.¹ A more commonplace reaction to aging is evidenced by the prevalence of age discrimination throughout history. For the purposes of the medical discussion later undertaken, aging will be considered as a decreasing expectation of life with the passage of time, unrelated to definable environmental factors and manifested by some biological deterioration of the human organism. These "definable environmental factors" change considerably as our knowledge expands and produce corresponding changes in the concepts of physiological aging. At present, there is some consensus of opinion that the worker over forty-five years of age has a tendency toward decreased industrial capability. As will be subsequently established, the laws outlawing age discrimination replace this industrial bias by relying more heavily on current medical thought.

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1. See A. COMFORT, *THE PROCESS OF AGEING* 3-6 (1964).

The prevention of age discrimination goes beyond medical discovery, however, and reflects a strong public need to help those facing unemployment. Between 1960 and 1970, the age group between forty-five and sixty-four increased numerically in most states.² Only in Illinois, Minnesota, Missouri, Nebraska, New Hampshire, New York, Vermont and Wisconsin was there a decline in the total number of residents in this age group. During 1970, more than 1,000,000 of the unemployed were over forty-five years of age.³ Furthermore, approximately one-half of the unemployed was over fifty-five years of age, and of those, one-third was unemployed for nearly four months. Between 1969 and 1971, unemployment for those over forty-five nearly doubled,⁴ and these statistics do not reflect accurately the rate of unemployment because many elderly people who are unable to find a job retire before sixty-five and are not listed among the unemployed. At present, 37,000,000 people in the United States are between forty and sixty-five years of age, approximately forty-four percent of the 84,000,000 over sixteen years of age.⁵ By 1990, 47,000,000 persons will be between forty and sixty-five years of age. Moreover, unemployment has affected both the blue-collar worker and the white-collar worker, with many white collar workers unable to meet large mortgages, taxes, and other costly amenities.⁶

TRADITIONAL ROLE OF THE AGED

The role and status of the aging person have varied with individual community attitudes and industrial developments. In the ancient Hebraic agricultural society, the eldest male served as the head of the family and was unquestionably the dominant figure.⁷ His dominance had been well established by biblical lore and reflected the respect instilled in the young for their elders. This leadership role prevails today in farming communities, in sharp contrast with that exhibited in industry.⁸ Since long life was viewed as a gift from God, the patriarch was a natural leader in the agricultural

2. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *FACTS AND FIGURES ON OLDER AMERICANS*, Table 5 (1973) [hereinafter cited as *FACTS & FIGURES*].

3. See generally 2 1971 WHITE HOUSE CONFERENCE ON AGING 13.

4. *Hearings on S. 555 Before the Subcomm. on Aging of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., 54-58 (1971).

5. EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, *AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967*, at 1 (1972).

6. *Hearings on Economics of Aging Before the Special Senate Comm. on Aging*, 91st Cong., 1st Sess., pt. I, at 1 (1969).

7. M. KELLER, *SOCIAL GERONTOLOGY* 61-64 (1968).

8. W. DONAHUE & C. TIBBITTS, *POLITICS OF AGE* 137-38 (1962).

isolation of the ancient society. With this divine blessing, aging was equated with wisdom and experience—a boon in a static, technologically free society. In light of the rapidly changing technology of today, experience and past knowledge are often equated with obsolescence.

In contrast, the Greeks worshipped the young athlete and associated aging with failing health, deteriorating appearance, and gradual diminution of grace.⁹ Consequently, the elder Greek, though young by today's standards, often welcomed death because of the fear that his family might abandon him. Similarly, the citizen-soldier, between nineteen and forty-seven years of age, was the dominant figure while Rome ruled the world. The Roman empire was maintained by the young, tough, and aggressive citizen and some authorities have suggested that Romans favored death "to suffering the indignities of physical, mental, and social decay."¹⁰

During the Middle Ages, the average life span was thirty years.¹¹ Consequently, aging did not pose a significant problem for agriculture or industry. It is likely that the age span of those doing manual labor was shorter than those who did not work. One possible explanation is that a sedentary existence has a beneficial effect on some of the physical disabilities associated with age, such as myocardial infarction and hypertension. Also, the sedentary individual who was exposed to infectious disease and environmental toxins could be more readily helped than those physically active. The limited protection accorded the older worker came from the church or head of the estate upon which he worked.

Life in colonial America was rigorous and few lived to what one today considers an advanced age.¹² The Puritans closely followed the Hebraic life-style, and the aged were entitled to considerable respect. The older white of the South, however, was generally excluded from the economic mainstream unless he happened to be a plantation owner. The Protestant Ethic, the predominant force during the developing period in the United States, favored self-reliance, freedom from government regulation, and, except for the black, an open and competitive market place. According to this ethic, the poor had only themselves to blame, and were left to look to their church for alms. Later, charitable support for the poor was shifted from the religious institutions to the general public without careful

9. KELLER, *supra* note 7, at 64-65.

10. *Id.* at 67.

11. *Id.* at 67-69.

12. *Id.* at 69-71.

consideration of the economic system's growing emphasis on the stronger and younger worker.¹³

Today, aging workmen in the United States face problems of employment that workers do not face in some European nations. Because of high employment and smaller labor forces, countries like Denmark and France provide incentives to induce older workers not to retire. In the United States, because of unemployment and the difficulty in finding jobs, older workmen are encouraged to retire.¹⁴ Nevertheless, most workmen between forty and sixty-five are employed and collective bargaining agreements, arbitration, and legislation protect their jobs.¹⁵ Should plants reduce the size of their workforce or close completely, however, older workers might find it difficult to find suitable employment. The United States, committed to a high level of employment since the advent of Keynesian economics, has been receptive to attacking age discrimination. Before exploring some of the legal and medical facets of the laws outlawing age discrimination, the gerontological approach of employers and unions is in need of review.

INDUSTRY AND THE OLDER WORKER

In all probability, a thirty-five-year-old worker has chosen his lifetime occupation.¹⁶ After one has selected an occupation, a psychological attitude develops often causing emotional problems when a shift to another occupation or industry is necessary. Although considerably reduced since World War II, geographic immobility remains. Moreover, the older worker who is willing to relocate exhibits substantial occupational immobility. In spite of the many complaints of boredom and the need to find a more stimulating work environment, a worker frequently has serious misgivings about shifting to another industry and developing new skills. These reservations, fostered either by a fear of the unknown or an absence of motivation, are often rationalized by—"things could be worse elsewhere." Although family ties and friendship reduce geographic mobility, occupational shifting should not be quite as difficult men-

13. By 1975 it is estimated that one-half of the population will be under 26 years of age. See SECRETARY OF LABOR, REPORT TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 3 (1965) [hereinafter cited as LABOR REPORT].

14. SOBEL & WILCOCK, PLACEMENT TECHNIQUES FOR OLDER WORKERS 17 (1969).

15. LABOR REPORT, *supra* note 13, at 5. It was reported that "[a]lmost 97% of male workers 45 and over were employed in 1964. Persons over 45 make up almost 40% of the U[nited] S[tates] labor force, but only 27% of total unemployment, and only 17% of . . ." unemployed registrants.

16. F. CLARK & A. DUNNE, AGING IN INDUSTRY 11 (1955).

tally, especially when the industry or economy is unstable.

Since older workers generally have less education and face more difficulty in changing jobs, it is likely that insufficient education obstructs employment or promotion. When compared to older white workers, the lack of education of older black workers is even more pronounced.¹⁷ Although one can overestimate the value of formal higher education and undervalue experience and self-education, a transfer to another occupation does require specific formal schooling, often a frightening thought to undereducated workmen. For older black workers, the difficulties are multiplied and extend beyond their educational shortage. Not only do they lack formal education, but also, older blacks have been denied the industrial experience and opportunities necessary to acquire job skills. In addition, data does exist that substantiates the claim that older workers with advanced education find suitable employment more readily than their uneducated peers.¹⁸ Where the supply of labor is scarce, job seekers with limited education do not qualify for training in specialized positions such as therapists or systems analysts.¹⁹ Although a highly motivated individual may overcome his educational handicap, employers often ignore this.

Another less-publicized factor is the impact of longer life spans on occupational decisions. When the mean age of death was approximately forty-five, there was little need to consider two or more careers. However, since the mean age is now approximately seventy and laws protect employment rights until sixty-five, the probability of technological change and job dissatisfaction becomes much greater. In recognition of the inevitable changes brought by technology and longer lives, educators and publicists should be doing more research to educate people concerning the potential benefits of following two occupational careers. Although the mean age of death for blacks, Mexican-Americans, and Indians is less than that for white Americans, no reason exists for them not to consider dual careers as well.²⁰ Due to education, medical care, diet, housing, occupation, and other factors, minority workmen undergo more rapid physical deterioration with advancing years.²¹ Some studies have found that

17. LABOR REPORT, *supra* note 13, at 3.

18. *Id.* at 12.

19. See generally 1971 WHITE HOUSE CONFERENCE ON AGING 12.

20. *Hearings on the Economics of Aging Before the Special Senate Comm. on Aging*, 91st Cong., 1st Sess., pt. I, at 126 (1969).

21. There is a realization that because of the greater likelihood that he is engaged in physical labor, the black worker may be less subject to coronary attack and other disabilities; yet, diet and tension are also important factors in heart disease.

a forty-eight-year-old Mexican-American migrant farm laborer compares physically with a white American sixty-five years of age in a less strenuous occupation.²² Most migrant workers are black or Mexican-American, lacking education and industrial training which, coupled with their accelerated physical deterioration, gives industrial employers many reasons to refuse employment.²³

As already mentioned, motivation is another pertinent factor in considering an occupational change.²⁴ Older workers seeking jobs may be less handicapped by physical and mental disabilities than by the absence of motivation. For example, psychological tests show that older workers often prefer solitary activities over those requiring interaction with coworkers or customers. To some, personal achievement is less important as they grow older and dislike for competition increases. Although few over the age of thirty-five strive for a second career, a legal framework protecting the older worker would provide incentive for those who are so inclined.

Older workers furloughed after spending many years in a declining industry face considerable difficulty finding other employment because a shift in industrial allegiance is necessary. In declining industries like lumber, furniture, leather, and mining, and also in expanding industries such as telephone, gas and electric utilities, finance, insurance, and real estate, older workers released from jobs are without skills to satisfy the needs of potential employers.²⁵ For example, the demand for bakers, blacksmiths, boilermakers, bookbinders, cabinet makers, and jewelers has been declining, and these workers find it difficult to move to other industries.²⁶ Although educational background, past training, and motivation present a formidable barrier, age laws could provide the help needed to surmount these obstacles.

Substantial evidence demonstrates that employers practice age discrimination by advancing excuses not supported by the facts. As stated in one report:

The 1965 survey shows . . . restrictions (i) in skilled occupations, the traditional crafts, and the professional and semiprofessional positions, . . . , and (ii) in the expanding but traditionally lower paid retail sales and service occupations. Age limitations are most frequent for clerical positions and for semi-skilled and unskilled work, and for outside salesmen. Similarly, the manufacturing industries, with the notable exception of apparel, are hiring relatively

22. 1971 WHITE HOUSE CONFERENCE ON AGING 166.

23. H. SHEPPARD, TOWARD AN INDUSTRIAL GERONTOLOGY 97 (1970).

24. *Id.* at 62-66. There is some evidence that training courses in motivation can overcome inertia.

25. See 1971 WHITE HOUSE CONFERENCE ON AGING 13.

26. B. SCHNEIDER, THE OLDER WORKER 6 (1962).

few people over 45. Retail stores, hotels, personal and medical service industries, and government agencies are generally hiring older workers in substantially larger proportions.²⁷

Employer's reasons for not hiring or promoting older workers are:

1. Older workers are often afflicted with physical and mental infirmities.
2. Young people must be hired who can be trained, motivated and promoted.
3. Young people are willing to work for less money than older people.
4. Pension, health and life insurance costs increase as the worker ages.
5. Many older workers lack skill, experience or education.
6. According to mortality tables, the older worker will work less time for the firm than a younger worker.
7. Older workers are more costly to train and are less productive.
8. Older workers are less adaptable and more difficult to train than younger workers.
9. Balance in age is needed in every work force. Because seniority clauses in collective bargaining agreements determine retention and promotion, employers need to hire young persons whenever possible.
10. Young executives feel uncomfortable directing older employees.

The most common reason for not hiring older workers relates to the assumption of physical deterioration.²⁸ Some evidence exists to support the contention that physical productivity drops slightly after forty-five years of age and is followed by a substantial decrease after age sixty. However, the overall performance of older workers, particularly when strenuous physical labor is not entailed, compares favorably with that of the younger workers. In most instances, productivity is determined by independent variables such as the occupation and physical condition of the worker coupled with his individual motivation. Age discrimination is most prevalent in unskilled and semi-skilled jobs, in which physical strength is required and undesirable working conditions are commonplace.²⁹ Obviously this generalization would not apply in retracting industries in which

27. LABOR REPORT, *supra* note 13, at 7. Note that in the industries in which older workers are being hired, the pay scale tends to be less than in many other industries.

28. *Id.* at 8-9.

29. See generally *Disproving Prejudices Against Older Workers*, 30 L.R.R.M. 15 (1952).

collective bargaining agreements protect older workers.

Other important factors that affect the employment of older workers are general economic conditions, community attitudes, and advances in technology.³⁰ For example, if the supply of labor is short and demand high, older workers become acceptable to employers. As medical knowledge expands and the negative effects of physiological and environmental aging are further limited, even less reason exists for challenging worker efficiency. "55.8% of the Nation's older population and 54.8% of its total population" are domiciled in states like California, New York, Pennsylvania, Illinois, Ohio, Texas, Florida, Massachusetts, Michigan, and New Jersey.³¹ In 1970 in Iowa, 20.4 percent of the total population was between forty-five and sixty-five, a 1.4 percent increase from 1960 to 1970.³² Such statistics indicate that protection for older workers is definitely needed in states with a large aging population. When average age is relatively high and young people either continue their education, enter the military, or leave the state, employers are less likely to discriminate against older workers.³³

Not only are employers unlikely to engage in age discrimination when young workers are in short supply, but the reasons assigned by employers for refusing to hire older workers are not acceptable under state or federal law. For example, even though equally competent younger workers can be hired for less, employers cannot refuse to hire older applicants merely because higher wages may be demanded. Prior to the Wagner Act of 1935,³⁴ employers could legally reduce wages. Under classical economic theory the savings would be passed to consumers through reduced prices. Moreover, demand would rise and lead to increased employment and overall benefit for society. Although the Wagner Act did not specifically alter classical economic theory, the congressional goal of promoting union growth succeeded admirably. As unions became powerful, they stabilized and gradually increased wages in both the organized and unorganized firms. Even before the passage of laws prohibiting age discrimination, those employers bargaining with unions or those paying minimum wages as required by the Fair Labor Standards Act³⁵ could not underpay younger workers. If a collective bargaining

30. See LABOR REPORT, *supra* note 13, at 8.

31. FACTS & FIGURES, *supra* note 2, at 3.

32. *Id.* at Table 1.

33. *But see Manpower Policy on Older Workers in Defense Programs*, 30 L.R.R.M. 3086 (1952).

34. 29 U.S.C. §§ 151-68 (1970).

35. 29 U.S.C. §§ 201 *et seq.* (1970).

agreement does not exist or the minimum wage laws are not applicable, employers may pay younger employees less than older employees. The age law in Iowa specifically protects younger workmen, who are between eighteen and forty years of age. Thus, thirty-five-year-old workers could claim a violation if eighteen-year-olds are preferred. Under Iowa and federal law, older job applicants willing to work for the same wages as a younger applicant could also establish a violation.³⁶

According to the age laws, both young and old people are to be trained to assume skilled positions and responsibility. Although a court would probably not require an employer to hire a sixty-three-year-old trainee for certain positions, age as a factor for training has been outlawed. The time factor involved in training has always been a tenuous excuse for not hiring older workers. Generally, the time spent in training programs is relatively short for most jobs. In some white collar occupations—art teachers, music and dancing, design, photography, cartooning—the training period is anywhere from two to ten years.³⁷ For insurance agents, brewmasters, harbor masters, the training period is from four to ten years.³⁸ In such blue collar skills as machinists, die makers, pressmen, engravers, electricians, the training period is from two to ten years.³⁹ Since these are among the most skilled occupations, the relative training period for other occupations is considerably less. In addition, some training programs for skilled jobs operate more as a device to control the supply of eligible workers than as a means of training skilled labor.

The assumption made by some employers that young employees are more inclined to remain with the firm longer than older employees is also questionable. During times of depression, younger employees, unable to find other opportunities, might well devote more years of service to a single employer than would older employees newly hired. Given the general prosperity in the United States since World War II, however, younger employees are less likely to remain with the firm than older workers. Although employers must provide opportunities to retain younger employees, openings leading to promotion are limited. Generally, older blue collar workers will not have as many opportunities to seek employment elsewhere.

The claims that older workers are less adaptable and more difficult to train than younger workers also have not been substantiated. For example, employers cannot cite arthritic pains, which

36. See Table 1 containing the state and federal laws.

37. *DICTIONARY OF OCCUPATIONAL TITLES 18-19* (Supp. to 3d ed. 1965).

38. *Id.* at 25-28.

39. *Id.* at 133-280.

typically afflict those over forty years of age, as an excuse not to hire older workers.⁴⁰ People with arthritis, as well as other maladies, are adaptable and can be trained. It is possible, however, that age does lead to personality changes which affect the adaptability of older workers.⁴¹ Not only may the loss of friends and family lead to personality difficulties but "the EEG findings . . . suggest that the electrical activity of the brain undergoes change with age, regardless of whether detectable physical disease is present or not. . . . Health, status, particularly cardiovascular disease, is, however, an important factor influencing brain potentials. . . ." ⁴² Yet this problem remains only a possibility and nothing more. Since studies conducted under various conditions may produce significant statistical differences, the studies advanced to document this position may not be reliable.

MEDICAL DATA

Surveys made by the National Association of Manufacturers and the United States Chamber of Commerce show that twenty-six percent of the firms polled do not hire workers over forty-five years of age.⁴³ It seems probable that many more firms refuse to hire or promote older workers without making it an express policy. Since firms cite physical or mental disabilities to justify age discrimination, examination of the medical evidence supporting or refuting this position must be reviewed.

MEASUREMENTS OF AGING

The human body is probably at its peak physiologic vigor at about twelve years of age.⁴⁴ Physiologic functions that tend to decline with age in humans include basal metabolic rate, vital capacity, maximal breathing capacity, renal blood flow and others.⁴⁵ Care must be taken when interpreting these changing functions. The fact that a system deteriorates with age, or an illness is more frequent with advancing age, does not mean that the dysfunction is primarily due to physiologic aging. One may be witnessing the effects of

40. Cf. *Hearings Before the Subcomm. on Employment and Retirement Incomes of the Special Senate Comm. on Aging*, 92d Cong., 1st Sess., pt. 4, at 237 (1971).

41. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *HUMAN AGING: A BIOLOGICAL AND BEHAVIORAL STUDY*, 1, 91, 153 (1963) (Pub. Health Serv. Publ. No. 986).

42. *Id.* at 311.

43. B. SCHNEIDER, *THE OLDER WORKER* 8 (1962).

44. A. COMFORT, *THE PROCESS OF AGING* 1 (1964).

45. Strehler, *Origin and Comparison of the Effects of Time and High-energy Radiations on Living Systems*, 34 Q. REV. BIO. 117, 120 (1959).

the external environment manifested by infectious disease, food supply or various occupational factors.

Though the mean life-span in this country has improved during this century, the maximum life-span has not changed in spite of all modern medical advances.⁴⁶ This can be further underscored by realizing that the maximum life-span has probably not increased from antiquity.⁴⁷ The mean life-span of the ancient Roman was certainly less than that of the modern American, but upon reaching the age of 70 life expectancy for the two groups is about the same. The shorter mean life expectancy for the Roman was probably due to environmental factors. The peak incidence of a particular disease is in some instances a useful index of physiologic age, but the data may be difficult to interpret and extreme care must be taken in the application of this measure.⁴⁸ For example, it has been suggested that the incidence of cancer is an index of physiologic aging,⁴⁹ but some authors feel the cancer-afflicted population is distinct and not a valid index of "normal" aging. Another indicator of physiologic aging is the "characteristic oldest age" as indicated by the average age of the last few surviving members of a given population.⁵¹ As long as the species population is large enough, the characteristic oldest age seems independent of definable environmental factors.

Life table statistics may lead to the assumption that chronological age reflects physiologic age. Although usually true, this is not always the case and several clinical conditions will be discussed which are presumably associated with premature senescence. One common way of assessing the "aging rate" is by plotting the percentage of a population surviving against time. Clearly this data may be difficult to interpret and is influenced by many environmental factors.⁵² For example, older people dying in a given year have a different nutritional and environmental life history than younger people dying in the same year. Furthermore, life expectancy statistics are not helpful when deciding claims of discrimination under the age laws.

46. Lew & Seltzer, *Uses of the Life Table in Public Health*, 48 MILBANK MEM. FUND Q. 15-37 (Oct. pt. 2 1970).

47. COMFORT, *supra* note 44, at 86-91; R. WALFORD, *THE IMMUNOLOGIC THEORY OF AGING* 104 (1969).

48. Simms, Berg & Davies, *Onset of Disease and the Longevity of Rat and Man*, in 5 CIBA FOUNDATION COLLOQUIA ON AGEING, *The Life Span of Animals* 72 (1959); Berg & Simms, *Nutrition and Longevity in the Rat*, 71 J. NUT. 255 (1960).

49. WALFORD, *supra* note 47.

50. Kohn, *Human Aging and Disease*, 16 J. CHRONIC DIS. 5 (1963).

51. Sacher, *Relation of Lifespan to Brain Weight and Body Weight in Mammals*, in 5 CIBA FOUNDATION COLLOQUIA ON AGEING, *The Life Span of Animals* 115, 117 (1959).

52. Davies, *Mortality and Morbidity Statistics*, 9 J. GERONTOL. 186 (1954).

Cohort analysis is a better but more difficult measure of the aging rate. Here, a mortality curve is constructed from individuals born at the same time.⁵³ This process is easier to accomplish in a controlled laboratory setting where the subjects are animals with life-spans much shorter than man's. It is obviously much more difficult to study human populations in controlled and identical environmental conditions. While data obtained from aging studies of animals should be applied to human populations with caution, it is often the only data available. Experimental designs vary greatly with respect to control methods, statistical techniques and other variables. Population studies, especially as applied to humans, are often crude and conclusions based on similar data are drawn with variable accuracy, as reflected by the conflicting opinions presented in the medical literature. Perhaps more accurate information can be obtained from population studies as physicians become more familiar with the application of biomathematical techniques to risk function analysis. There is a distinct need to evaluate several risk factors of a given disease simultaneously as continuous quantitative variables.⁵⁴

Morbidity factors must also be considered in an assessment of the aging process. How does one assess the impact of disease or age on a person's life, occupation or capacity for work? This question is at least as complex as analyzing mortality statistics, since it is extremely difficult to develop precise criteria to measure anatomic impairment. Furthermore, sound criteria for converting anatomic impairment to functional disability are even harder to find. A related problem is the question of "percent disability." How does a physician evaluate the psychosocial aspects of an illness in conjunction with the physical manifestations when fixing a "percent disability?" These aspects are extraordinarily difficult to standardize. At this point in medical history it is probably unwise to attempt to diffuse standardizations too quickly. Individual physicians may differ in their assessments of the same patient and the criteria for establishing a given diagnosis may vary as well (see subsequent discussion on diabetes mellitus). In addition, few attempts are made to assess the various psychosocial aspects of aging because of the difficulty in identification. Comfort has suggested the standardized measurement of several clinical and laboratory parameters in

53. Jones, *The Relation of Human Health to Age, Place, and Time*, in HANDBOOK OF AGING AND THE INDIVIDUAL 336 (J. Birren ed. 1959).

54. Stamler & Epstein, *Coronary Heart Disease: Risk Factors as a Guide to Preventive Action*, 1 PREV. MED. 27 (1972).

an attempt to assess more precisely the human aging rate.⁵⁵ He cites the need to establish aging assessment units in order to begin controlled longitudinal studies under a variety of conditions, including long-term pharmacological manipulation (the physical, constitutional and ethical problems implicit in such studies are not discussed). Several centers for the study of aging have already been established in this country to gather such important information.

There are several laboratory techniques which may yield information in the future regarding the overall process of aging. Of particular interest are techniques employing explanted cell and tissue cultures. As the donor's age increases, the ability to initiate growth from a variety of tissue explants decreases.⁵⁶ Fibroblasts are frequently used for cell cultures. Though fibroblasts from different sites may have different physical properties, all normal human fibroblasts show a characteristic three-phase growth cycle.⁵⁷ The final phase usually occurs within a year of culture initiation and is characterized by a gradual loss of the ability to divide (mitotic potential) which eventually culminates in cell death. Hayflick and Moorhead reported that normal human cells seem to have a finite life-span in culture.⁵⁸ Further reports find an increase in the number of cells with other than the normal number of chromosomes for that cell type (aneuploid cells) in the last few subcultures before cell lines cease to divide.⁵⁹ An inverse correlation exists between the chronological age of the cell donor and the *in vitro* life-span of the explanted cell culture.⁶⁰ Fibroblasts from patients with progeria, a syndrome thought to be a model of premature senescence, have a decreased *in vitro* life-span as compared to chronologically age-matched controls.⁶¹ Hayflick notes that many *in vivo* cell lines do not actually reach the point where they will not reproduce in some way.⁶² He

55. Comfort, *Test-battery to Measure the Aging-rate in Man*, 2 LANCET 1411 (1969).

56. Soukupová, Holečková & Hněvkovský, *Changes of the Latent Period of Explanted Tissues During Ontogenesis*, in AGING IN CELL AND TISSUE CULTURE 41 (E. Holečková & V. Cristofalo eds. 1970).

57. Hayflick, *The Limited In Vitro Lifetime of Human Diploid Cell Strains*, 37 EXP. CELL RES. 614 (1965); Martin, Sprague & Epstein, *Replicative Life-span of Cultivated Human Cells: Effect of Donor's Age, Tissue, and Genotype*, 23 LAB. INVEST. 86 (1970).

58. Hayflick & Moorhead, *The Serial Cultivation of Human Diploid Cell Strains*, 25 EXP. CELL RES. 585-621 (1961).

59. Saksela & Moorhead, *Aneuploidy in the Degenerative Phase of Serial Cultivation of Human Cell Strains*, 50 PROC. NAT'L ACAD. SCI. USA 390-95 (1963).

60. Goldstein, Littlefield & Soeldner, *Diabetes Mellitus and Aging: Diminished Plating Efficiency of Cultured Human Fibroblasts*, 64 PROC. NAT'L ACAD. SCI. USA 155-69 (1960). See Martin, Sprague & Epstein, *supra* note 57.

61. Goldstein, *Lifespan of Cultured Cells in Progeria*, 1 LANCET 424 (1969).

62. Hayflick, *The Biology of Human Aging*, 265 AM. J. MED. SCI. 433 (1973).

states that this cessation of cell replication is merely a convenient parameter to measure in tissue culture, and notes that *in vivo* functional losses preceding cessation of cell division may actually give rise to many of the clinical and biochemical manifestations of aging. Many of these tissue culture findings have implications relating to the genetic aspects of aging discussed below.

CLINICAL CONCOMITANTS OF INCREASING AGE

The exact cause of aging is not known.⁶³ There are numerous theories, including immunologic,⁶⁴ genetic,⁶⁵ free radical reactions,⁶⁶ and collagen maturation.⁶⁷ Genetic and immunologic theories are currently the most popular and are probably interrelated. Experimental data are complex and often difficult to interpret. These theories will not be discussed further here and the reader is referred to the footnotes cited for further information.

It is difficult to be certain that any age-associated biological change is due to a "primary aging process." Many bodily functions are affected by diverse circumstances over the passing years. This is not intended to be an exhaustive review, but rather a brief summary of several clinical areas where the deteriorative aspects of advancing chronologic age might be deemed more serious in terms of mortality and morbidity.

63. Curtis, *Genetic Factors in Aging*, 16 *ADV. GENET.* 305 (1971); Goldstein, *The Biology of Human Aging*, 285 *N. ENG. J. MED.* 1120 (1971).

64. T. Makinodan, *AGE-RELATED CHANGES IN ANTIBODY FORMING CAPACITY* 3-17 (M. Sigel & R. Good eds. 1972); Burnet, *Somatic Mutation and Chronic Disease*, 1 *BR. MED. J.* 338 (1965); Cammarata, Rodnan & Fennell, *Serum Anti-gamma-globulin and Antinuclear Factors in the Aged*, 199 *J.A.M.A.* 455 (1967); Giannini & Sloan, *A Tuberculin Survey of 1,285 Adults with Special Reference to the Elderly*, 1 *LANCET* 525 (1957); Hallgren, Buckley, Gilbertsen & Unis, *Lymphocyte Phytohemagglutinin Responsiveness Immunoglobulins and Autoantibodies in Aging Humans*, 111 *J. IMMUNOL.* 1101 (1973); Svec & Veit, *Occurrence and Characteristics of Organ-Specific Antibodies in Sera of Aged Persons*, 73 *J. LAB. CLIN. MED.* 379 (1969); see Walford, *supra* note 47, at 11-20.

65. W. M. Court Brown, *HUMAN POPULATION CYTOGENETICS* 10 (1967); Lansing, *General Biology of Senescence*, in *HANDBOOK OF AGING AND THE INDIVIDUAL* 119 (J. Birren ed. 1959); Jervis, *Premature Senility in Down's Syndrome*, 17 *ANN. N.Y. ACAD. SCI. USA* 559 (1970); Nielsen, Johansen & Yde, *Frequency of Diabetes Mellitus in Patients with Klinefelter's Syndrome of Different Chromosome Constitutions and the XYY Syndrome, Plasma Insulin and Growth Hormone Level After a Glucose Load*, 29 *J. CLIN. ENDOCRINOL. & METAB.* 1062 (1969); Post & Hoffman, *Cell Renewal Patterns*, 279 *N. ENGL. J. MED.* 248 (1968).

66. Chio, Reiss, Fletcher & Tappel, *Peroxidation of Subcellular Organelles: Formation of Lipofuscinlike Fluorescent Pigments*, 166 *SCIENCE* 1535 (1969); Harman, *Prolongation of Life: Role of Free Radical Reactions in Aging*, 17 *J. AM. GERIATR. SOC. J.* 721 (1969).

67. Piez, *Cross-Linking of Collagen and Elastin*, 37 *ANNUAL REV. BIOCHEM.* 547 (1968); Verzar, *Intrinsic and Extrinsic Factors of Molecular Ageing*, 3 *EXP. GERONTOL.* 69 (1968).

A. *Senile Dementia*

It has been estimated that eighty-five percent of the patients in the United States institutionalized with a diagnosis of organic dementia have the pathological equivalent of the presenile dementia, Alzheimer's disease.⁶⁸ This form of dementia associated with advancing age is termed senile dementia. The pathological hallmarks of Alzheimer's disease are the twisted tubule, found in neurofibrillary tangles, and the senile plaque.⁶⁹ A definite cause-and-effect relationship between these pathological alterations and senile dementia has not yet been established.⁷⁰ These pathological alterations are not necessarily specific for these clinical conditions. There is also a distinct, though often mild, loss of neurons in the cerebral cortex with advancing age.⁷¹ Subcellular organelles in nervous tissues manifest certain changes with advancing age.⁷²

The entity of "arteriosclerotic dementia" is generally overdiagnosed, in reality often representing senile dementia.⁷³ One large study, slanted towards populations from more economically privileged countries, indicates that the mean age of clinical onset is approximately seventy-four years for both sexes, with a range of fifty-six to ninety-two years of age.⁷⁴ The authors found no relationship between the incidence of senile dementia and socioeconomic status. One autopsy series revealed that of all patients dying during their seventh decade, approximately eighty-one percent had to some degree the pathological alterations discussed as characteristics of senile dementia. By the eighth decade, varying degrees of these pathological changes could be found in ninety-nine percent of the autopsied cases.⁷⁵ There appears to be a positive correlation between the presence of dementia as measured by a standardized battery of psychological tests, and the concentration of senile-associated path-

68. See 3 R. ADAMS & R. SIDMAN, *INTRODUCTION TO NEUROPATHOLOGY* 511 (1968).

69. Terry, *Neuronal Fibrous Protein in Human Pathology*, 30 *J. NEUROPATHOL. EXP. NEUROL.* 8 (1971).

70. Wisniewski, Terry & Hirano, *Neurofibrillary Pathology*, 29 *J. NEUROPATHOL. EXP. NEUROL.* 163 (1970).

71. See Brody, *Organization of the Cerebral Cortex*, 102 *J. COMP. NEUROL.* 511 (1955).

72. Bondareff, *Histophysiology of the Aging Nervous System*, 1 *ADV. GERONTOL. RES.* 1 (1964); Brody, *The Deposition of Aging Pigment in the Human Cerebral Cortex*, 15 *J. GERONTOL.* 258 (1960).

73. See Terry, *supra* note 69.

74. Larsson, Sjogren & Jacobson, *Senile Dementia*, 39 *ACTA PSYCHIAT. SCAND.* 1 (Supp. 167, 1963).

75. Matsuyama, Namiki & Watanabe, *Senile Changes in the Brain in the Japanese: Incidence of Alzheimer's Neurofibrillary Change and Senile Plaques* in *PROCEEDINGS OF THE FIFTH INTERNATIONAL CONGRESS OF NEUROPATHOLOGY* 979-80 (Excerpta Medica Series 100, 1966).

ologic changes observed at autopsy.⁷⁶ Note, however, that the age laws do not apply after sixty-five and few remain in the work force.

There is a danger signal here. If this clinico-pathologic relationship is as close as it appears, and if we continue to increase the mean human life-span, both the incidence (number of newly diagnosed cases of a given disease per 100,000 population per year) and prevalence (number of persons with a given disease per 100,000 population at a given time) of serious psychological dysfunction in our elderly population may show a marked increase.⁷⁷ The morbidity inflicted by this non-replicating group of cells would become frightfully obvious. We might approach the character of the people called "struldbruggs," described by Swift in *Gulliver's Travels*. These immortal beings were cursed with the inability to die, just becoming older, crazier, and more despised with time. The sight of these poor people tempered even Gulliver's desire for immortality.

B. Coronary Heart Disease

Of approximately 626,000 coronary deaths in 1967, about 167,000 were in people thirty-five to sixty-four years of age (three males to one female).⁷⁸ An apparently healthy male from the United States has about a twenty percent chance of developing clinical coronary heart disease before the age of sixty, mostly in the form of myocardial infarction. Of those middle-aged persons recovering from an initial heart attack, the chance of dying within the next five years is approximately five times as great as persons without a history of coronary heart disease.⁷⁹ Annual financial losses, both for medical care and production losses, are estimated to be in the billions of dollars.⁸⁰ On account of these statistics, employers are reluctant to hire or retain employees with a history of heart disease.

Coronary heart disease is a striking cause of premature death in this and other industrialized nations. It has been shown that atherosclerosis probably evolves in distinct pathological steps, the earliest lesion being the fatty streak. This streak then progresses to

76. Roth, Tomlinson & Blessed, *Correlation Between Scores for Dementia and Counts of "Senile Plaques" in Cerebral Grey Matter of Elderly Subjects*, 209 NATURE 109 (1966).

77. See Terry, *supra* note 69.

78. Inter-Society Commission for Health Disease Resources, Atherosclerosis Study Group and Epidemiology Study Group, *Primary Prevention of the Atherosclerotic Disease*, 42 CIRCULATION A55 (1970).

79. Stamler, Berkson & Lindberg, *Risk Factors: Their Role in the Etiology and Pathogenesis of the Atherosclerotic Diseases*, in THE PATHOGENESIS OF ATHEROSCLEROSIS 41 (R. Wissler & J. Greer eds. 1972); Stamler, *Acute Myocardial Infarction—Progress in Primary Prevention*, 33 BR. HEART J. 145 (Supp. 1971).

80. See 2 PRESIDENT'S COMMISSION ON HEART DISEASE, CANCER AND STROKE (1965).

the fibrous streak, and then calcifies with such ensuing complications as hemorrhage, ulceration, and thrombosis.⁸¹ The transition phase of fatty streak to fibrous streak is evident in many by thirty years of age and often accelerates by age forty. In one study, about eighty percent of patients under fifty who had evidence of coronary artery disease by angiography had a demonstrable abnormality of serum lipids.⁸²

The major well-established identifiable risk factors for coronary heart-disease are elevated serum cholesterol, cigarette smoking and hypertension.⁸³ In this context, age and sex can be considered factors involving fundamental biology generally not amenable to exogenous influences.⁸⁴ Though the incidence of coronary heart disease does seem to increase with age, this does not appear to be a major risk factor in and of itself, particularly in regard to premature mortality. Even in those that have experienced heart disease, productivity in the plant may not be impaired. Age matched controls indicate that as age increases, the relative risk of having a heart attack at a given elevation of serum cholesterol increases. Data indicate that serum cholesterol level is predictive of mortality rates for men recovering from one or more heart attacks occurring in middle-age. Though serum cholesterol tends to increase with age throughout middle life, the serum level tends to fall about the seventh decade.⁸⁵ Data indicate that for each age and sex group, the coronary heart disease mortality rate increases with the intensity of cigarette smoking. Apparently the younger the age-group (based on patients forty to eighty-four years) the higher the relative mortality risk associated with smoking.⁸⁶ Autopsy data indicate a significant relationship between hypertension and the severity of atherosclerosis.⁸⁷ Men with

81. Strong, Eggen & Oalman, *The Natural History, Geographic Pathology, and Epidemiology of Atherosclerosis*, in *THE PATHOGENESIS OF ATHEROSCLEROSIS* 20 (R. Wissler & J. Greer eds. 1972).

82. Heinle, Levy, Frederickson & Gorlin, *Lipid and Carbohydrate Abnormalities in Patients with Angiographically Documented Coronary Artery Disease*, 24 *AM. J. CARDIOL.* 178 (1969).

83. Stamler, *Epidemiology of Coronary Heart Disease*, 57 *MED. CLIN. N. AM.* 5 (1973); see Stamler & Epstein, *supra* note 54.

84. Grundy, *A RATIONAL APPROACH TO THE "AT RISK" CONCEPT*, 2 *LANCET* 1489 (1973); Leren, *Effect of Plasma Cholesterol-Lowering Diet in Male Survivors of Myocardial Infarction*, 181 *ACTA MED. SCAND.* (Supp. 466 1967).

85. Thompson, Nichols & Obrist, *Relation of Serum Cholesterol to Age, Sex, and Race*, 20 *J. GERONTOL.* 160 (1965).

86. Hammond, *Smoking in Relation to Death Rates of One Million Men and Women*, 19 *NAT'L CANCER INST. MONO.* 127 (1966); Hammond & Garfinkel, *Coronary Heart Disease, Stroke and Aortic Aneurysm—Factors in the Etiology*, 19 *ARCH. ENVIRON. HEALTH* 167 (1969).

87. See Stamler, Berkson & Lindberg, *supra* note 79.

"true" hypertension (diastolic elevation with or without concomitant systolic elevation), along with those with just systolic hypertension, are more likely to develop clinical coronary heart disease when compared to age-matched controls.⁸⁸

More emphasis needs to be placed on the application of preventive medicine to the problem of coronary heart disease, since all the major risk factors identified above are potentially amenable to therapy.⁸⁹ The aging process itself does not seem to be a major factor in the premature mortality from coronary artery disease.⁹⁰ Closer cooperation between business and medicine is needed to identify populations prone to coronary heart disease. Some large industrial firms have already begun programs aimed at their young executives that emphasize, among other factors, the importance of dietary cholesterol intakes. In terms of the specific employability of the coronary patient, a qualified physician must make the decision in each case. The age discrimination laws lead to this goal by requiring the employer to look at the individual.

C. *Diabetes Mellitus*

In a clinical series of insulin-dependent diabetics with a history of disease greater than twenty years duration, an increased prevalence of thyrogastric autoantibodies (antithyroid and antiparietal cell), "autoimmune" disease (hyperthyroidism and pernicious anemia) and vascular disease was found.⁹¹ The prevalence of thyrogastric autoantibodies (antithyroid and antiparietal cell), to "autoimmune" disease (hyperthyroidism and pernicious anemia) and vascular disease was found. The prevalence of thyrogastric antibodies in those patients less than forty years old reached a level comparable to nondiabetic controls greater than sixty years old. With advanced age, the prevalence of these thyrogastric antibodies in insulin-dependent diabetics eventually fell. This fall was attributed to a disproportionately high death rate among diabetics with the autoantibodies. It was then surmised that if the development of autoantibodies was an index of aging, then the aging process in

88. See Stamler, *supra* note 83.

89. Dayton, Pearce, Hashimoto, Dixon & Tomiyasu, *A Controlled Clinical Trial of a Diet High in Unsaturated Fat*, 40 CIRCULATION 1-63 (Supp. 2 1969); see Stamler, *supra*, notes 79 & 83.

90. There are many other clinical cardiological problems such as congestive heart failure and angina pectoris which relate to morbidity and mortality that will not be discussed here.

91. Whittingham, Mathews, Mackay, Stocks, Ungar & Martin, *Diabetes Mellitus, Autoimmunity, and Ageing*, 1 LANCET 763 (1971).

certain insulin-dependent diabetics was advanced some twenty years over that in nondiabetic age-matched controls.

Although dramatic, this conclusion is speculative and certainly not to be used as a hiring standard by employers or as courtroom evidence. In fact, it does not represent the situation for the non-insulin-dependent diabetic majority. The relationship between diabetes and advancing age is quite complex. In most persons, there is a progressive deterioration of performance in each advancing decade of life on almost all the commonly used laboratory parameters for assessing diabetes.⁹² However, many biochemical investigations of aging patients are made on institutionalized individuals over sixty-five years old. These institutionalized patients represent a minority of the over-sixty-five population and cannot be necessarily considered a representative sampling of the aging population. Though some sources indicate there is an increase in true diabetes with advancing age (especially over sixty years),⁹³ it is uncertain whether changes in glucose tolerance alone (the most commonly used parameter for diagnosing diabetes) indicate an emerging true diabetes or if they are simply part of a progressive aging process.⁹⁴ The fact that different physicians use different criteria to diagnose the diabetic syndrome causes certain socio-economic disadvantages for the group labeled "diabetic." The level of glucose intolerance in the labeled group may be no worse than other individuals of the same age who do not carry the diabetic diagnostic label. There does appear to be distinct justification for attempts to standardize glucose tolerance values against age-matched controls. But since adult-onset diabetes primarily hits at an advanced age (over sixty) and can usually be well controlled by drugs, it is not a standard that the employer should be legally permitted to use under the age laws. However, true elderly diabetics who manifest some other of the clinical or biochemical stigmata of the diabetic syndrome, in addition to a mildly impaired glucose tolerance, do appear to have age-matched death rates two or three times their peers.⁹⁵ This increased mortality may not be adequately explained by the severity of diabetes (in terms of impaired glucose tolerance) or the incidence of renovascular complications.⁹⁶

92. Andres, *Aging and Diabetes*, 55 MED. CLIN. N. AM. 835, 844 (1971).

93. See Joslin & Krall, *The Incidence of Diabetes*, in THE TREATMENT OF DIABETES MELLITUS 27-33 (10th ed. E. Joslin, H. Root, P. White & A. Marble 1959).

94. Andres, *supra* note 92.

95. Jackson & Winik, *Hyperglycemia and Diabetes in the Elderly*, in DIABETES MELLITUS: THEORY AND PRACTICE 526 (M. Ellenberg & H. Rifkin eds. 1970).

96. Pell & D'Alonzo, *Factors Associated with Long-Term Survival of Diabetics*, 214 J.A.M.A. 1833-40 (1970).

Glucose tolerance generally deteriorates with age until about the middle of the eighth decade. At that point, the prevalence of impaired glucose tolerance may begin to diminish. Once past seventy-five years, previously diagnosed diabetes may become metabolically less severe.⁹⁷ It should be remembered that old age alone may not lead to diabetes. There may be a dual population of elderly hyperglycemics—one with and one without a fully developed diabetic syndrome and one with and one without all the concomitant problems of accelerated vascular disease. More than one glucose tolerance test may be needed if a patient is to be accurately labeled hyperglycemic. Proper medical examination, however, requires an evaluation of the individual and not blind acceptance of an established standard.

D. Neoplasia

While there is a pronounced increase in the incidence of cancer with advancing age, it is not certain that this increase is related to age alone.⁹⁸ Many common cancer types, such as epithelial (skin, lung and gut) tumors, rapidly increase in frequency with advancing age. This increase begins at about twenty years of age and continues until approximately eighty years. Other cancer types, such as acute lymphoblastic leukemia, bone tumors, and testicular tumors, have characteristic peak age incidences and do not increase in frequency with advancing age. There could be a number of reasons for this age-associated incidence increase. A long period of exposure to certain carcinogens may be required and latent cancers may be "released" due to impaired aspects of immunity with advancing age.⁹⁹ As previously noted, some authors feel that the cancer population is a distinct one, and incidence should not be used as a measure of the aging-rate in a normal population.¹⁰⁰

E. Cerebrovascular Disease

This group of diseases, loosely termed strokes, can be divided into four categories: subarachnoid hemorrhage, cerebral hemorrhage, cerebral thrombosis and infarction, and spasm of the vessels

97. Porter & Langley, *Studies in Blood-Sugar*, 2 LANCET 947 (1926); see Jackson & Winik, *supra* note 9.

98. Doll, *Age Differences in Susceptibility to Carcinogenesis in Man*, 35 BR. J. RADIOL. 31 (1962).

99. Burch, *Carcinogenesis and Cancer Prevention*, 197 NATURE 1145-51 (1963); see Walford, *supra* note 47.

100. See Kohn, *supra* note 50.

with other ill-defined abnormalities.¹⁰¹ One large study indicated that stroke was the third most common cause of death in the United States.¹⁰² The international distribution of stroke deaths is fairly uniform. Another study indicates that the most reliable predictor of stroke-proneness in adults over forty years of age is pre-existing cardiovascular disease, including electrocardiographic change, angina pectoris, prior heart attack, congestive heart failure, or left ventricular enlargement (suggestive of hypertension or left ventricular aneurysm). Atherosclerosis rarely exists in the coronary or cerebral systems without both being involved.¹⁰³ Heart dysfunction predisposes the individual to stroke by giving rise to emboli from mural thrombi¹⁰⁴ or to cerebral ischemics from dysrhythmic episodes.¹⁰⁵ Readily seen is that many of the factors relating to coronary heart disease discussed above are also applicable to cerebrovascular disease morbidity and mortality rates.

Age-specific prevalence rates for cerebrovascular disease have been shown to rise rapidly after age thirty-five to about a six percent level at age seventy-five and over.¹⁰⁶ There does not appear to be much difference between the sexes in this regard. Incidence rates as a whole seem to increase rapidly with age, and in several series five percent of those people eighty-five or over had new strokes each year.¹⁰⁷ It appears that past the age of thirty-five incidence may be somewhat higher for males. Age-specific death rates for subarachnoid hemorrhage seem to remain fairly constant throughout adult life, but the other three previously mentioned categories show logarithmic increases in age-specific death rates. The black population seems to have an increased mortality risk from cerebrovascular disease, but this may relate to factors other than stroke itself.¹⁰⁸ One

101. Kurtzke & Kurland, *The Epidemiology of Neurologic Disease*, in 3 CLINICAL NEUROLOGY, ch. 48 (A. Baker & L. Baker eds. 1973).

102. Goldberg & Kurland, *Mortality in 33 Countries from Diseases of the Nervous System*, 3 WORLD NEUROL. 444 (1962).

103. Toole & Cole, *Ischemic Cerebrovascular Disease*, in 1 CLINICAL NEUROLOGY, ch. 10 (A. Baker & L. Baker eds. 1973).

104. M. Wells, *Anticipation of Emboli*, in CEREBRAL VASCULAR DISEASES 82 (R. Siekert & J. Whisnant eds. 1961).

105. Ferrer, *The Sick Sinus Syndrome*, 47 CIRCULATION 635-36 (1973); Hutchinson & Stock, *Paroxysmal Cerebral Ischemia in Rheumatic Heart-Disease*, 2 LANCET 635 (1963).

106. Logan & Cushion, *Studies on Medical and Population Subjects, No. 14, morbidity statistics from General Practice, Vol. I, General*. (London: Her Majesty's Stationery Office, 1958); Matsumoto, Whisnant, Kurland & Okazaki, *Natural History of Stroke in Rochester, Minnesota, 1955 through 1969: An Extension of a Previous Study, 1945 through 1954*, 4 STROKE 20, 23 (1973).

107. See Kurtzke & Kurland, *supra* note 101.

108. Berkson & Stamler, *Epidemiological Findings on Cerebrovascular Diseases and Their Implications*, 5 J. ATHEROSCLER. RES. 189, 191 (1965).

author listed six major factors relating to the risk of stroke: transient ischemic attacks or prior cerebral infarction, hypertension, cardiac abnormalities, clinical evidence of atherosclerosis, diabetes mellitus, and elevated blood lipids.¹⁰⁹ As with cardiovascular disease, much of the premature mortality and morbidity might be preventable if more attention was given to preventive medical principles at an early age. The social and scientific mystique of the central nervous system has impeded major medical advances in the clinical neurological fields. Pathologic findings are difficult to demonstrate antemortem, and postmortem follow-up is often lost because of family objection. Many medical institutions conduct limited autopsies, excluding the brain from study because of the wishes of the deceased's family. Accurate epidemiological studies are even more difficult to come by in relation to central nervous system diseases than with many other types of illness.

F. Neuromuscular Diseases

It is fairly common to see grouped muscle atrophy, so-called senescent muscular atrophy, in biopsy specimens from leg muscles of patients over sixty years old.¹¹⁰ Proximal muscle weakness is frequent in aging subjects,¹¹¹ and the pathological pattern as demonstrated from biopsy sections is not distinctly distinguishable from the skeletal muscle wasting occurring with a number of disorders, such as cachexia and disuse.¹¹² Advancing age seems to have deleterious effects on intramuscular motor nerve endings, and minor systemic illnesses can cause changes in the terminal axonal splays as early as the end of the first decade of life.¹¹³ Clinically it has been noted that muscle bulk and the strength of voluntary muscle contraction generally decreases with age.¹¹⁴ In addition, it is thought that because of the decrease with age of muscle and other lean body mass components, weight should be lost slowly after thirty years of

109. Kannel, *Current Status of the Epidemiology of Brain Infarction Associated with Occlusive Arterial Disease*, 2 *STROKE* 295, 316 (1971).

110. Rebeiz, Caulfield & Adams, *A Pathological Study of Oculopharyngeal Dystrophy (Abstracted)*, in *SECOND INTERNATIONAL CONGRESS OF NEURO-OPTHALMOLOGY 76-77* (Excerpta Medica Int'l Cong. Series No. 154, 1967).

111. Serratrice, Reux & Aquaron, *Proximal Muscular Weakness in Elderly Subjects: Report of 12 Cases*, 7 *J. NEUROL. Sci.* 275, 295 (1968).

112. Tomlinson, Walton & Rebeiz, *The Effects of Ageing and of Cachexia upon Skeletal Muscle: A Histopathological Study*, 9 *J. NEUROL. Sci.* 321 (1969).

113. Woolf, *The Pathology of Intramuscular Nerve Endings*, in *PROCEEDINGS OF THE FIFTH INTERNATIONAL CONGRESS OF NEUROPATHOLOGY 641* (Excerpta Medica Int'l Cong. No. 100, 1966).

114. Burke, Tuttle, Thompson, Janney & Weber, *The Relation of Grip Strength and Grip-Strength Endurance to Age*, 5 *J. APPL. PHYSIOL.* 628-30 (1953).

age.¹¹⁵ Many older people considered to be of ideal weight may actually be overweight because of this decrease in lean body mass.

Some authors suggest that this loss of muscle bulk with increasing age is predominantly myopathic (intrinsic in etiology to the muscle).¹¹⁶ Several investigators underscore the difficulties in interpreting the microscopic pathology of a given muscle biopsy as "myopathic."¹¹⁷ In a recent clinical series using an electrophysiological technique for the estimation of the number of functioning motor units (the muscle fibers supplied by a single motor neuron), it was found that there was little measurable loss of functioning motor neurons prior to age sixty. Thereafter, there was a distinct progressive depletion.¹¹⁸ If these estimations are correct, there is an attrition rate of approximately 3.3 percent per year from the original motor-neuron pool after the age of sixty.¹¹⁹ Genetic and autoimmune theories of aging could be implicated here. Cohesive data on tissue culture survival of neural cells explanted from donors of varying age and illness have not yet been published, and sampling of human material may be particularly difficult. Certainly a multitude of extraneous factors could influence the aging process of the human motor neuron pool.¹²⁰

An apparent "tempering" of the motor neuron "aging process" during the later decades is interesting, and several other clinical parameters discussed above (such as serum cholesterol and adult onset diabetes mellitus) show a similar characteristic. The reason for this type of trend is not clear. It has been suggested, at least for the motor neuron pool, that there is a "sick phase" during which most of the obvious deleterious aging changes take place. It was estimated that this so-called phase lasts about seven years in the normal adult, after which time there is an apparent attenuation of the aging process in the motor neuron system as measured by those

115. Gastineau, *Obesity: Risks, Causes, and Treatments*, 56 MED. CLIN. N. AM. 1021-22 (1972).

116. Vézar, *Muscular Dystrophy in Old Age*, 1 GERONTOL. CLIN. 41 (1959).

117. Drachman, Murphy, Nigam & Hills, "Myopathic" Changes in Chronically Denerated Muscle, 16 ARCH. NEUROL. 14 (1967); Engel, *Selective and Nonselective Susceptibility of Muscle Fiber Types*, 22 ARCH. NEUROL. 97 (1970); Kovarsky, Schochet & McCormick, *The Significance of Target Fibers: A Clinicopathologic Review of 100 Patients with Neurogenic Atrophy*, 59 AM. J. CLIN. PATHOL. 790 (1973).

118. McComas, Fawcett, Campbell & Sica, *Electrophysiological Estimation of the Number of Motor Units Within a Human Muscle*, 34 J. NEUROL. NEUROSURS. PSYCHIATRY 121 (1971).

119. McComas, Upton & Sica, *Motoneurone Disease and Ageing*, 2 LANCET 1477-78 (1973).

120. See generally E. GUTMANN & V. HANZLÍKOVÁ, *AGE CHANGES IN THE NEUROMUSCULAR SYSTEM* (1972).

techniques. This is highly speculative and its applicability to other biologic systems, let alone the motor neuron pool, is uncertain. Consequently, using age to establish neuromotor disability is legally shaky under the age discrimination laws; the functional effects of any measurable neuromuscular deterioration might be highly variable for any one of a number of reasons.

G. *Skeletal and Arthritic Disorders*

Osteoporosis is an extremely common finding with advancing age.¹²¹ Bone loss averages about fifteen percent in most individuals and is most severe in the trabecular bone of the major weight bearing joints. This trait predisposes the individual to traumatic fractures as age increases, particularly those involving the lower forearm, proximal femur, and vertebrae. The osteoporotic involvement tends to be most severe in post-menopausal females, but men over the age of seventy are affected to an increasing degree. The precise etiology of this negative calcium balance is not known and therapeutic regimens are of variable effectiveness.¹²²

Autopsy studies show that degenerative joint changes may begin to appear by the second decade of life.¹²³ By age forty, ninety percent of all people studied showed some radiographic evidence of degenerative changes in their weight bearing joints. Radiographic findings are generally mild under forty-five years,¹²⁴ and several authors feel that the diagnosis of osteoarthritis cannot be based on mere radiographic evidence of joint spurring.¹²⁵ Biochemical changes may be evident in joint cartilage by age thirty, and these changes seem to indicate that a distinct pattern is evident in patients with osteoarthritis which does not reflect a simple extension of "normal" age-associated biochemical changes in the joint cartilage.¹²⁶ Certain jobs lead to repetitive trauma for employees that

121. Nordin, *Clinical Significance and Pathogenesis of Osteoporosis*, 1 BR. MED. J. 571 (1971).

122. Hurxthal & Vose, *The Relationship of Dietary Calcium Intake to Radiographic Bone Density in Normal and Osteoporotic Persons*, 4 CALIF. TIS. RES. 245 (1969). See also Nordin, *supra* note 121.

123. See generally Lowman, *Osteoarthritis*, 157 J.A.M.A. 487 (1955).

124. Moskowitz, *Clinical and Laboratory Findings in Osteoarthritis*, in ARTHRITIS AND ALLIED CONDITIONS 1032-33 (8th ed. 1972).

125. Danielsson & Hernborg, *Morbidity and Mortality of Osteoarthritis of the Knee (Gonarthrosis) in Malmö, Sweden*, 69 CLIN. ORTHOP. 224 (1970); Danielsson & Hernborg, *Clinical and Roentgenologic Study of Knee Joints with Osteophytes*, 69 CLIN. ORTHOP. 302 (1970).

126. Mankin, *Biochemical and Metabolic Aspects of Osteoarthritis*, 2 ORTHOP. CLIN. N. AM. 19 (1971).

initiates or accelerates symptomatic difficulties. Premature mortality is not a feature of osteoarthritis, and in the vast majority of instances the disease itself will not be of a severity requiring early job retirement. Many pharmacological and surgical treatments are available to aid in alleviating pain and speeding physical rehabilitation.¹²⁷

Rheumatoid arthritis is a multisystem disorder more common in females than males, characterized by remitting and relapsing inflammation of multiple joints.¹²⁸ Although it becomes increasingly prevalent with advancing age, it is unusual for rheumatoid arthritis to lead to premature mortality.¹²⁹ Epidemiologic studies are difficult, as the rigidity of application of acceptable diagnostic criteria varies among physicians and the disease itself is characterized by remissions and exacerbations. Though feared by laymen as a great crippler, this result does not occur in the majority of cases. Some clinical series report that fifty percent of the patients are in improved or in stationary categories ten years after the initial diagnosis.¹³⁰ Studies indicate that the majority of patients remain capable of full time employment.¹³¹ After fifteen to twenty years of disease, only about ten percent of these patients were fully incapacitated. Although many forms of therapy are available for different clinical stages of illness, it is essential that the therapy be individualized.¹³² It must be remembered that a gross anatomic deformity may not impose much functional loss, depending on the individual circumstances.

Gout is a clinical disorder seemingly unique to humans and characterized by both acute and chronic arthritic forms related to the presence of sodium urate crystals in the joint.¹³³ The primary idiopathic form of gout is predominantly a disease of adult males and its occurrence correlates positively and distinctly with serum

127. Moskowitz, *Treatment of Osteoarthritis*, in *ARTHRITIS AND ALLIED CONDITIONS* 1054 (8th ed. 1972).

128. See *PRIMER ON THE RHEUMATIC DISEASES* 8 (G. Rodman ed. 1973).

129. Mikkelsen, *The Epidemiology of Rheumatic Diseases* 211-17, and Ragan, *The Clinical Picture of Rheumatoid Arthritis* 333-40, in *ARTHRITIS AND ALLIED CONDITIONS* (8th ed. 1972).

130. See C. Short, W. Bauer & W. Reynolds, *RHEUMATOID ARTHRITIS* 391, Table 44.2 (1957).

131. Duthie, Brown, Truelove, Barager & Lawrie, *Course and Prognosis in Rheumatoid Arthritis*, 23 *ANN. RHEUM. DIS.* 193, 195-96 (1964); Ragan & Farrington, *The Clinical Features of Rheumatoid Arthritis*, 181 *J.A.M.A.* 663-64 (1962).

132. For a discussion of the different forms of therapy for rheumatoid arthritis see *ARTHRITIS AND ALLIED CONDITIONS* (8th ed. 1972). See also Rodman, *supra* note 128.

133. Wyngaarden & Kelley, *Gout*, in *THE METABOLIC BASIS OF INHERITED DISEASE* 889 (3rd ed. 1972).

levels of uric acid. Geographic factors may also influence the disease prevalence. For example, in the Maori tribe of New Zealand, the prevalence of clinical gout may reach ten percent in the male population.¹³⁴ Several specific enzyme defects are known to lead to hyperuricemia and clinical gout, and many factors may be associated with the occurrence of "secondary gout."¹³⁵ A relationship between hyperuricemia and atherosclerosis has been suggested,¹³⁶ but it has been strongly questioned.¹³⁷ It does not seem that gout itself is associated with a significant premature mortality, and in the vast majority of cases proper treatment should enable individuals to continue their jobs.¹³⁸

H. Miscellaneous

Several changes occur in the pulmonary system with advancing years.¹³⁹ Elastin content increases, as does the size of many of the small components of the ductal system. Thoracic wall changes include progressive calcification of the costochondral cartilages with a slight increase in kyphosis, which leads to an increase in antero-posterior diameter. These external changes do not necessarily reflect parenchymal lung changes. In general, vital capacity tends to decrease with age, but many patients perform noticeably better on standard pulmonary function tests than would be predicted from age-function curves. It is difficult to separate those aspects of deterioration in pulmonary function actually due to age from those due to toxic effects of environmental pollutants (cigarette smoke, asbestos particles, coal dust). Presbycusis, the conductive hearing loss often related to advancing age, may owe much of its occurrence to environmental noise pollution. Also, many eye and ear problems are treatable and complications preventable if called to the attention of the appropriate medical specialist.¹⁴⁰

134. Decker & Lane, *Gouty Arthritis in Filipinos*, 261 N. ENG. J. MED. 805 (1959); Prior & Rose, *Uric Acid, Gout and Public Health in the South Pacific*, 65 N.Z. MED. J. 295-96 (1966).

135. See Wyngaarden & Kelley, *supra* note 33.

136. Dreyfuss, *The Role of Hyperuricemia in Coronary Heart Disease*, 38 DIS. CHEST 332 (1960); Eidlitz, *Uric Acid and Arteriosclerosis*, 2 LANCET 1046 (1961); Hansen, *Hyperuricemia, Gout, and Atherosclerosis*, 72 AM. HEART J. 570-71 (1966).

137. Hall, *Correlations Among Hyperuricemia, Hypercholesterolemia, Coronary Disease and Hypertension*, 8 ARTHRITIS RHEUM. 846 (1965); Myers, Epstein, Dodge & Mikkelsen, *The Relationship of Serum Uric Acid to Risk Factors in Coronary Heart Disease*, 45 AM. J. MED. 520 (1968).

138. Talbott & Lilienfeld, *Longevity in Gout*, 14 GERIATRICS 409, 415-18 (1959); Talbott & Terplan, *The Kidney in Gout*, 39 MEDICINE 405, 415, 447 (1960).

139. Richards, *Pulmonary Changes Due to Aging* in 2 HANDBOOK OF PHYSIOLOGY 1525 (1965); see D. Bates, R. Christie & P. Macklem, RESPIRATORY FUNCTION IN DISEASE (1964).

140. See 2 SYSTEM OF OPHTHALMOLOGY (S. Duke-Elder ed. 1961). See also 9 *id.* at 663-75 (1966); 10 *id.* at 517-28 (1967); 11 *id.* at 10-16 (1969).

Performance on a wide variety of cognitive tests appears to deteriorate with age, but these deficiencies are difficult to interpret in terms of establishing a cognitive profile for the aged.¹⁴¹ These tested deficiencies may vary greatly with many external and internal factors, including the test arrangement itself.¹⁴² Indeed, tests showing a decreased intelligence in an aging population must be interpreted with great care and the circumstances of the testing situation critically analyzed (testing will be subsequently considered). Job performance problems for individuals may not be related to aging but rather to the accumulation of diverse and unmanageable responsibilities. While motivation, or a lack thereof, may be one important factor for the aging employee, there are so many factors interwoven between the medical and psychological spheres that separating them is a staggering job.

THERAPEUTIC ALTERATION OF THE AGING PROCESS

A variety of methods for slowing the aging process have been somewhat over-zealously proposed in the past—such as yogurt, animal gonad transplantation to man, cytotoxic serum, body freezing techniques, and others.¹⁴³ Most well-documented data do not substantiate human life-spans beyond 110 to 120 years.¹⁴⁴ There have been some claims of life-spans around 160 years among the Abkassians (residents of the Caucasus), but the accuracy of these reports is highly questionable.¹⁴⁵ As mentioned above, most of the increase in life expectancy over the last several hundred years is in terms of the mean, not the maximal, life expectancy; the characteristic oldest age has not changed markedly. Even if the treatment of known human cancers were successful, total mean life expectancy would probably only be increased by about two years.¹⁴⁶ Perhaps seven more years could be added if premature coronary heart disease were eliminated.¹⁴⁷ To initiate any true alteration of the characteristic oldest age, however, more information must be collected about the aging process. In terms of the aging laws and retirement plans, this

141. Botwinick & Thompson, *Practice of Speeded Response in Relation to Age, Sex, and Set*, 22 J. GERONTOL. 72 (1967).

142. Furry & Baltes, *The Effect of Age Differences in Ability—Extraneous Performance Variables on the Assessment of Intelligence in Children, Adults, and the Elderly*, 28 J. GERONTOL. 73 (1973).

143. See Hayflick, *supra* note 62.

144. McKain, *Are They Really That Old? Some Observations Concerning Extreme Old Age in the Soviet Union*, 1 GERONTOL. 70 (1967).

145. Leaf, *Every Day is a Gift When You Are Over 100*, 143 NAT'L GEOG. 93 (1973).

146. See R. KOHN, *PRINCIPLES OF MAMMALIAN AGING* 110 (1971).

147. See Hayflick, *supra* note 62.

alteration might not be important unless the quality of life is improved at the same time. As a side effect of increasing life expectancy, political pressure would be exerted to protect workers past 65 and to raise the age of compulsory retirement.

There is not much information on the pharmacological control of the rate of human aging.¹⁴⁸ While caloric restriction in rats leads to a longer life-span, it is not entirely certain how this principle applies to man.¹⁴⁹ Superficially, this experimental data gathered from rats would seem to conform to the old "rate of living" theory where life-span was felt to be inversely proportional to the rate of energy expenditure.¹⁵⁰ Fish (poikilothermic animals) have been shown to have increased longevity when reared at lower ambient temperatures;¹⁵¹ rats (homeothermic animals) have a decreased life-span under similar circumstances.¹⁵² Experimental data may not be comparable as regards longevity in poikilothermic and homeothermic animals. Castration does not seem to have a distinct effect on the life-span of mammals.¹⁵³ While antioxidants might be expected to alter aging changes produced by free radicals, experimental effects of antioxidants are so far somewhat less than striking.¹⁵⁴ It has been suggested that pharmacologic tests could be performed on *in vitro* cultured human cell lines to evaluate drug effects on cellular life-spans and hopefully to provide information applicable to an entire organism.¹⁵⁵ Experiments employing freezing techniques indicate that life can be temporarily suspended under certain conditions but picks up with the same rate of aging at the same age when thawed. The use of procaine hydrochloride remains controversial.¹⁵⁶ In summary, there is no distinct mechanism currently known for slowing the aging rate in man.

INDUSTRIAL MEANING

There is little doubt that the current mean age of death reflects

148. Bender, Kormendy & Powell, *Pharmacological Control of Aging*, 5 EXP. GERONTOL. 97-98 (1970). See Goldstein, *supra* note 63.

149. McCay, *Chemical Aspects of Aging and the Effect of Diet Upon Aging*, in PROBLEMS OF AGING 139 (1952).

150. See R. PEARL, *THE RATE OF LIVING* (1928).

151. Liu & Walford, *Observations of the Lifespans of Several Species of Annual Fishes and of the World's Smallest Fishes*, 5 EXP. GERONTOL. 241, 243 (1970).

152. Johnson, Kintner & Kibler, *Effects of 48°F. (8.9°C.) and 83°F. (28.4°C.) on Longevity and Pathology of Male Rats*, 18 J. GERONTOL. 29 (1963).

153. See Comfort, *supra* note 47, at 180-81.

154. See Harman, *Prolongation of Life: Role of Free Radical Reactions in Aging*, 17 J. AM. GERIAT. SOC. J. 721 (1969).

155. See Goldstein, *supra* note 63, at 1125.

156. See Bender, *supra* note 148.

a vast number of environmental interactions, most of which are not understood. Before man can fully comprehend his own "aging process" he will better need to control the environmental factors affecting his mortality (for example, coronary heart disease, viral diseases, nuclear power). In this respect a major role can be played on the part of preventive medicine. Thus far, unfortunately, this role has been sadly understated and underpracticed by the general public and medical profession.

Though man may stumble on a magic elixir dramatically extending his functional stay on earth, some of the mysteries of aging will need to be unraveled by the experimental scientist in the laboratory. This must be accomplished before large-scale meaningful attempts can be made towards slowing the aging process. Perhaps all of "physiologic aging" is related to as yet unidentified environmental factors, and given a proper test-tube environment we could live forever. This does not sound aesthetically pleasing at this time, and certainly is not in sight for the near future.

In regard to the earthier problem of employability for the forty-to sixty-five-year age group, there would seem to be better predictors of morbidity and mortality in this group than chronologic age itself. Closer cooperation is needed between industry and medicine to make accurate and ethical decisions regarding the employability of individuals in particular jobs. Based on available data, it has been determined that the costs of hospitalization increase only slightly with age.¹⁵⁷ Some employers prior to 1967 used the added cost of hospitalization benefits provided by collective bargaining as an excuse not to hire older workers.¹⁵⁸ Since the added cost is slight, however, employers should not be permitted to point to medical data to excuse refusals to hire older workers. In fact, even before 1967 it had been established under state workmen's compensation laws that age had little impact on the costs of providing medical insurance benefits.¹⁵⁹ Although the physical infirmity of the worker may be strained by labor, workmen's compensation benefits have not been denied.¹⁶⁰ Age does not increase the probability of accident even though heart, circulatory and other diseases figure prominently in workmen's compensation claims.

157. G. SHATTO, EMPLOYMENT OF THE MIDDLE-AGED 156 (1972).

158. LABOR REPORT, *supra* note 13, at 47-49.

159. G. SHATTO, *supra* note 157, at 170-80.

160. *Coombe v. Penegor*, 348 Mich. 635, 83 N.W.2d 603 (1957); *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 83 N.W.2d 614 (1957); *Dwyer v. Ford Motor Co.*, 36 N.J. 487, 178 A.2d 161 (1962); *Ciuba v. Irvington Varnish and Insulation Co.*, 27 N.J. 127, 141 A.2d 761 (1958).

UNIONS, COLLECTIVE BARGAINING AND ARBITRATION

Prior to the Railway Labor Act,¹⁶¹ the terms of employment were usually fixed on an individual basis with the employees hired. Union membership increased and collective bargaining supplanted individual negotiation in the railroads after 1926. The Wagner Act was passed in 1935, thereby increasing union growth and collective bargaining in most industries operating in interstate commerce.¹⁶² The act requires employers to bargain in good faith with union representatives over wages, hours and other conditions of employment.¹⁶³ This good faith bargaining requirement brought about certain concessions and accommodations. Agreements were made whereby employers not only relinquished considerable authority over hiring, promotion, and retention, but also provided pensions, insurance, and other fringe benefits. While not mentioned in the Wagner Act and the subsequent amending legislation, the duty to bargain in good faith over these various conditions was so broadly interpreted in prior cases¹⁶⁴ that it was inevitable that age would be considered in the agreements. This broad posture allowed employers complete discretion, in the absence of antiunion motive, to hire, discharge, promote, or assign workmen as they saw fit, but agreements made with unions tempered the unilateral power of employers.¹⁶⁵

The hiring hall was contracted for in the construction, maritime, and other industries, and the average age of employees was influenced by the fact that members of long standing were entitled to preferential treatment. Unions traditionally exhibit interest in promoting and protecting older members,¹⁶⁶ and the hiring hall often benefited older members.¹⁶⁷ In fact, there is no evidence that hiring halls have ever been operated to the disadvantage of older members. Employers obligating themselves to hire through a hiring hall could

161. Ch. 347, 44 Stat. 577 (codified in scattered sections of 15, 18, 28, 45 U.S.C.).

162. 29 U.S.C. § 151-66 (1970).

163. 29 U.S.C. §§ 158(a)(5), 159(a); see *McMullans v. Kansas, O. & G. Ry.*, 129 F. Supp. 157 (E.D. Okla. 1955).

164. See generally *NLRB v. Cranston Print Works Co.*, 258 F.2d 206 (4th Cir. 1958); *NLRB v. Industrial Cotton Mills*, 208 F.2d 87 (4th Cir. 1953), cert. denied, 347 U.S. 935 (1954); *Logan Mfg. Co.*, 162 N.L.R.B. 1586 (1967); *Borg-Warner Corp.*, 128 N.L.R.B. 1035 (1960); *Miami Coca-Cola Bottling Co.*, 108 N.L.R.B. 456 (1954); *Shields Eng'r. & Mfg. Co.*, 85 N.L.R.B. 168 (1949); *Goldblatt Bros.*, 77 N.L.R.B. 1262 (1948).

165. *Consolidated Welding and Eng'r Co.*, 146 N.L.R.B. 739 (1964); *Blue Plate Foods, Inc.*, 102 N.L.R.B. 1057 (1953).

166. W. DONAHUE & C. TIBBITTS, *POLITICS OF AGE* 148-50 (1971); *LABOR REPORT*, *supra* note 13, at 54.

167. B. SCHNEIDER, *THE OLDER WORKER* 7 (1962).

be held responsible for either contractual violations or unfair labor practices if they refused to hire older, but qualified, members referred by the union. To some extent the hiring hall agreement prevented employers from equating age with physical incapacity so long as the referred were able to do the job.

Younger members, here defined as forty years of age or under, generally view the world differently than the older members who provide the leadership in the union.¹⁶⁸ The attitudes of these older members were shaped by the 1930 depression and World War II, while younger members knew prosperity, the Korean and Vietnam Wars, and civil rights showdowns. For example, pensions are of less concern to younger than to older members. If the current median age of union membership drops, the union goals to be achieved through collective bargaining might also change, and because older members can hinder the opportunities of younger members, union leaders could be forced to shift priorities as the median age is lowered.¹⁶⁹

Before the age discrimination laws there was some possibility that if younger members were unfairly represented, unfair labor practice charges could be successfully prosecuted or unions decertified under the Taft-Hartley Act. For example, when black employees were harassed by unions prior to the enactment of state and federal fair employment laws, the NLRB and the courts found unfair representation¹⁷⁰ or violations of section 8(b).¹⁷¹ It seems possible that the NLRB could entertain age discrimination claims against unions grossly overprotective of older members. It should be remembered that while the federal age discrimination law is not related to the Taft-Hartley Act, congressional policy has been declared protecting older workers. Under these circumstances, the NLRB is not likely to ignore claims of age discrimination when interpreting the Taft-Hartley Act. In fact, the 1967 legislation indicates that the NLRB must be more aware of age discrimination than in the past. Without turning to the NLRB, employers who fail to comply with

168. R. MILLER, F. ZELLER & G. MILLER, *THE PRACTICE OF LOCAL UNION LEADERSHIP* 76 (1965).

169. *TOO OLD TO WORK—TOO YOUNG TO RETIRE* 4 (1960).

170. *Conley v. Gibson*, 355 U.S. 41 (1957); *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955) (*per curiam*); *Turnstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951); *Mitchell v. Gulf, M. & O.R.R.*, 91 F. Supp. 175 (N.D. Ala. 1950); *Hall v. Louisville & N.R.R.*, 26 L.R.R.M. 2468 (W.D. Ky. 1950); *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

171. *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964); *South Tex. Produce Co.*, 66 N.L.R.B. 1442 (1946), *aff'd sub nom.*, *NLRB v. Whittenburg*, 165 F.2d 102 (5th Cir. 1947).

the terms of their agreement can also be sued for damages under section 301 of the Taft-Hartley Act.¹⁷² The Supreme Court has interpreted section 301 as creating a new federal right,¹⁷³ and suits can be brought in a state or federal court for breach of contract¹⁷⁴ or unfair labor practice charges brought before the NLRB.

Now that the alternative remedies available under the Taft-Hartley Act have been established, some of the contractual devices utilized by unions to protect older members will be reviewed. Before the Wagner Act, unions attempted to contractually limit employer control over the work force in order to minimize discrimination against union members. After the Wagner and Taft-Hartley Acts, union leaders shifted their goals by negotiating agreements limiting the employer's ability to make decisions. For example, while right-to-work states can outlaw all forms of union security, hiring hall job referral is legal in all states if it is stipulated in the contract. To maximize retention and promotion probabilities, seniority clauses that favor older workers are emphasized by unions.¹⁷⁵ The vast majority of collective bargaining agreements specify some form of seniority in considerations for promotion, layoff and choice of shift.¹⁷⁶ Grievances over referrals and seniority can be brought before an arbitrator.

The seniority clause also raises some disadvantages for employees because it limits their ability to test its legality under age discrimination laws.¹⁷⁷ This contractual protection appears fair for older workers serving the same employer since it serves as a reward for long and faithful service. For older workers seeking employment or the newly hired, however, the seniority clause poses a major hurdle. Since large employers are more likely to contractually provide for seniority than small employers, older unemployed workers generally experience less difficulty securing suitable employment in small firms which do not bargain with unions.¹⁷⁸

Even in the absence of a seniority clause, employers are ex-

172. 29 U.S.C. § 185 (1970).

173. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

174. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Note that the state court must apply federal law.

175. *See, e.g.*, *Price v. Teamsters Union*, 457 F.2d 605 (3d Cir. 1972); *Evans v. United Transp. Union*, 80 L.R.R.M. 2016 (N. D. Ala. 1970).

176. H. DAVEY, *CONTEMPORARY COLLECTIVE BARGAINING* 228-36 (3d ed. 1972).

177. Like all rules of thumb, exceptions are possible and some seniority agreements might be voided under an age discrimination law. For example, departmental seniority is more common than job or plant seniority, which holds down opportunity for members in one department because there is less layoff and greater opportunity in another department.

178. LABOR REPORT, *supra* note 13, at 60.

tremely reluctant to promote or train older workers.¹⁷⁹ Employers claim that such training of older workers is inefficient and costly because the time actually spent in the new job is limited. Unions often question employer decisions denying opportunity to members and turn to arbitrators to protect older workers. Furthermore, if agreements are negotiated to permit early retirement, arbitration is utilized if employees are retired against their will.¹⁸⁰ Grievances are also brought before arbitrators pursuant to the "just cause" provision when employers claim that older employees were released for inefficiency and age.¹⁸¹ Even before the enactment of the age laws, however, some arbitrators felt that age was not "just cause" for discharge.¹⁸² They took the position that employers discharging older employees must clearly prove the inefficiency of the worker. Arbitrators also felt that the age of grievants does not bar training or promotion.¹⁸³ While the arbitrator had discretion in preventing age discrimination,¹⁸⁴ generally only unilateral and factually unsupported age policies adopted by employers were made taboo.¹⁸⁵ Arbitrators disagreed whether or not age limits for job trainees were "factually unsupported." Some felt that a maximum age limit could be fixed by employers if it was reasonable and the jobs entailed considerable training.¹⁸⁶ Although views of reasonable age

179. F. & E. ELKOURI, *HOW ARBITRATION WORKS* 607-08 (3d ed. 1973).

180. See generally *Honeggers' & Co. v. Teamsters Local 90*, 71-1 CCH LAB. ARB. AWARDS 3703 (1971); *A.O. Smith Corp. v. Smith Steel Workers, Affiliated Local 19806*, 66-1 CCH LAB. ARB. AWARDS 4038 (1965).

181. *White Motor Co. v. Machinists Lodge 804*, 65-2 CCH LAB. ARB. AWARDS 5711 (1965).

182. Cf. *United States Steel Corp. v. Steelworkers Local 2701*, 57 Lab. Arb. 237, 251-52 (1971); *United States Steel Corp. v. Steelworkers Local 2227*, 55 Lab. Arb. 659, 662-63 (1970); *Scott Paper Co. v. Pulp Mill Workers Local 11*, 67-2 CCH LAB. ARB. AWARDS 4627 (1967); *National Coop. Refinery Ass'n v. Oil Workers Local 5-558*, 44 Lab. Arb. 92 (1964); *Louisville Pub. Warehouse Co. v. Teamsters Local 89*, 29 Lab. Arb. 128 (1957).

183. *Municipal Authority v. Utility Workers Local 416*, 70-1 CCH LAB. ARB. AWARDS 3528 (1969); *American Smelting & Ref. Co. v. Steelworkers Local 4347*, 28 Lab. Arb. 557 (1957).

184. Cf. *Jones & Laughlin Steel Corp. v. Steelworkers Local 1272*, 29 Lab. Arb. 532 (1957). In New York, age standards for apprenticeship in the sheet metal trades are 18 to 23. See SOVERN, *RACIAL DISCRIMINATION IN EMPLOYMENT* 865 (1973). It should be noted that this seems to violate the New York age discrimination law (see Table I) and the federal law.

185. See generally *Ozark Smelting & Mining Div., Sherwin-Williams Co. v. Oil Workers Local 5-609*, 66-2 CCH LAB. ARB. AWARDS 4490 (1966). With age discrimination laws, the arbitrator should not follow the terms of an agreement calling for age discrimination.

186. *Aro, Inc. v. Air Engineering Metal Trades Council & Affiliated Unions*, 52 Lab. Arb. 372 (1969); *Pittsburgh Steel Co. v. Steelworkers Local 1187*, 47 Lab. Arb. 88 (1966); *Ozark Smelting & Mining Div., Sherwin-Williams Co. v. Oil Workers Local 5-609*, 46 Lab. Arb. 697 (1966); *Libby, McNeill & Libby v. Long Shoremen's Local 142*, 37 Lab. Arb. 553 (1961); *Sutherland Paper Co. v. Independent Union of Sutherland Paper Co. of Employees*, 25 Lab. Arb. 716 (1955).

limitation varied, some arbitrators were reluctant to endorse age limitations.¹⁸⁷ Other arbitrators, without expressed legislative guidance, found employers responsible for violating collective bargaining agreements by setting age standards.¹⁸⁸ As the Supreme Court clearly specified in *Gardner Denver*,¹⁸⁹ arbitrators are not required to follow legislation or court interpretation.

Certain rulings by arbitrators are reviewed. For example, when an eligible thirty-year-old candidate for a job was rejected because the collective bargaining agreement called for preference for the senior bidder,¹⁹⁰ the arbitrator correctly felt that the age limitation, preferring younger employees, imposed by the employer was unreasonable. If the age limitation imposed by the employer is reasonable, the senior bidder is without recourse.¹⁹¹ In making his decision, the arbitrator did not mention two significant factors. First, permitting an employer to establish age limitations when senior employees bid for jobs changes the terms of the collective bargaining agreement. Does an arbitrator exceed his authority by interpreting the contract so as to permit change? Section 301 endorses the sanctity of the contract and requires the arbitrator to follow terms as specified. By reading an age limitation that is not present into a contract, the arbitrator frustrates the right of the union to protect the senior man. By making such an interpretation, the arbitrator actually aids the employer seeking to circumvent the age discrimination laws. Secondly, while employers may amicably greet seniority for considerations of layoff, recall, and choice of shift, reliance on seniority to determine promotion and job training is repugnant to them. Unless the contract gives employers the right to establish age limitations, it would seem that endorsement by arbitrators is questionable under the *Steelworkers* trilogy and the age laws. However, this view is less than gospel. If the agreement is silent and there is no evidence pertaining to the use of age limitations for promotion or job training, arbitrators could rule that the employer holds implied authority. Such a construction means that the courts would favor the arbitrator's decision, permitted under the *Steelworkers* cases without judicial review.

There is another factor, medically reviewed in a previous sec-

187. Kovarsky, *Civil Rights and Arbitration*, 1974 WASH. U.L.Q. 59.

188. *Ball Bros. Co. v. Glass Bottle Blowers Local 88*, 46 Lab. Arb. 1153 (1966); *Ciba Pharm. Co. v. Chemical Workers Local 9*, 41 Lab. Arb. 14 (1963).

189. 415 U.S. 36 (1974).

190. *Ball Bros. Co. v. Glass Bottle Blowers Local 88*, 66-2 CCH LAB. ARB. AWARDS 5097 (1966).

191. See also *United States Plywood Corp. v. Woodworkers Local 5-317*, 67-2 CCH LAB. ARB. AWARDS 4852 (1967).

tion and supported by the age discrimination laws, that somewhat reflects a lack of insight on the part of some arbitrators. As breakthroughs are made by medical science, more people will live for longer periods of time even though they may experience serious ailments. Due to these medical advancements, less people are debilitated with medical problems and more are capable of matching the performance of younger people. Arbitrators and employers tend to forget too often that motivation on the job, as in athletics, can overcome many deficiencies. A more sensible approach is for arbitrators to support contracts without exception by awarding the opportunity to the senior bidder and completely removing age as a factor.¹⁹² Admittedly, senior bidders sixty years of age, who must be trained for two years and who retire at sixty-five, are not good choices for promotion and training. Few at this age, however, seek a new challenge or willingly transfer to another job where previously accumulated seniority may be lost. By adopting this recommendation, employers can still present evidence to arbitrators that senior bidders are physically or mentally disabled. In this fashion, the arbitrator is in accord with the age discrimination laws requiring employers to evaluate the individual. While a cost would be attached to the medical testimony required to help arbitrators determine the capability of the job bidders, such costs are justifiable if older workers are to be protected. If unions are unwilling to share in the arbitration and evidentiary costs, they can advise the grievants to seek a legal remedy. Whether proceeding to court or arbitration, the cost to employers could be considerable.

A less agonizing but similar question often taken to arbitration is whether employers can unilaterally retire all employees reaching sixty-five years of age. The problem can become more complicated if employers single out employees for retirement on an *ad hoc* basis. While employers may claim that a management prerogative clause authorizes the unilateral establishment of a retirement age,¹⁹³ arbitrators have supported the grievants by finding a breach of the job tenure provisions of the agreement.¹⁹⁴ Some arbitrators, however, support the notion that employers do not act arbitrarily by estab-

192. *Scott Paper Co. v. Pulp Workers Local 11*, 67-2 CCH LAB. ARB. AWARDS 4627 (1967).

193. *See United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). In this case the Supreme Court ruled that a vague management rights clause does not give the employer the right to skip arbitration.

194. *Consolidated Packaging Corp. v. Machinists Lodge 131*, 68-2 CCH LAB. ARB. AWARDS 4501 (1968); *H.K. Porter Co. v. Sheet Metal Workers Local 170*, 67-2 CCH LAB. ARB. AWARDS 4982 (1967).

lishing a reasonable but compulsory retirement age.¹⁹⁵ Arbitrators espousing this position accept the universal standard that sixty-five years of age is a reasonable retirement age. From a medical viewpoint, sixty-five years may be a fair retirement age because of a more rapid physiological breakdown after sixty years of age. Whether employers should be allowed to fix even a reasonable retirement age is still a controversial question, especially when this age is less than sixty-five. Consequently, an investigation of recent decisions by arbitrators does not disclose a retirement age that would be classified as reasonable. Since some of the collective bargaining agreements permit or require retirement at sixty, it seems that the unilateral selection of this age by employers might be reasonable. Furthermore, state and federal laws sanction bona fide compulsory retirement plans prior to the age of sixty.¹⁹⁶ Yet, sixty could still be considered unreasonable where employees are fit and retirement unwanted.¹⁹⁷ There is probably more reason to exercise caution when employers fix the age of retirement than if a public agency makes the decision.

Grievances are taken to arbitration where the physical capability of grievants are questioned. Arbitrators are reluctant to sanction the discharge of employees who have slowed down but are still physically capable and the age discrimination laws support this position. While arbitrators would be hard-pressed to support grievants obviously unable to handle their jobs, they could support those who perform satisfactorily even if they are physically incapacitated. Testimony before arbitrators as to the physical infirmity of workers is frequently conflicting, and the philosophy expressed in the current laws tips the scales in favor of grievants. Some arbitration awards pertaining to physical ability are now reviewed. If temporarily disabled, an employee who is warned of inadequate performance cannot be improperly discharged.¹⁹⁸ This position has been taken by arbi-

195. *Service Tech. Corp. v. Laborers Local 313*, 72-1 CCH LAB. ARB. AWARDS 4207 (1972); *Owens-Illinois, Inc. v. Glass Bottle Blowers Local 59*, 70-2 CCH LAB. ARB. AWARDS 4997 (1970); *Cook & Brown Lime Co. v. Teamsters Local 126*, 68-2 CCH LAB. ARB. AWARDS 4617 (1968); *Brickles, Inc. v. Retail Clerks Local 1059*, 65-2 CCH LAB. ARB. AWARDS 5577 (1965).

196. See discussion pertaining to retirement *infra*.

197. *Western Air Lines, Inc. v. Air Line Pilots Ass'n.*, 33 Lab. Arb. 84 (1959). Note that the Federal Aviation Agency today regulates air carrier pilots and it has determined that 60, because of safety factors, is the mandatory retirement age. Note, however, that the 60-year retirement age was established by a public agency authorized to regulate air carriers and provide for the public safety. See Bergman, *Age Discrimination in Employment: Air Carriers*, 36 J. AIR L. & COM. 3 (1970). The question of compulsory retirement for air pilots at 60 will be considered again when the federal age discrimination law is reviewed.

198. *City Prods. Corp. v. Teamsters Local 743*, 65-2 CCH LAB. ARB. AWARDS 5302

trators even when the temporarily disabled employee adds to the costs of production.¹⁹⁹ While the age discrimination laws do not call for the protection of those permanently disabled and unable to perform satisfactorily, they probably do protect those permanently and temporarily disabled who can do the job. As employees age, however, the period of recovery is often longer than for younger workers. Does an employer violate the age discrimination laws by discharging older workers who mend slowly? While arbitrators could uphold the right of employers to insist that temporarily disabled employees stop working, with or without pay, discharge could be seen as a sign of age discrimination. Some arbitrators have even ruled that discharged workers permanently disabled should be assigned to jobs they can perform.²⁰⁰ Arbitrators are careful to emphasize the fact that the employee must be capable of handling another assignment.²⁰¹ If the employer discharges those close to retirement without seeking an alternative solution, the age laws could be interpreted to forbid discharge leading to a loss of benefits.

THE FEDERAL AGE LAW HISTORY AND INTERPRETATION

Prior to Congressional action, the states enacted legislation to

(1965). This type of question, temporary disability, is not mentioned in the 1967 law forbidding age discrimination. Arbitrators in this type of situation interpret the "just cause" provision of an agreement so that a ruling is proper that temporary disability is not "just cause" for discharge. The 1967 law does not require an employer to retain an employee temporarily incapable of doing the job, but it could be argued that discharging such an employee is evidence of age discrimination, especially if no attempt is made to place him elsewhere, and the employee has been with the firm a considerable length of time. For awards similar to that made in *City Products Corp. see General Tel. Co. v. Communication Workers Union*, 72-2 CCH LAB. ARB. AWARDS 4601 (1972); *Douglas & Lomason Co. v. Industrial Workers Local 669*, 68-2 CCH LAB. ARB. AWARDS 5238 (1968); *Magnavox Co. v. Industrial Workers Local 254*, 46 Lab. Arb. 719 (1966); *Barth Smelting & Ref. Co. v. Mine Workers Local 482*, 42 Lab. Arb. 374 (1964); *A & P Co. v. Bakery Employees Local 262*, 41 Lab. Arb. 278 (1963); *Columbia Packing Co. v. United Packinghouse Workers*, 31 Lab. Arb. 152 (1958); *Management Servs. v. Oil Workers Local 9-439*, 26 Lab. Arb. 505 (1956).

199. *Shahmoon Indus. v. United Steelworkers*, 42 Lab. Arb. 392 (1963); *Laher Battery Prod. Corp. v. UAW Local 76*, 11 Lab. Arb. 41 (1948).

200. *Silas Mason Co. v. Machinists Lodge 1010*, 72-1 CCH LAB. ARB. AWARDS 4027 (1972); *Anemostat Controlair Corp. v. Sheetmetal Workers Local 170*, 50 Lab. Arb. 1277 (1968); *United Brick & Tile Co. v. Glass Workers Local 142*, 62-3 CCH LAB. ARB. AWARDS 5761 (1962); *Allegheny Ludlum Steel Corp. v. Steelworkers Local 2478*, 25 Lab. Arb. 214 (1955); *Sylvania Electric Corp. v. United Electrical Workers*, 25 Lab. Arb. 407 (1955); *Republic Steel Corp. v. Steelworkers Local 3670*, 25 Lab. Arb. 238 (1955).

201. *Eureka Pipe Line Co. v. Oil Workers Local 3-693*, 67-2 CCH LAB. ARB. AWARDS 5002 (1967); *Riegel Paper Corp. v. Pulp Workers Locals 738 & 797*, 66-2 CCH LAB. ARB. AWARDS 4522 (1966); *Western Elec. Co. v. Communication Workers Union*, 42 Lab. Arb. 1316 (1964); *Bethlehem Steel Co. v. Steelworkers Local 1383*, 42 Lab. Arb. 137 (1964); *American Oil Co. v. Oil Workers Local 124*, 62-1 CCH LAB. ARB. AWARDS 4284 (1962).

meet the needs of older workers. In 1903 Colorado became the first state to enact an age discrimination law and it was followed by Louisiana in 1934 and Massachusetts in 1937.²⁰² These laws existed prior to the extensive development of administrative law and violations were enforced by criminal proceedings. Few age charges were brought into the courtroom under the early laws.²⁰³ Not only was it more difficult to establish guilt beyond all reasonable doubt, but employees unprotected by unions feared being black-balled and few would risk offending employers. A second era began in 1950 when Massachusetts placed the regulation of its age discrimination law under the control of an administrative agency.²⁰⁴ Other states soon followed the Massachusetts lead in placing the administration of their laws under agency control. *See* Table I.

In enacting the 1967 age discrimination legislation, Congress drew upon a multitude of state and federal laws and experiences to fashion a federal bill. One source for banning age discrimination was the agreements negotiated by employers and unions that were enforced under section 301 of the Taft-Hartley Act and interpreted by arbitrators.²⁰⁵ While there had been some sentiment to amend the unfair labor practice provisions of the Taft-Hartley Act to outlaw age discrimination,²⁰⁶ this approach would have meant that age discrimination violations, prohibited by contract, could be arbitrated and that the NLRB could entertain unfair labor practice complaints.²⁰⁷ Another early source was an executive order, similar to the one forbidding government contractors to engage in racial and religious discrimination,²⁰⁸ that prohibited discrimination on the basis of age.²⁰⁹ There is no evidence that any government agency enforced this executive order and as a matter of fact no enforcement agency was ever designated.

Because of state age laws and the Civil Rights Act of 1964,²¹⁰ there was some support for placing control of the federal age dis-

202. 8 LAB. REL. REP., FAIR EMPLOY. PRAC. MANUAL § 451, at 182, 491, 559.

203. To date, California, Colorado, Georgia, Louisiana, Nebraska, and North Dakota provide that the aggrieved or attorney general can bring a civil or criminal action. *See* CAL. LABOR CODE § 1422 (West 1971); COLO. REV. STAT. § 80-21-7 (1964); GA. CODE ANN. § 54-9927 (1974); LA. STAT. ANN. § 23:892-93 (1964); NEB. REV. STAT. § 48-1008 (1968); N.D. CENT. CODE § 34-01-17 (1972). The method of enforcement of the law in Ohio is not indicated. *See* OHIO REV. CODE § 4101.17 (Anderson 1973).

204. 8 LAB. REL. REP., FAIR EMPLOY. PRAC. MANUAL 451:559 (1974).

205. *Beatrice Foods v. Machinists Lodge 1127*, 71-1 CCH LAB. ARB. AWARDS 3254 (1970).

206. B. SCHNEIDER, *THE OLDER WORKER* 74 (1962).

207. *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962).

208. *See, e.g.*, 42 U.S.C. § 2000e *et seq.* (1970).

209. 8 LAB. REL. REP., FAIR EMPLOY. PRAC. MANUAL 421:207-08 (1973).

210. 92 U.S.C. § 2000e *et seq.* (1970).

crimination law with the Equal Employment Opportunity Commission (E.E.O.C.). Congress, however, placed the regulation of the 1967 law in the hands of the Department of Labor.²¹¹ The Wage and Hour Division of the Department of Labor was later charged with failing to enforce the age law; a similar charge had been leveled against the Department of Labor for not enforcing contracts prohibiting racial discrimination.²¹² As of 1969, there were less than 1,000 enforcement officers in the Wage and Hour Division devoting less than ten percent of their time to age discrimination complaints; the equivalent of less than 100 enforcement officers devoted full time to the age complaints. As late as 1971, Senator Rudolph of West Virginia claimed that the law was not being enforced satisfactorily.²¹³ Due to this continuing criticism of the Wage and Hour Division, it is possible that the administration of the law may, at some future date, be turned over to the E.E.O.C. Even though it is not specifically authorized to investigate age complaints, the E.E.O.C. has been receiving them.²¹⁴ In fact, Congress considered the inclusion of a ban against age discrimination when the Civil Rights Act of 1964 was debated.²¹⁵ When the 1964 legislation was enacted, however, section 715 only authorized the Secretary of Labor to undertake a study of age discrimination.²¹⁶

As shown in Table I, the federal legislation contains a savings clause so that "any State performing like functions" can adjudicate complaints with the exception that "action under this (federal) Act . . . shall supersede any State action."²¹⁷ The federal law prohibits suit "before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."²¹⁸ This law differs from the state laws in several respects. Many of the state laws empower an administrative commission to make a binding decision. An agency must conciliate before making a binding decision or else suit must be brought *ab initio* in court under other state laws. While the federal law author-

211. Age Discrimination in Employment Act of 1967, §§ 5-7, 29 U.S.C. §§ 624-26 (1970).

212. *Hearings Before the Subcomm. on Employment and Retirement Incomes of the Special Comm. on Aging*, 91st Cong., 1st Sess., pt. 9, at 1178-79 (1969).

213. *Hearings on S. 555, 1307, 1580 Before the Subcomm. on Aging of the Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., at 59 (1971). For a review of the investigations made, see DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMIN., AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 2-4 (1972).

214. N.Y. Times, Nov. 1, 1965, at 36, col. 2.

215. *Hearings on H.R. 405 Before the Subcomm. on Labor of the Comm. on Education and Labor*, 88th Cong., 1st Sess., at 22, 38-39, 92, 430, 478-79 (1963).

216. 42 U.S.C. § 2000e-14 (1970).

217. 29 U.S.C. § 633(a) (1970).

218. *Id.* § 633(b).

izes the Secretary of Labor to attempt conciliation through the Wage and Hour Division, a binding decision cannot be made. If conciliation is unsuccessful, the Secretary of Labor can press charges against the firm or union in a federal district court. The Secretary of Labor cannot by-pass conciliation—it must be undertaken before turning to a federal court.²¹⁹

In contrast, the Iowa age legislation delegated to the Iowa Civil Rights Commission the authority to make decisions and to issue cease and desist orders.²²⁰ Investigation and conciliation are the initial steps under the Iowa legislation, followed by a public hearing if necessary. As in the racial complaints, the investigation and conciliation attempts must be kept confidential until the public hearing stage. However, under Iowa law the commission decision is not enforced, and a full hearing is held in a state court on appeal if necessary. Since the Wage and Hour Division can only conciliate, proceedings in a federal court are *de novo*. Iowa also adds a dimension not found in most of the other state and federal laws. Discrimination at *all* ages is prohibited, while most other state laws and the federal law only apply to discrimination from forty to sixty-five years.²²¹ Even though no ages are designated, however, it seems unlikely that the Iowa law protects minors. The Iowa law also bars discrimination where “the physical or mental condition of a person . . . constitutes a substantial handicap, but is unrelated to such person’s ability to engage in a particular occupation.”²²² While the federal law does not mention physical or mental handicap, it might be possible for the handicapped in some instances to equate their disability with age and establish a federal violation. For example, many elderly persons with a mildly progressive senile or presenile dementia can satisfactorily continue to perform their jobs. This ability can be equalled by those who have had certain types of strokes. Moderately severe degenerative joint disease might also have little effect on the employee’s ability to function well in sedentary work. Depending on individual circumstances, many mechanical and intellectual functions can be performed satisfactorily with moderate dysfunctions of eyesight and hearing. With the help of prosthetics, medicines, vocational rehabilitation, surgical, environmental, and other scientific

219. *Id.* § 626(b). See *Brennan v. Weis Markets*, 5 F.E.P. Cases 850 (M.D. Pa. 1973).

220. The Iowa law could not be immediately enforced because the State legislature did not provide funds. In fact, Iowa, in 1970, amended its fair employment laws to prohibit discrimination on the basis of sex, which, by 1973, had not been funded.

221. See Table 1. It can be anticipated that few charges will be considered in Iowa before 21 years of age and after 65 years of age.

222. IOWA CODE ANN. § 601A.2(11) (Additional Supp. 1974).

innovations, those over forty with physical and mental handicaps can satisfactorily fill many jobs. If the physical or mental disability is not age related, however, the federal law might not control even if the complainant performs satisfactorily on the job. In Iowa and states with similar legislation, those with a physical or mental handicap unrelated to age can successfully seek redress.

States with age discrimination laws have the first opportunity to remedy violations if "like functions," as specified in the federal law, are performed by these states. Section 636(b) of the federal law permits recourse to the Department of Labor "before the expiration of sixty days after proceedings have been commenced under the State law." A question likely to be considered carefully in the future is the meaning of "like functions." For example, if a state merely encourages the elimination of age discrimination without making it illegal, must the Department of Labor defer to the state? Since the state law is without teeth, there would seem to be little reason for the Wage and Hour Division to hesitate; the state law is clearly without "like functions." This problem was considered in *Goger v. H. K. Porter Co.*,²²³ where the plaintiff claimed the right to by-pass the state remedy by bringing suit under federal law because only discrimination in hiring, and not discharge, was forbidden. The federal court decided that the New Jersey law forbade discharge, but did not expressly review the meaning of "like functions" of the federal law. The court concluded:

It is true that the Act does not require an aggrieved to exhaust state remedies as a condition precedent . . . but it clearly requires that a complaint be made to the appropriate state agency. . . . The State must be given a threshold period of 60 days in which it may attempt to resolve the controversy, normally by voluntary compliance. . . .²²⁴

This decision can be challenged in light of the "like functions" specified in the federal law. If the New Jersey law is without "like functions," immediate recourse to the Wage and Hour Division seems proper. It is unlikely that the court implied, without discussion, that the New Jersey law contained "like functions." Employers operating in interstate commerce are subject to federal regulation and the propriety of requiring notification to the state needs explanation.

Where the "functions" are substantially "alike," however, asking for immediate federal relief is improper.²²⁵ For example, the Pennsylvania state law forbids discrimination to sixty-two while the

223. 5 F.E.P. Cases 695 (D.N.J. 1973).

224. *Id.* at 697.

225. *McGarvey v. Merck & Co.*, 359 F. Supp. 525 (D.N.J. 1973).

federal law forbids discrimination to sixty-five. If a plaintiff was fifty-nine years of age, there would be no reason to permit immediate recourse under the federal law because this difference is not substantial, and does not take away from the "like functions" of the Pennsylvania law. If our hypothetical Pennsylvania plaintiff was past sixty-two years of age, there would not be "like functions" and only the Wage and Hour Division could attempt to resolve the dispute. The federal and state laws are similar in the respect that they blanket private employers, unions, and employment agencies, exempting public agencies, and applying to hiring, promotion, and discharge. A few states—California, Colorado, Georgia, Idaho, Indiana, Louisiana, Montana, North Dakota, and Ohio—do not specify who is covered nor are there specific exclusions. While there is some variance, most of the states and the federal law create exceptions when there are bona fide retirement and insurance plans. Colorado is one state in which the law applies only to discharge and not to hiring—or apparently promotion.

Under section 4(f)(1) of the federal law,²²⁶ age discrimination is legal, as it is under state laws, "where the differentiation is based on reasonable factors other than age" It is apparent that "reasonable factors" will require considerable interpretation by the Department of Labor and the courts and differences of opinion will inevitably arise. Based on the medical data previously reviewed, the use of abstract standards to establish physiological aging is not acceptable. To establish disability, the individual must be physically or mentally evaluated without recourse to potentially misleading probability statistics. It is essential that complaints be encouraged at the present time, not only to aid older workers but to explore and establish the meaning of "reasonable factors" and other unknowns. Perhaps at some future time medical breakthroughs will permit screening standards so that the capability of each individual employee need not be determined individually. For the time being, however, it seems proper to follow the policy already adopted by the Wage and Hour Division in limiting the number of bona fide exceptions.²²⁷

The meaning of "reasonable factors other than age" is obscure, but in most instances it should be geared to the individual and not the firm. Technically speaking, the employer can turn away a job candidate for unreasonable factors if unrelated to age. Thus, if the

226. Age Discrimination in Employment Act of 1967, § 4(f)(1), 29 U.S.C. § 623(f)(1) (1970).

227. 29 C.F.R. § 860.102(b) (1973).

word "reasonable" is included as a standard to guide decision-makers, was the challenged decision made on age or other "factors?" If "reasonable," the Wage and Hour Division and the courts should attach greater credibility to the other "factors." Unreasonable "factors" not only cast doubt upon the intentions of employers and unions, but are also against the law.²²⁸ It should be noted that while the federal law does not necessitate intentional age discrimination, there are some state laws where intentional discrimination does appear to be a prerequisite.

Employers can use a wide variety of personnel tools such as medical examinations and aptitude, ability, and intelligence tests.²²⁹ Courts accept testing that is not intentionally or inherently discriminatory where there is little reason to believe that such use violates the federal age law as unreasonable "factors other than age." Tests that are not geared to job description, validated, and checked for reliability can discriminate against older workmen. The viewpoint that age leads to personality changes which seldom affect performance on the job would probably follow congressional intent since elder legislators are naturally sympathetic to older workers in industry. Intelligence tests may unfairly measure older workers since they are more likely to have fewer years of schooling than younger workers and to be further removed in time from formal learning.²³⁰ Given the current state of the art, there is considerable doubt as to whether native intelligence can be measured—what is measured is acquired knowledge and the ability to take tests.²³¹ In contrast, it can be reasoned that the most important elements for success on the job are experience and motivation. Unless an intelligence test can predict motivation or ability to learn, the test score is not that significant. For example, older job seekers may be more highly motivated because of the fact that employment opportunities disappear with age. In fact, holding a job or granting a promotion can eliminate personality changes in older and depressed workers.

228. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

229. Note, *The Age Discrimination in Employment Act of 1967: A Practical Application*, 24 BAYLOR L. REV. 601 (1972).

230. This was a factor in *Duke Power Co.*, convincing the Supreme Court that Title VII was violated because blacks average less years in school than whites and are exposed to an inferior education. Thus, the effect of the employers testing policy was to discriminate against black workmen.

231. "New Chicago Plan Ordered," 4 RACE REL. REP., Nov. 19, 1973, at 1. The Urban League accused unions of relying on "rigid age and educational requirements" to screen out blacks from employment opportunities. As older workers typically have less years in school than younger workers—this is true for black and white—intelligence test scores for all older workers should be lower than for younger workers.

Such an interpretation would be well received in federal district courts since judges are up in years and also naturally receptive.

As previously indicated, personality changes with age and tests could be used to screen out older employees. Since complaints have not been registered by older people, employers using personality tests appear secure.²³² While little of scientific merit is known about personality testing, some are used for research or diagnostic purposes and others are used for selection in industry. Some personality tests are prepared without designating norms while others carefully delineate norms that reflect the bias of the selectors.²³³ Many clinical psychologists and psychiatrists feel that personality tests are not a proper industrial tool²³⁴ and those attempts made to validate personality tests for industrial use have not been convincing. One particular reason for this lack of success is the fact that there are no right or wrong answers in these tests.²³⁵ Furthermore, to properly assess personality, intellectual ability and background must be taken into account.²³⁶ The claim that advancing age leads to serious inroads in mental capacity or psychiatric disorder is doubtful in the absence of other physiological changes, even though "[t]he EEG findings . . . suggest that the electrical activity of the brain undergoes change with age, regardless of whether detectable physical disease is present or not. . . ."²³⁷ As indicated previously, changes tend to occur in those sixty years of age and over. The EEG is a very general medical tool that must be looked at in light of the population sampled and the type of abnormality present.

In general, fewer activities are pursued as a person ages and such people are more interested in solitary activities.²³⁸ Due to these changes and the threat of a new generation, tests are viewed with trepidation by older people.²³⁹ While those holding professional and

232. In relation to the extent that age discrimination in employment is commonplace, few complaints are being registered with the Wage and Hour Division. Complaints should increase as large awards, such as that recently imposed against Standard Oil of California, are imposed. Furthermore, unlike the E.E.O.C., the Wage and Hour Division does not have investigatory power—it can only act when a complaint is registered. Some of the states with age discrimination laws have delegated the power to investigate to commissions.

233. THE SIXTH MENTAL MEASUREMENTS YEARBOOK ¶ 58, at 142-47 (Buros ed. 1965).

234. Lovell, *The Human Use of Personality Tests: A Dissenting View*, 22 AM. PSYCH. 383, 387 (1967).

235. HUMAN AGING 103, 204 (S. Chown ed. 1972).

236. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, HUMAN AGING: A BIOLOGICAL AND BEHAVIORAL STUDY 153 (1963) (Pub. Health Serv. Publ. No. 986).

237. *Id.* at 311.

238. H. GEIST, THE PSYCHOLOGICAL ASPECTS OF THE AGING PROCESS WITH SOCIOLOGICAL IMPLICATIONS 50 (1968); H. JACOBS, YOUTH LOOKS AT AGING 6 (1969).

239. H. GEIST, *supra* note 238, at 60.

managerial positions should be least affected by age, personality tests tend to be used most frequently at these levels.²⁴⁰ While age may affect vision, hearing, and touch sensitivity, experience can compensate for such low-level losses. The question of a test score and seniority has gone to arbitration.²⁴¹ Without mentioning the 1967 age discrimination law, the arbitrator favored the employer who selected an employee for a job with less seniority because the worker with greater seniority was older and scored low on an aptitude test. The arbitrator permitted this result without examining the validity of the test. Because of the *Steelworkers* trilogy²⁴² and other Supreme Court decisions,²⁴³ the arbitrator's decision cannot be questioned and legislation need not be considered when making an award.²⁴⁴ It is possible, however, that workers of all ages can be evaluated by the same intelligence and aptitude tests.²⁴⁵ While disadvantaged when tests are prepared to favor younger workers, older workers are usually less affected by intelligence, verbal, numerical, and space perception tests than by finger dexterity and similar performance tests.²⁴⁶

One aspect of the age discrimination laws that has not been explored is the right of employees to bid for jobs laterally, or downward, rather than upward. Since complaints are made only upon hiring and promotion failures or compulsory retirement, neither state nor federal laws and regulations cover this possibility.²⁴⁷ The federal law only bars segregation or the limitation of opportunity,²⁴⁸ and Congress seemed unconcerned with employees interested in less-taxing or perhaps more personally satisfying jobs. Yet there is

240. G. MARBACH, *JOB REDESIGN FOR OLDER WORKERS* 20 (1968).

241. *North Am. Refractories Co. v. Brick Workers Local 448*, 68-1 CCH LAB. ARB. AWARDS 3732 (1968).

242. *United Steelworkers Union v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers Union v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers Union v. American Mfg. Co.*, 363 U.S. 564 (1960).

243. *United States Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 358 (1971) (Harlan, J., concurring); *NLRB v. Strong*, 393 U.S. 357 (1969); *NLRB v. Acme Ind. Co.*, 385 U.S. 432 (1967); *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Truck Drivers Local 89 v. Riss & Co.*, 372 U.S. 517 (1963).

244. According to *Gardner-Denver*, however, there is no election of remedy if proceeding under Title VII after an arbitrator's award.

245. *Duke Power Co.* seems to indicate that the test must be designed for the job, geared to job description, and must not discriminate against a group who takes the test and who faces disadvantage.

246. H. GEIST, *supra* note 238, at 58-59; G. MARBACH, *supra* note 240, at 17.

247. Such a question has gone to arbitration. See *Overhead Door Co. v. Carpenters Local 2047*, 70-1 CCH LAB. ARB. AWARDS 3691 (1969).

248. 29 U.S.C. § 623(a) (1970).

little doubt that many older employees, particularly after children are grown, would welcome jobs with less physical or mental strain. The question thus arises as to whether refusals by employers to honor lateral or downward bids constitute evidence of age discrimination when openings are available.²⁴⁹ If employees are forced to accept early retirement and downward bids are denied, employers should be held responsible for violating the federal age law. While the retirement plan may be "bona fide," it should not be used as a means to force retirement when alternatives are available. On the other hand, if employees are physically incapacitated or lack the necessary skills, or if the employer advances some other satisfactory reason, employers turning down job transfers should not be held responsible for age discrimination. Without "reasonable" explanations, however, employers should be made legally responsible. The burden of proof should be placed on the employer who refuses a job shift to show that he is not discriminating.

While seldom resorting to the Taft-Hartley Act to protect older members, unions do negotiate seniority clauses, contractual clauses reserving specific jobs and a reduced workweek for aging members, as well as hiring-hall agreements, which entitle older members to referral preferences.²⁵⁰ The federal age discrimination law protects the "bona fide" seniority plan,²⁵¹ but does not mention the hiring hall and other contractual preferences. If an agreement calls for shift or hiring-hall preference for those over fifty years of age, workers between forty and fifty would be at a disadvantage. Agreements giving preference to those over fifty years of age are unquestionably valid under the Taft-Hartley Act, but legitimacy under the age laws is less certain. It can be reasoned, however, that those over fifty need more protection than is legally provided and that the agreement must follow the spirit, if not the language, of the age laws. The collective bargaining agreement should be acceptable even though the age laws call for equal protection for those forty to sixty-five years of age. Congress apparently does not favor additional court-

249. While such a dispute can be decided by an arbitrator when the collective bargaining agreement calls for arbitration, the union and not the employee decides whether the grievance should be taken to arbitration. *See Vaca v. Sipes*, 386 U.S. 171 (1967). Some agreements provide that the wages and hours of employees are to be adjusted due to physical disability or age. *See Borden Foods Co. v. Teamsters Local 563*, 46 Lab. Arb. 1175 (1966). When the employer refuses to honor the agreement, he could be brought before an arbitrator, sued under § 301 for not honoring his agreement, or charged with an unfair labor practice, not bargaining in good faith, before the NLRB. But whether the 1967 law could be applied is uncertain.

250. B. SCHNEIDER, *THE OLDER WORKER* 23-31 (1962).

251. 29 U.S.C. § 623(f)(2) (1970).

created exceptions to the federal legislation other than those specified in the act; the "bona fide occupational qualification reasonably necessary to the operation of the particular business" points to such a conclusion.²⁵² To allow contractual exceptions to the 1967 legislation for those over fifty cannot be considered "reasonably necessary to the normal operation of the particular business. . . ." ²⁵³ Whatever validity there is to this type of a contractual arrangement has to be considered on the basis of the needs of older workers and not strictly by business needs.

This problem poses two major questions:

1. Since the Taft-Hartley Act does not bar agreements authorizing age preferences, is it impliedly amended by the federal age discrimination law if such preferences are ruled violative of congressional intent? Unions or employers insisting on extending greater protection to workmen than called for in the 1967 legislation could be cited for bargaining in bad faith and violating section 8(a)(5) and 8(b)(3). If not a legitimate bargaining goal, such an agreement could not be enforced under section 301, but it might still be brought to arbitration. If these agreements do not contradict the federal age law or if the federal age law need not be read into the Taft-Hartley Act, then such bargaining is in good faith and the agreements can be enforced under section 301.
2. Should the Wage and Hour Division and the courts permit greater protection by collective bargaining agreements for the older worker than presently permitted under the 1967 legislation? This question not only involves congressional intent, but also considerations of whether workmen over fifty need such additional protection.

It is unlikely that such a contractual bonus qualifies as a "bona fide" exception, because it is unrelated to "occupation" and is not likely to qualify as being "reasonably necessary to the operation of the business." Should humanitarian employers unilaterally favor those over 50, the courts might be more suspicious than where negotiated by agreement. Yet to view suspiciously an employer helping those over fifty seems far-fetched.

An additional consideration is the effect of state laws upon employers operating in interstate commerce. The federal and state laws could be differently interpreted, raising questions of federal

252. *Id.* § 623(f)(1).

253. *Id.*

preemption. Through the savings clause, the 1967 law does protect a state law which gives greater protection to workmen than the federal law. Suppose, however, that the federal age law is interpreted to outlaw the agreement but it is ruled valid under the Iowa age law. The Taft-Hartley Act supersedes other labor legislation enacted in Iowa and there is no savings clause in the Taft-Hartley Act to protect such an agreement. In accordance with *Lincoln Mills*,²⁵⁴ the federal law of contract preempts state law because of the need for uniform regulation. Again, the NLRB and the courts could rule that the 1967 age legislation impliedly amends the Taft-Hartley Act. Based on the *Borg-Warner*²⁵⁵ bargaining categories, an agreement violating the 1967 legislation is unenforceable under the Taft-Hartley Act. To uniformly regulate employers and unions, the NLRB, the Wage and Hour Division, and the courts must reach the same conclusions irrespective of the fact that they operate under different laws and procedures.

Society could also benefit if arbitrators were forced to follow the same rules, but the *Steelworkers* trilogy and the *Gardner-Denver* case rule out this goal. There are, however, at least some arbitrators who still feel compelled to follow the federal age law.²⁵⁶ For this reason, decisions of arbitrators are more uniform than might be imagined.²⁵⁷ Since most arbitrators are legally trained, they do tend to look at the decisions of other arbitrators even though they do not cite such precedent in their awards. Since lawyers often represent the contestants at the hearings, there is an additional push toward uniformity.

The federal preemption of the Wisconsin age discrimination law by the Taft-Hartley Act was considered prior to 1967. The question was raised in *Walker Manufacturing Co. v. Industrial Commission*,²⁵⁸ where an employer had the option of retiring an employee between sixty and sixty-five years of age with ten years of service. The lower court found that the employer violated the Wisconsin age law by exercising the contractual option and claimed federal preemption, pointing to sections 8(a)(5) and 8(b)(3) of the Taft-Hartley Act. Differing with the lower court, the Wisconsin

254. 353 U.S. 448 (1957).

255. 356 U.S. 342 (1958).

256. See Mead Corp., 59 Lab. Arb. 789 (1972).

257. See generally Westerkamp & Miller, *The Acceptability of Inexperienced Arbitrators: An Experiment*, 22 LAB. L.J. 763 (1971); Report of the Federal Mediation & Conciliation Service, 1958, 82 Mo. LAB. REV. 408, 410 (1959).

258. 57 L.R.R.M. 2553 (Wis. Cir. Ct. 1964), *aff'd*, 27 Wis. 2d 669, 135 N.W.2d 307 (1965).

Supreme Court ruled that the Taft-Hartley Act did not signal a congressional intent to preempt the state age law and turned to the following three Supreme Court opinions to support its ruling: *Garmon*,²⁵⁹ *Oliver*²⁶⁰ and *Continental Air lines*.²⁶¹

In *Garmon*, the demand made by the union for a union security agreement barred by a state right-to-work law was deemed to be grounds for an unfair labor practice charge as regulated by the NLRB. Justice Frankfurter provided the guidelines missing in the Taft-Hartley Act with the following markers:

1. If the federal interest is "peripheral" rather than direct, state regulation is appropriate.
2. If there is a deep-rooted state interest not clearly superseded by federal legislation, state regulation is appropriate.

Deciding when the federal interest is direct and not peripheral is often difficult. Justice Frankfurter in *Garmon* must have known that his guidelines would raise future cliff-hangers.²⁶² Yet, where Congress fails to delineate direction, the Supreme Court is virtually obligated to provide some direction. To avoid making a decision by throwing the question back to Congress would have been even more disruptive than the broad guidelines offered by the Court.

In *Oliver*, which preceded *Garmon*, the Supreme Court ruled that since the federal interest in regulating competition under the Sherman Act was paramount to state interest, any state regulation was improper. While there was some question of the propriety of regulating unions under the Sherman Act,²⁶³ the Supreme Court felt that it was improper to invoke a state law to control wage agreements negotiated between the union and an employer operating in interstate commerce. In *Continental Airlines*,²⁶⁴ the Supreme Court decided that, in the absence of federal fair employment legislation, Colorado properly enforced its fair employment law against an air

259. 359 U.S. 236 (1959).

260. 358 U.S. 283 (1959).

261. 372 U.S. 714 (1963).

262. For other decisions not cited by the Wisconsin Court see *Retail Clerks' Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963); *Plumbers Local 100 v. Borden*, 373 U.S. 690 (1963); *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958); *International Union UAW v. Russell*, 356 U.S. 634 (1958); *Black v. Cutter Laboratories*, 351 U.S. 292 (1956); *United Const. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954); *NLRB v. General Motors Corp.*, 303 F.2d 428 (1962), *rev'd*, 373 U.S. 734 (1963).

263. See *Allen Bradley Co. v. Local 3, Electrical Workers*, 325 U.S. 797 (1945).

264. 372 U.S. 714 (1963). See also *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945) (upholding the constitutionality of the New York Civil Rights Law against the claim of federal preemption).

carrier operating in interstate commerce.²⁶⁵ Expounding the majority view, Justice Black felt that the Colorado statute did not in any way frustrate the federal purpose as spelled out in both the Railway Labor Act and Taft-Hartley Act. While the state and federal interest in containing racial discrimination should be equal or near equal, the primary factor was that the Railway Labor and Taft-Hartley Acts, for the most part, could only be utilized to reach union discrimination.²⁶⁶ Consequently, federal regulation was less satisfactory than regulation under the Colorado fair employment law.

Relying on this precedent, the Wisconsin Supreme Court stated that the "test is whether enforcement of the state act would frustrate the objectives of the particular federal act which allegedly has preempted the field,"²⁶⁷ and concluded that the federal purpose was not thwarted because, as in *Continental Airlines*, a federal law prohibiting age discrimination had not been enacted. Whatever interference that existed with sections 8(a)(3) and 8(b)(1) and (2) of the Taft-Hartley Act was considered to be only peripheral. If the 1967 law was in effect, the savings clause would still permit Wisconsin regulation. Even today, it would seem that the regulation of age discrimination under the Taft-Hartley Act is peripheral and Wisconsin regulation should be permitted. The NLRB could still entertain unfair labor practice charges and representation decertification petitions where the foundation of the complaint is age discrimination. What might develop is an election of remedy issue if a complaint is adjudicated by the NLRB and a dissatisfied party then seeks relief under a state or federal age discrimination law.²⁶⁸

SPECIAL TYPES OF WORKERS

A. *Airlines Pilots*

While adherence to the federal laws protects the employer and

265. See *Hall v. DeCuir*, 95 U.S. 485 (1877) and *Morgan v. Virginia*, 328 U.S. 373 (1946), in which state laws pertaining to passengers, rather than employees, burdened interstate commerce.

266. See *Syres v. Oil Workers Union*, 350 U.S. 892 (1955); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

267. *Walker Mfg. Co. v. Industrial Comm'n*, 27 Wis. 2d 669, 135 N.W.2d 307 (1965).

268. For the position of the NLRB regarding arbitration rather than a Taft-Hartley remedy see NLRB COUNSEL, *ARBITRATION DEFERRED POLICY UNDER COLLYER-REVISED GUIDELINES 17* (1973). For similar situations involving an election of remedy, *i.e.*, seeking a remedy under Title VII after an award by an arbitrator, see the conflicting opinions in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) and *Hutchings v. United States Indus., Inc.*, 428 F.2d 303 (5th Cir. 1970). This issue was before the Supreme Court in *Gardner-Denver*. See also *Barry v. Flint Fire Dep't*, 83 L.R.R.M. 2173 (Mich. App. 1973), in which the court decided that when the question is one of constitutional rights, it is proper to turn to the courts rather than the grievance procedure.

union from age discrimination charges, it may require industries like the commercial airlines to hire older employees (those over forty) even if long periods of training are necessary. Since pilots require several years of training and must retire at sixty, airlines might well reason that it is uneconomical to train pilots over forty years of age. This policy seriously hinders the efforts at finding civilian employment for pilots retired from the military after twenty years of service. It should be noted that the F.A.A. has not fixed any cutoff age governing the hiring or promotion of pilots and the courts to date have not ruled on the legitimacy of such a policy for airlines.

Several states, Colorado, Delaware, Illinois, Michigan, New Jersey, and Wisconsin, specifically permit or indicate that age discrimination is proper when reasonably necessary to fill jobs and when the cut-off age is reasonable. The federal law, section 4(f)(1), legalizes discrimination "if reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." Since federal law protects only those forty and over, carriers could refuse to hire pilots thirty-five years of age; under Iowa law, which prohibits all age discrimination, it would be illegal. This creates a conflict of regulation problem for air carriers²⁶⁹—legality under federal law and potential illegality in states such as Iowa. While it could be argued that the Iowa law unduly burdens interstate commerce, the success of this position is not likely because employment, and not the carriage of passengers, is the issue as evidenced by the savings clause in the federal age law.

For pilots retiring from the military, two related problems exist—the interpretation of state laws protecting those under forty years of age and state and federal laws protecting those over forty years of age.²⁷⁰ Section 4(f)(1) permits "bona fide occupational" exceptions if necessary to employer operation or if there are "reasonable factors other than age."²⁷¹ The regulations of the Department of Labor provide that age is not a determining factor in hiring.²⁷² Since pilots fly until sixty, the F.A.A. or a carrier would be hard-pressed to produce evidence that hiring pilots over forty years of age creates a hazard. If an exception is to be permitted, it would have

269. See, e.g., *Colorado Anti-Discrim. Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963).

270. For a discussion of retirement benefits for commercial pilots see notes 343-44 *infra* and accompanying text. See also Bergman, *Age Discrimination in Employment: Air Carriers*, 36 J. AIR L. & COM. 324-27 (1970).

271. 29 U.S.C. § 623(f)(1) (1970).

272. 29 C.F.R. § 860.103(e) (1973).

to be based on the business necessity rationale that training pilots over forty is uneconomical. Admittedly, passenger carriage by air is in need of uniform regulation and a serious question exists whether state regulation should be permitted. There is no apparent reason, however, why the Iowa law should not apply at the hiring level because it would in all probability be seen as a strengthening of the federal law.

B. *Firemen and Policemen*

The federal age discrimination law did not initially include state employment.²⁷³ Unless there was a collective bargaining agreement and/or a state law pertaining to state employees, firemen or policemen claiming age discrimination had to look for protection to a peripheral federal law or constitutional right. The federal law, however, was amended in 1974 to outlaw age discrimination by any state agency.²⁷⁴ Under section 15(b) of the 1974 amendments, federal policemen and firemen (and all other federal employees) can complain of age discrimination to the Civil Service Commission (but not the Wage and Hour Division). As an ultimate remedy, the complainant has a right to bring suit in a federal district court.

In one such suit involving both age and racial discrimination, the plaintiff, a black, brought suit against the Minneapolis Fire Department under the Civil Rights Act of 1866 and 1871²⁷⁵ and the equal protection clause of the fourteenth amendment.²⁷⁶ At the time of the suit, the Minneapolis Fire Department was entirely white and the state of Minnesota had not outlawed age discrimination. The Minneapolis Civil Service regulations provide that those seeking employment as firemen must be less than thirty years of age, unless they are veterans of the Armed Forces. Not only were the 19th century laws applicable, but the court found an equal protection violation on the grounds that there was no compelling reason to favor veterans over non-veterans on the basis of age. The court, however, failed to indicate whether a cut-off age of thirty for all fire department applicants would be unreasonable under the fourteenth

273. B.N.A. 401:5004 (§ 11(b)).

274. Note that federal employment remains excluded under the 1974 federal amendments.

275. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court upheld the constitutionality of 42 U.S.C. § 1982 and presumably § 1 of the Civil Rights Act of 1866 passed by Congress under the auspices of the thirteenth amendment. Section 1 guarantees freedom of contract to the black and a denial of public employment is tantamount to a badge of servitude. The thirteenth amendment is applicable to private and public employers.

276. See *Carter v. Gallagher*, 337 F. Supp. 626 (D. Minn. 1971).

amendment. Since the training period for a fireman is not lengthy, it is possible that the fourteenth amendment could be invoked against an unreasonable cut-off age where the complainants are black.²⁷⁷

For example, in *Barry v. Flint Fire Department*,²⁷⁸ a collective bargaining contract requiring that anyone seeking promotion to equipment supervisor must have more than two years of remaining service before retiring was ruled unconstitutional under the fourteenth amendment. This contractual provision was not part of the Civil Service regulations or law and it had been ignored in some promotions, an important factor according to the court.²⁷⁹ Notably, the two-year service requirement was not labeled unreasonable, and even if it had been fixed by law or civil service regulation, the fourteenth amendment would be satisfied even though such laws and civil service regulations can easily be changed. This is a troublesome feature in the *Barry* opinion. While laws are sometimes difficult to change, regulations are often easier to change than the terms of a collective bargaining agreement. It seems that the court in *Barry* did not advance substantial reason to support its opinion.

A thirty or thirty-five year cut-off age is not physically justifiable. The training period for firemen and policemen is short and Herculean efforts are not required in many of the departmental jobs. The age standards for firemen and policemen were established many years ago and have remained unchanged in spite of recent medical information and advanced technology. A few decisions are reported that dwell upon the special circumstances under which firemen and policemen operate. These decisions are relevant to the established cut-off age for hiring. Presumably, physical standards for firemen and policemen are higher than in other occupations, and age is relied upon as a rough barometer of physical fitness. Physical standards, especially those at the hiring stage, are higher than in most occupations. The physical demands placed upon a firefighter

277. The fourteenth amendment equal protection proviso has been used to reach sex discrimination in employment. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). But whether the Supreme Court would consider the fourteenth amendment as controlling in age discrimination disputes is an open question. See also cases cited note 344, *infra*, involving the F.A.A. regulations requiring retirement at 60 for airline pilots.

278. 44 Mich. App. 602, 205 N.W.2d 627 (1973).

279. The Flint Fire Department claimed that the 2-year minimum service rule was established to protect the pension funds and to justify the costs of promotion due to the inevitable inefficiency of learning the new job. Michigan has an age discrimination law covering the 18 to 60 year age span that applies to public employment. Effective in 1974, the federal law would also be applicable.

may be greater than upon policemen since a firearm can be a substitute for physical strength on the police force. In fact, physical standards for policemen have been lowered and women are being hired with less physical strength than men. The physical fitness standards for athletes are greater than for firemen and policemen. An aging athlete finds that while his strength does not noticeably deteriorate, his legs and speed are less than what they used to be. The person over fifty years of age who is physically fit can hold his own as a fireman or policeman even though his speed and agility are reduced. What seems to be important in these jobs is not the age of those hired but their physical fitness. A regulation demanding physical fitness makes more sense than blindly equating age with physical capability. Such a regulation would follow the spirit of the age discrimination laws by focusing upon the physical capabilities of the individual. Until 1974, those over forty could not contest the thirty to thirty-five age standard under the federal law. In states, such as Iowa, that bar all age discrimination, the cut-off age could be classified as unreasonable.

While no decision has been found testing the maximum hiring ages for firemen and policemen under a state age law, the maximum hiring age of thirty-five was indirectly challenged in *Pierce v. Fort Wayne Board*.²⁸⁰ The plaintiff was forty-two years of age when hired and was discharged at forty-seven. He contended that the Indiana law forbidding age discrimination between forty and sixty-five was violated. Taking a circuitous route to uphold the discharge, the Indiana Supreme Court said:

Pierce [the plaintiff] was not discharged because he was between 40 and 65 years of age. He was discharged because he was over 35 years of age when he was appointed to the fire force. We reach this conclusion as a matter of law; it is the only reasonable inference flowing from the evidence. Pierce was not discriminated against because he was 47 years of age. He was discharged because . . . (the Indiana law) prohibits appointments to the fire force of a person over 35 years of age.²⁸¹

Especially since the plaintiff was a dispatcher and not a fire fighter, the court should have questioned, or at least considered, the hiring age limitation.²⁸² Although the dissenting judge did not cite medical data, he felt that thirty-five years was a reasonable hiring age for firemen due to the physical demands of the job. He took the position, however, that thirty-five years was not reasonable for adminis-

280. ___ Ind. App. ___, 292 N.E.2d 857, *petition for transfer denied*, ___ Ind. ___, 301 N.E.2d 842 (1973).

281. *Id.* at ___, 292 N.E.2d at 858.

282. *See* 301 N.E.2d at 842 (Hunter, J., dissenting).

trative and maintenance employees. No evidence has been found that police or fire departments establish lesser standards for administrative personnel and this factor casts a longer shadow upon the age standards adopted for these public employees throughout the United States.

A somewhat similar question was raised in *McIlwaine v. The Pennsylvania State Police*,²⁸³ where the plaintiff, a sixty-year-old police captain, was forced to retire pursuant to a Pennsylvania law requiring all policemen to retire upon reaching the age of sixty unless they have served less than twenty years. The plaintiff claimed a violation of both the Pennsylvania law outlawing age discrimination between forty and sixty-two and the equal protection clause of the fourteenth amendment.

The lower court supported the defendant for the following reasons:

1. The rule permitting policemen to continue on the force after sixty-two to complete twenty years of service was reasonable in order to ensure adequate pension benefits.
2. A compulsory retirement age at sixty is both necessary and reasonable due to the strain of police work. The trial judge stated:

The fact that a particular police officer is physically fit and able to perform his duties or that minds may differ upon the particular mandatory retirement age selected by the legislature is not proof of want of bona fides as to qualification otherwise applied uniformly . . . to the selected class.²⁸⁴

Unlike interpretations of the federal age law, the trial court in *McIlwaine* did not shift the burden of establishing the reasonableness of its retirement policy to the defendant.²⁸⁵ A concurring judge did feel that the defendant should justify the disparity of requiring retirement at sixty-two with more than twenty years of service while permitting those with less than twenty years to continue to work. If those with less than twenty years of service continue to work past sixty-two, it indicates that they are physically able to handle the job. It is more difficult under such circumstances to support a compulsory retirement policy at sixty-two merely because the employee has more than twenty years of continuous employment.

The dissenting judge felt that the defendant had not sustained the burden of proof to justify a bona fide exception. Since the plain-

283. 6 Pa. Cmwlth. 505, 296 A.2d 630 (1972), *aff'd*, 454 Pa. 129, 309 A.2d 801 (1973).

284. *Id.* at 512, 296 A.2d at 633.

285. For cases showing federal policy under Title VII see *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); *Weeks v. Southern Bell Tel. Co.*, 408 F.2d 288 (5th Cir. 1969).

tiff was sixty years of age, the state should have been required to show that he was incapable of continuing in his job. The plaintiff's position as a police captain was not physically demanding and his long years of service were an asset. The dissenting judge also felt that the plaintiff's need for employment and the state's need for police efficiency must be balanced. Because the plaintiff was physically and mentally qualified, the defendant was easing the difficulty of making decisions by following a fixed retirement rule not medically justifiable. As stated in the dissenting opinion:

Under the equal protection test which should . . . apply, the classification must demonstrate a "significant relationship" to the legislative purpose. Where such a relationship . . . exists, it must be balanced against the nature of the class thereby disadvantaged. . . . There is no showing that age is significantly related to [the plaintiff's] . . . performance of his duties as a troop commander.²⁸⁶

While the F.A.A. regulations governing pilots emphasized public safety, the majority appellate opinion in *McIlwaine* did not stress this factor. They simply ruled that physical fitness did not alter the bona fide quality of a retirement plan uniformly followed. This point will be considered again when pension plans are evaluated.

Many state laws protecting public employees are inapplicable because discrimination against those under forty is not barred. These states are California, Connecticut, Delaware, Indiana, Massachusetts, Pennsylvania, Rhode Island, Washington and West Virginia. However, there could still be a violation of the equal protection clause if the complainant is under forty. Alaska, Iowa, Maryland, Michigan, New Hampshire and Oregon bar all age discrimination in public and private employment and a cut-off age of thirty or thirty-five must be justified. Medically, it will be difficult to defend this cut-off hiring age as a bona fide exception and it can be anticipated that more civil service hiring and compulsory retirement regulations will be tested constitutionally in the future. Civil service age standards frequently do not protect the public and should not be considered more sacrosanct than age standards established by private employers.

C. *Bus and Truck Drivers*

While truck drivers haul freight, bus drivers are responsible for the safety of passengers. The Interstate Commerce Commission is

286. 454 Pa. at ____, 309 A.2d at 811 (Roberts, J., dissenting). It should be observed that such a construction could jeopardize many retirement and pension plans under or over 65 years of age, plans which the state and federal laws tend to legitimize.

responsible for the physical standards set for truck drivers while bus drivers are under the control of the Department of Transportation. Even though truck drivers are not closely supervised, the Department of Transportation requires entry and physical examinations every two years until fifty years of age and yearly thereafter.²⁸⁷ To protect the public safety and regulate the national highways, the federal government properly sets standards for bus drivers, trucking firms, and passenger carriers under the commerce clause.²⁸⁸ Because of special problems and the need for uniform regulation, it is possible to argue that drivers should not be controlled by either state or federal age discrimination laws. While most of these laws do not single out an industry for special attention, bona fide employment exceptions could be permitted for truck and bus carriers differing from other industries that are not so closely regulated. With possible state and federal regulations as well as collective bargaining agreements applicable, questions of federal preemption and the proper regulatory vehicle are raised. The stringent standards set by the Department of Transportation are not likely to be questioned under an age discrimination law because the physical condition of the individual bus driver is being checked and a neutral agency protecting the public sets the standards. Regulation by the Department of Transportation is similar to regulation by the F.A.A. What is more likely to be questioned under an age law are those employment standards imposed by companies and unions.

Two decisions concerning bus drivers have been made under the federal age law.²⁸⁹ In *Hodgson v. Tamiani Trail Tours*, the defendant refused to hire bus drivers over forty years of age, stressing the need for public safety and claiming that a "bona fide occupational qualification [was] reasonably necessary to the normal operation of the . . . business," as specified in section 4(f)(1). Ruling in favor of the defendant, the court cited the *Duke Power Co.*²⁹⁰ decision which stated:

The Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary,

287. *Hodgson v. Greyhound Lines, Inc.*, 354 F. Supp. 230, 233 (N.D. Ill. 1973); Department of Transportation, Federal Highway Adm., Ch. III, § III, § 391 *et seq.* (1972).

288. Because public funds have been given to states to build roads, because of concepts of national defense, because of interstate commerce considerations, etc., there is a federal right to provide regulations governing highway safety.

289. *Hodgson v. Greyhound Lines, Inc.*, 354 F. Supp. 230 (N.D. Ill., 1973), *rev'd*, 7 F.E.P. Cases 817 (7th Cir. 1974); *Hodgson v. Tamiani Trail Tours*, 4 F.E.P. Cases 728 (S.D. Fla. 1972).

290. 401 U.S. 424 (1971).

and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.²⁹¹

The Court also said:

The Act prohibits not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.²⁹²

Because the tests had not been properly validated as required by the E.E.O.C. and the need for high school diplomas had not been established, the defendant was found to be responsible for unfair employment under Title VII without evidence of intentional discrimination.

Following *Duke Power Co.*, the district court in *Tamiani* stated that "(t)he touchstone for a B.F.O.Q. exemption . . . is a finding that age is a *reasonable* requirement, necessitated by normal business operations and having a manifest relationship to the employment in question."²⁹³ The court felt that the defendant bears the burden of establishing both the need for a cut-off hiring age of thirty-five and the fact that public safety was promoted by this policy. The court in *Tamiani* also felt that it was impractical for the employer to weigh the physical fitness of each employee and permitted the adoption of a reasonable policy to protect public safety. The court accepted the testimony of an expert witness that forty was a reasonable maximum hiring limitation for bus drivers because of factors such as declining vision, slowdown of motor reflexes and decrease in stamina. The finding of reasonableness was also influenced by the fact that new bus drivers were assigned to the least desirable and most taxing runs and that the choice runs were determined according to seniority. The district court concluded:

The general nature of a motor bus operation, the exclusive trust and reliance put upon a single driver . . . and the strict requirements imposed upon a carrier for qualification, training and monitoring a driver are all indistinguishable from . . . requirements imposed upon airlines. . . .²⁹⁴

The district court placed greater reliance on the need for public safety than appears to be warranted by medical data. It should be noted that the hiring age was fixed by the employer and not by a public agency. If medical data warranted the restriction of hiring to those under thirty-five, it would seem that the Department of Transportation could have provided the necessary guidance. Fur-

291. *Id.* at 430-31.

292. *Id.* at 431.

293. 4 F.E.P. Cases at 730.

294. *Id.* at 733.

thermore, declining vision can be corrected by glasses, and the mandatory medical examinations every year or two assure periodic testing of reflex action. While disabilities are not always detected by examination, vision and motor reflex action can be tested with accuracy.²⁹⁵ While motor reflexes, in the context of quick reactions, are not generally checked in routine physical examinations, either the Department of Transportation or the employer could insist that this be done.

The lower court decision in *Hodgson v. Greyhound Lines, Inc.*²⁹⁶ is not reconcilable with the *Tamiani* decision. Greyhound employs more than 9,500 bus drivers and has a policy of not hiring candidates past thirty-five years of age. Relying on section 4(f)(1) and the need for public safety, the defendant was not certain why thirty-five years was adopted as the point of entry. Consequently, the burden of establishing the need for its age policy was shifted to the defendant who claimed:

1. The safety record of the company is evidence of the success of its policy.
2. Medical technology has not progressed sufficiently to detect accurately disabilities in those over forty years of age.
3. Drivers with less than ten years of seniority are classified as extras, and not assigned to a regular run which is grueling for older drivers.
4. Interstate drivers with the best safety records have served sixteen years or more. Thus, it is not economically feasible to employ those more than thirty-five years of age. This approach constitutes a business necessity argument as specified in *Duke Power Co.*

One factor weighing in favor of the plaintiffs was the disagreement among expert witnesses as to the reliability of physical examinations. One medical expert testified that after forty years of age "degenerative changes occur . . . such as arteriosclerotic changes in the blood vessels, the heart, the blood vessels in the brain, the kidneys, the lungs, his lower extremities and his visual capacity or

295. There may be some difference in opinion concerning the rate of decline in the speed of motor impulses. The slowdown in sensimotor activities due to age varies with the person, but this slowdown may be partly due to caution and a lack of motivation rather than physiological aging.

296. 354 F. Supp. 230 (N.D. Ill. 1973). For further discussion of the lower court position see J. BIRREN, R. BUTLER, S. GREENHOUSE, L. SOKOLOFF & M. YARROW, HUMAN AGING: A BIOLOGICAL AND BEHAVIORAL STUDY 38-45 (1963); H. JACOBS, YOUTH LOOKS AT AGING 4-6 (1969); G. SHATTO, EMPLOYMENT OF THE MIDDLE-AGED 148-51 (1972).

sensory changes including a decrease in his ability to see at night."²⁹⁷ Some heart conditions are not easily detected by electrocardiogram, even in those appearing to be likely candidates. Another expert, however, testified that "chronological age is not a reliable index of a person's physical or psychological condition."²⁹⁸ There is some evidence that systolic and diastolic blood pressure vary with unemployment, probationary employment and promotion. These changes in blood pressure may be related to the perceived seriousness of the employment situation and the related personal tension of the worker. This data is uncertain, however, because there are different opinions regarding the "significance" of given blood pressure elevations. It is fairly well agreed that any physical or emotional stress can temporarily elevate pressure or aggravate pre-existing hypertension. The prognostic and diagnostic implications of systolic and diastolic hypertension may differ. It is certainly open to question whether prolonged "stress" is a cause of the sustained diastolic hypertension which some feel represents "true" hypertension. Thus, "hypertension" and a single elevated blood pressure reading do not necessarily have the same medical implications.²⁹⁹

Tension in anyone, young or old, may create temporary signs of physical disability.³⁰⁰ However, these signs often disappear when the external conditions creating the tension are removed. According to *Greyhound*, a blanket policy barring employment at thirty-five years of age is suspect unless the employer can produce evidence of business necessity. It seems unlikely, as in *Duke Power Co.*, that employers will be able to establish sufficient business need to justify a relatively young age limitation. Also, some doctors believe that we are approaching an era in which certain diseases, like atherosclerosis, can be prevented or reversed, particularly in the sixty-five-year and under age group.³⁰¹ This type of data speaks for the wisdom of the age discrimination laws, focusing on the individual involved.

In *Greyhound Bus*, testimony was presented that few accidents are caused by the physical condition of the driver. For example, even a bus driver experiencing a heart attack could pull over to the side of the road without endangering the passengers. As another indication of the similarity of working conditions for new and old drivers, it was noted in *Greyhound* that neither regular nor new

297. 354 F. Supp. at 233.

298. *Id.* at 234. It would seem that the psychological condition of a driver may be an important factor.

299. G. SHATTO, *supra* note 296, at 89.

300. *Id.* at 89-91.

301. J. BIRREN, *supra* note 296, at 53.

drivers could drive continuously for more than the number of hours fixed by the Department of Transportation. In contrast to those sex discrimination cases where employers routinely disqualify women from jobs merely for physical reasons, the trial judge in *Greyhound* was determined to have the employer justify his policy.³⁰² Since drivers over forty had a better safety record than those under forty, the defendant definitely did not sustain the burden of proof. An additional factor in *Greyhound Bus* was that the employer, during periods of peak demand, hired temporary drivers of any age. If the older and newly hired bus drivers did not create safety problems during periods of peak demand, there is no reason to suppose that safety would be burdened if they were permanently hired.

Given the current regulation by the Department of Transportation, there appears to be little need for bus lines to adopt a policy barring the employment of those over thirty-five years of age.³⁰³ For this reason alone, the approach taken by the lower court in *Greyhound Bus* is more reasonable than that taken in *Tamiani*. The Department of Transportation exempts intra-city bus drivers and truck drivers ferrying cargo from regulation, but interstate bus drivers are regulated to protect the public interest.³⁰⁴ Without mentioning age, those with a history of diabetes mellitus (even if controlled by hypoglycemic agents), myocardial infarction, or other cardiovascular diseases are ineligible to drive under Department of Transportation regulations.³⁰⁵ Granting that medical examinations do not always uncover physiological, neurological, and other serious disabling disorders, the Department of Transportation has acted to protect the public interest, and the need for carriers to use age as an additional indicator of physical incapacity seems unjustifiable. It should also be noted that the carriers are not prevented "from imposing more stringent or additional . . . examinations" than required by the Department of Transportation.³⁰⁶ If disabilities are uncovered under a more stringent examination conducted at the request of the employer, he has the right not to hire the applicant with a disqualifying disability. While permitting tougher examinations, the regulations fail to mention age as a disqualifying factor.

It is possible that the Department of Transportation could, like

302. One testifying expert felt that drivers over 50 showed an increase in the number of accidents.

303. 35 FED. REG. 6460 (1970).

304. 49 C.F.R. § 391.2(a) (1973).

305. 49 C.F.R. § 391.41 (1973). Those with a "blood pressure . . . consistently above 160/90 mm. Hg." may be asked to undergo additional examinations to determine whether eligible to drive a bus or truck carrying hazardous material. 49 C.F.R. § 391.43(c) (1973).

306. 49 C.F.R. § 391.1(b) (1973).

the F.A.A., supplement its regulations by requiring the retirement of drivers over sixty years of age. The F.A.A., however, does not regulate the maximum employment age for pilots and the Department of Transportation could experience difficulty in court if inclined to fix a maximum hiring age. However, more diligent medical examination to protect the public is within the province of the Department of Transportation. As medical standards are put into operation or tightened, exceptions to the age discrimination laws requested by employers are less tenable. For example, F.A.A. regulations provide that only the doctor who qualifies as an "aviation medical examiner" can conduct a physical examination.³⁰⁷ While the Department of Transportation has not singled out any special group of medical practitioners, it could limit in some fashion those eligible to conduct examinations. The Department of Transportation has specified that if "two or more medical examiners disagree . . . the Director, on application of that person or a motor carrier, may determine whether that person is physically qualified. . . ."³⁰⁸

On April 22, 1974, the Seventh Circuit Court of Appeals reversed the lower court in *Greyhound* and followed the *Tamiani* ruling without expressly citing it.³⁰⁹ On appeal, Greyhound claimed that the burden of proof imposed upon it to justify the age hiring cut-off was improper and that the "hiring policy is a bona fide occupational qualification reasonably necessary to the normal operation of its business."³¹⁰ Because of the public nature of the companies' activities, the court felt that the burden of proof imposed on the defendant to justify its age-hiring policy was unjustified. While it might have been proper in other industries, the need for public safety justified less stringent standards of proof. As stated by the appellate court:

Greyhound need only demonstrate . . . a minimal increase in risk of harm (to passengers) . . . to show that elimination of the hiring policy might jeopardize the life of one or more person(s) that might otherwise occur under the present hiring system.³¹¹

In reality, the appellate court was asked to decide whether to use chronological or functional age as a measure of employability. Evidently the court found both standards equally valid. With respect to the bona fide occupational exception permitted under the age law, the court felt that the evidence presented by the defendant

307. 14 C.F.R. § 67.23 (1974); 30 FED. REG. 12025 (1965).

308. 49 C.F.R. § 391.47 (1973).

309. *Hodgson v. Greyhound Lines, Inc.*, 7 F.E.P. Cases 817 (7th Cir. 1974).

310. *Id.* at 818.

311. *Id.* at 819.

supported its claim to an exception. The evidence marshalled included:

1. Medical evidence of changes in the body as one ages. According to the court, however, this was not enough to justify an exception to the age law.
2. The lack of an assigned run was very demanding. Evidently, if both an assigned and regular run were available, an exception might not be in order.
3. Government witnesses and government reports supported the companies' position that aging has an effect on bus drivers. It should be noted that expert witness testimony and reports other than those coming from the government might not be given such legal weight.

As an alternative remedy, arbitrators frequently entertain grievances concerning the physical condition of an employee under a collective bargaining agreement regulated by the Taft-Hartley Act.³¹² While questions of employee representation of commercial air carriers are regulated by the Railway Labor Act, bus and truck drivers represented by unions are regulated by the Taft-Hartley Act. Due to the multiplicity of administrative regulation, conflicts may arise. As indicated in *Vaca v. Sipes*,³¹³ differences of opinion can be arbitrated when doctors cannot agree upon the physical capabilities of an employee. While section 391.47 of the Department of Transportation regulations provides that medical differences can be brought to the Director, this step is not required. Consequently, medical questions can be brought before arbitrators who weigh expert testimony in making decisions. As indicated in the *Steelworkers* trilogy,³¹⁴ arbitrators' opinions are not to be challenged by the courts so long as the collective bargaining agreement permits such decisions. Furthermore, arbitrators are not required to follow the medical standards established by the Department of Transportation. It can be concluded that arbitrators are no less qualified to make medical judgments than judges. It would seem, however, that greater medical expertise would be available in the Department of Transportation than in arbitrators or judges.

In *Gateway Coal Co. v. U.M.W.*,³¹⁵ the Supreme Court decided

312. Cf. *Seaboard Coast Line R.R.*, 53 Lab. Arb. 578 (1969). This employer is under the Railway Labor Act.

313. 386 U.S. 171 (1967).

314. *Steelworkers Union v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers Union v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers Union v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

315. 94 S. Ct. 629 (1974).

whether questions of safety in coal mines could be ruled upon by arbitrators, where federal standards have been established.³¹⁶ The answer supplied by the Supreme Court was unclear because the air flow problem had been corrected and the three foremen responsible had been either retired or suspended. Writing the majority opinion, Justice Powell favored arbitrability of the dispute on the grounds that there was no more reason to fear a decision by an arbitrator than a decision by a public agency. Justice Powell was not concerned that the employer and union selected the arbitrator and not a public agency or that an arbitrator searching for an answer is guided somewhat by precedent, background, moral commitment, and a need to satisfy the employer and union to assure future appointments. It cannot be denied, however, that politics have played an important role in regulating, or more accurately, not regulating safety in mines. Thus the fact that arbitrators are selected by the contestants and are not publicly accountable³¹⁷ for their decisions leaves room for uneasiness; and *Gardner-Denver* does not require arbitrators to follow precedent.

The *Gateway* decision, as it applies to bus and truck drivers, points to the propriety of regulating matters of public safety before an arbitrator. While Justice Douglas's opinions in the *Steelworkers* trilogy handed arbitrators an awesome amount of power, he disagreed with the *Gateway* decision on the ground that safety should not be pigeonholed with other arbitrable types of disputes.³¹⁸ As stated by Justice Douglas in *Gateway*:

When it comes to health, safety of life, determination of environmental conditions within the mines, Congress has preempted the field. . . . An arbiter seeks a compromise, an adjustment, an accommodation. There is no mandate in arbitration to apply a specific law. . . .³¹⁹

If arbitrators seek compromise and there is a need to satisfy appointing employers and unions, a serious question that Justice Powell did not address is whether arbitrators should be permitted to make decisions in which the public interest is greater than usual. For example, the *Gateway* decision did not mention the federal requirement that a chest roentgenographic examination be conducted under the supervision of the Secretary of Health, Education, and Welfare, to protect those miners susceptible to what is popu-

316. 30 U.S.C. §§ 861-78 (1971).

317. See 94 S. Ct. 635-38.

318. See generally *id.* at 643-44; see *United States Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971).

319. 94 S. Ct. at 645.

larly known as miners tuberculosis.³²⁰ It would appear that this kind of health dispute should not be submitted to arbitration.

D. Other Industries and Employees

Where public control is absent, the complainant must establish age discrimination unless the employer accepts the burden of proof by asserting that discrimination is permissible.³²¹ Some standards have been announced by the Secretary of Labor, but many ground rules are now being established on a case-to-case basis. A leading case is *Hodgson v. First Federal Savings & Loan Association*,³²² in which a female, weighing 147 pounds, five feet five inches in height, and forty-seven years of age, was refused employment as a bank teller. The defendant claimed that her obesity would make standing difficult for long periods of time. The district court felt that the plaintiff had not presented evidence sufficient to establish wrongdoing. The appellate court reversed, stating that the plaintiff "is required only to make out a prima facie case of unlawful discrimination at which point the burden shifts to the defendant to justify the existence of any disparities."³²³ The appellate court accepted the following evidence to establish discrimination:

1. From June 12, 1968, the effective date of the age discrimination law, to July 14, 1969, the defendant hired thirty-five bank tellers, all under forty years.
2. On the applications of the plaintiff and another applicant over forty, comments of their age appeared. While the defendant claimed that the writing on the applications was intended to indicate excessive weight and thick legs, a sign of physical incapacity, evidence was produced that another female who was five feet five inches in height, 160 pounds, and age twenty-five was considered employable.

Based on the evidence produced, particularly the failure to hire anyone over forty years of age, a prima facie case of wrongdoing was established and the court of appeals shifted the burden of proof to the employer to justify his decision. The defendant was not able to present evidence to establish the physical incapacity of the plaintiff because the physical qualities of thick legs and excessive weight do not by themselves establish physical incapacity.

320. 30 U.S.C. § 843 (1971); 38 FED. REG. 20076 (1973).

321. 29 U.S.C. § 623(f)(1) (1971); 29 C.F.R. § 860.103(e) (1973).

322. 3 F.E.P. Cases 16 (S.D. Fla. 1970), *modified* 455 F.2d 818 (5th Cir. 1972).

323. 455 F.2d at 822.

In *Hodgson v. Sugar Cane Growers*,³²⁴ the plaintiff was hired at age 51 and was later discharged because he allegedly slowed down while being somewhat overweight. The plaintiff produced evidence that convinced the court that he was discharged solely because of age. Following *First Federal Savings & Loan Association*, the court in *Sugar Cane Growers* felt that after the plaintiff established a prima facie case of age discrimination, the burden of establishing innocence was shifted to the employer. The defendant was not able to produce evidence that the plaintiff's weight led to a perceptible slowdown so as to rebut the prima facie case of discrimination.³²⁵ What constitutes acceptable evidence of discrimination received further attention in *Schulz v. Hickok Mfg. Co.*³²⁶ Experiencing financial difficulty, the defendant discharged a district sales manager for allegedly insufficient sales. The court felt that the discharge of other older employees and the hiring of younger employees was relevant evidence and established a prima facie case of age discrimination that shifted the burden of proof to the employer. The employer was unable to establish innocence because the merit-rating of the plaintiff was good and sales in his territory had risen by thirteen percent as compared to an increase of only eleven percent for the entire firm.

In summation, the courts have implemented public policy by outlawing age discrimination in two ways. After the plaintiff establishes a prima facie case of discrimination, the burden of proof shifts to the employer to establish innocence. Shifting the burden of proof to the employer eases the plaintiff's evidentiary burden of establishing a violation. Where the physical fitness of the employee is raised, the defendant has been required to evaluate each employee individually. An exception is the bus driver. The traditional reasons advanced to justify refusals to hire older workers—young executives are not comfortable directing older employees, employing younger workers leads to a more stimulating and exciting atmosphere, some jobs are only suitable for the young, the need to train young people for the future—are not legally acceptable. If older workers lack the

324. 346 F. Supp. 132 (S.D. Fla. 1972).

325. For similar decisions under federal law see *Hodgson v. Earnest Mach. Prod., Inc.*, 479 F.2d 1133 (6th Cir. 1973); *Billingsley v. Service Technology Corp.*, 6 F.E.P. Cases 404 (S.D. Tex. 1973); *Hodgson v. Career Counsellors Int'l, Inc.*, 5 F.E.P. Cases 129 (N.D. Ill. 1972). For decisions of a similar nature arising under state laws see *School Comm. v. Massachusetts Comm'n Against Discrimination*, 4 F.E.P. Cases 474 (Mass. 1972); *Judson v. Apprenticeship & Training Council*, 9 Ore. App. 367, 495 P.2d 291 (1972); *University of Conn. v. Connecticut Comm'n on Human Rights and Opportunities*, 4 F.E.P. Cases 1242 (Conn. Super. Ct. 1971).

326. 358 F. Supp. 1208 (N.D. Ga. 1973).

necessary skill or education, firms can hire younger applicants with the necessary qualifications. Employers are legally responsible, however, if older job applicants are turned away on the ground that they are too old to be taught new skills or are insufficiently motivated.

RETIREMENT

Prior to the passage of the state and federal age laws, many union contracts with employers provided for retirement benefits, and many questions arose under the Taft-Hartley Act. When these retirement benefits were not provided by agreement, questions arose as to whether employees retired by command were discharged for "just cause."³²⁷ Decisions have also been made affirming unions' insistence upon employers bargaining over retirement benefits.³²⁸ Courts acknowledge distinctions between retirement, layoff, and discharge, so that the agreement providing for layoff and discharge is not controlling if retirement is omitted.³²⁹ Where the agreement is silent, employers retain unilateral control over retirement in the absence of evidence of an anti-union motive.³³⁰

Retirement benefits were soon classified as a mandatory subject for bargaining, directly linked to wages and hours of employment.³³¹ A question presented to the Supreme Court in 1971 was whether employers violate sections 8(a)(1) and (5) by refusing to bargain for improved medical benefits for retired employees.³³² The NLRB favored bargaining because medical benefits for retirees are akin to deferred wages. The administrative judge felt that retirees are not "employees" because they are ineligible to vote in a representation election. The NLRB, on the other hand, noted that while retirees are less interested in representation than active workers, they do have a direct and continuing interest in improving medical benefits.

327. See *Protective Workers Union v. Ford Motor Co.*, 194 F.2d 997 (7th Cir. 1952).

328. See *Hughes v. Chicago, R.I. & P.R.R.*, 26 L.R.R.M. 2317 (W.D. Okla. 1950); *Flowers v. Brotherhood of Locomotive Firemen*, 212 Ga. 142, 91 S.E.2d 41 (1956); *Lamon v. Georgia S. & F. Ry.*, 212 Ga. 63, 90 S.E.2d 658 (1955).

329. See *Protective Workers v. Ford Motor Co.*, 194 F.2d 997 (7th Cir. 1952); *Bakery Workers Local 492 v. National Biscuit Co.*, 177 F.2d 684 (3d Cir. 1949).

330. See *Cashner v. United States Steel Corp.*, 327 F.2d 533 (6th Cir. 1964); *United States Steel Corp. v. Nichols*, 229 F.2d 396 (6th Cir. 1956). An issue over which there has been conflicting opinion is whether an employer who unilaterally retires an employee can be forced to arbitrate where there is an "all disputes" arbitration clause. See *International Tel. & Tel. Corp. v. Electrical Workers Local 400*, 184 F. Supp. 866 (D.N.J. 1960), *rev'd*, 290 F.2d 581 (3d Cir. 1961).

331. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

332. See *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

The NLRB philosophized that if workers are valid employees before retirement or after firms dissolve, there is no reason to categorize them differently upon retirement. The NLRB expressed the following reasons to justify the placement of retirees in the category of employees: the inflationary spiral, the intention of Congress to broadly define the term "employee", the fact that pension and health benefits are regulated under section 302(b)(5)(B), and the feeling that it would be erroneous to exempt retirees from the protection of section 8(a)(5). A dissenting member of the NLRB felt that while an employer could bargain voluntarily for retirees, bargaining should only be mandatory for active employees and for those eligible to vote in union affairs.³³³

The NLRB was reversed by the court of appeals, which broadly interpreted "employees" in section 2(3) to include retirees.³³⁴ In section 8(a)(5), however, Congress created an exception that required employers to bargain only for employees still working. Rebuking the NLRB, the appellate court also ruled that, unlike the administrative charges preferred with the NLRB under section 8(a)(5), section 302 hearings are criminal. Adopting the rationale of the dissenting member of the NLRB, the appellate court expressed the fear that retirees could lose benefits if bargaining was required. The appellate court said that "it is not . . . unlikely that a union negotiator, presented with the opportunity to advance employees' wages", would favor active union members.³³⁵ As previously indicated, the average age of the union member could drop, and it is possible that union negotiators in the future will be less concerned with retirement benefits.

The Supreme Court affirmed the appellate court decision on the following grounds:

1. Congress, through the Taft-Hartley Act, was interested in minimizing labor disruption, and retirees cannot disrupt interstate commerce.
2. Precedent was not cited by the appellant to support the claim that "employee" meant someone other than those working or expecting to work. This type of approach means that the retiree did not satisfy the burden of proof necessary to establish that "employee" included retirees.
3. The protection of pension benefits under section 302 is irrel-

333. This is a matter determined by the union constitution or by-laws and is not a matter of federal law.

334. 427 F.2d 936 (6th Cir. 1970).

335. *Id.* at 947.

evant to the duty imposed upon the employer to bargain in good faith under section 8(a)(5). Section 302 allows employers to provide pension benefits properly administered without violating the general ban against payoffs to union officials.

4. Retiree interest in collective bargaining is limited, especially where the union constitution does not permit voting in union affairs.

Irrespective of whether pension benefits for retired employees are voluntary or mandatory, the Supreme Court noted in *Pittsburgh Plate Glass* that most firms view pension benefits for active and retired employees as a mandatory bargaining subject.³³⁶ To support this position, a recent survey discloses that pension benefits are specified in ninety percent of the agreements.³³⁷ From this data, it seems fair to conclude that employers long ago conceded that retirement benefit bargaining is required for active employees. The same survey discloses that disability retirement is contractually specified before sixty-five years of age in seventy-six percent of the plans surveyed, and ninety-two percent permit early retirement.³³⁸ More than fifty percent of the contracts require employees seeking pension benefits to be sixty-five years of age or older and employed by the same firm for a minimum of ten years.³³⁹ Agreements permitting early retirement, at not less than fifty-five years of age, call for reduced benefits with ten to fifteen years of employment.³⁴⁰ Seventy-six percent of the agreements also provide for disability benefits after ten to twenty years of employment.³⁴¹ If unemployment continues to mount, it seems reasonable to assume that union-employer bargaining increasingly will focus on providing full benefits for those less than sixty-five years of age.³⁴² This means that the "bona fide" aspects of early retirement under the age laws could receive increased scrutiny.

To determine whether a pension system is "bona fide" under an age discrimination law, the courts should consider the following

336. 404 U.S. at 176.

337. BNA PENSION & OTHER RETIREMENT BENEFITS, PPF Survey No. 103, Oct. 1973, at 1.

338. *Id.* at 3.

339. *Id.* at 6-7.

340. *Id.* at 9.

341. *Id.* at 11.

342. The energy crisis has already affected the bargaining patterns of unions where retirement is concerned. See *CLC Challenge to Airline Increases, Summary of Development*, 84 LAB. REL. REP. 3 (1973). See also *General Motors and Voluntary Overtime*, 84 LAB. REL. REP. 308 (1973).

factors: (1) whether the plans are unilaterally established by employers or with unions; (2) the compulsory age of retirement; (3) the circumstances under which retirement can be postponed; (4) whether retirement is voluntary or compulsory; and (5) the benefits paid. Even though in recent years the number of plans permitting voluntary retirement before sixty-five without loss of benefits have increased, sixty-five years of age is still the most common age of compulsory retirement. Since social security awards have been and continue to be inadequate, unions push employers to supplement these benefits. Some individuals retiring before sixty-five have been forced to return to the labor force by inflation and inadequate benefits. Further anxiety among the retired is created by the fact that few of the current plans provide for cost-of-living adjustments.

Some plans permitted earlier retirement for female than for male employees. Today, different retirement benefits for male and female employees in the same bargaining unit probably violate Title VII, a sign of sex discrimination. Because of actuarial differences, however, reconciling the 1967 age discrimination law and Title VII prohibiting sex discrimination poses some problems. Since the average male does not live as long as the average female—there is a three-year differential—compulsory or voluntary retirement at sixty-five means that the average female receives benefits for more years than the average male, thereby giving rise to a possible violation of Title VII. While Title VII could be interpreted to exclude the retiree, it prohibits sex discrimination at all ages. Before retirement, male employees could point to Title VII because their total benefits will be less than those of female employees (where both are entitled to the same monthly amounts). Would the federal age discrimination law be violated if women are paid less retirement benefits than men because women live longer? Section 4(a)(1) of the federal age discrimination law does not forbid discriminatory retirement plans geared to sex, but it does outlaw discriminatory hiring practices and compensation. In this way, the federal law is pertinent to sex discrimination in retirement. The question arises as to whether bargaining goals should place more emphasis on raising wages and less on retirement benefits. This position indicates that unions and employers view retirement benefits as an extension of wages. Section 4(a)(2) also prohibits the classification by employers of an employee so that he is deprived “of employment opportunities or otherwise adversely affect[ed in] his status as an employee. . . .” The same prohibition is imposed upon unions in section 4(c)(1) and (2). Should more collective bargaining agreements call for earlier retire-

ment, the question whether unions fairly represent members forced to retire before sixty-five will be raised more frequently.

The responsibility for setting the compulsory retirement of airline pilots at sixty years of age was assumed by the FAA.³⁴³ However, the question of whether physically fit pilots could be forced to retire at sixty under the federal age discrimination law raises another question. In the absence of a showing of an illegal motive violating the Railway Labor Act or Taft-Hartley Act, employers and unions were free to establish any retirement age and impose sundry conditions by contract. In terms of overall legal difficulty, the required retirement of pilots at sixty years of age was less questionable than in other occupations because a neutral federal agency fixed the age.³⁴⁴ The FAA selected sixty as the compulsory retirement age because medical data pointed to the possibility of sudden incapacitation and the slowdown of reflex reaction. Furthermore, it can be reasoned that the federal age law was directed against standards set by private employers, not a neutral public agency, and that most employees of private employers do not hold positions of specific "public interest." The income loss faced by retiring pilots seems inconsequential when balanced against the need for public safety. There is also a greater reluctance on the part of judges to second guess decisions made by an administrative agency presumably composed of experts than to question those decisions made by employers and unions. While employers and unions typically compromise to reach a workable solution, the public interest should be less amenable to compromise.

Evidently, where a public agency sets the retirement age, the burden of establishing a discriminatory policy is on the plaintiff while the burden of establishing its propriety is on the private employer making a similar decision.³⁴⁵ The Wage and Hour Division has accepted the sixty years of age compulsory retirement rule for pilots, but, until recently, most of the employees of airline carriers were less than forty-five years of age.³⁴⁶ Typically, a declining industry has a higher percentage of older employees than younger employees.³⁴⁷ Employers in declining industries often seek to attract

343. The Wage and Hour Division has already approved of compulsory retirement of pilots at age 60, categorizing them as a "bona fide" exception. 8 LAB. REL. REP. 401:5203 (1968).

344. See *Chew v. Quesada*, 182 F. Supp. 231 (D.D.C. 1960), *aff'd sub. nom.*, *Air Line Pilots Ass'n, Int'l v. Quesada*, 286 F.2d 319 (2d Cir.), *cert. denied*, 366 U.S. 962 (1961).

345. See generally *Barry v. Flint Fire Dep't*, 44 Mich. App. 602, 205 N.W.2d 627 (1973).

346. See *Hearings Before the Subcomm. on Employment and Retirement Incomes of the Special Senate Comm. on Aging*, 91st Cong., 1st Sess., pt. 9, at 1173 (1969).

347. F. CLARK & A. DUNNE, *AGEING IN INDUSTRY* 11 (1955).

young blood and to force the retirement of older employees before sixty-five. Early retirement in a declining industry might indicate age discrimination and should be viewed more suspiciously than similar action in a growing industry.

There is some conflict between contracts calling for mandatory retirement before sixty-five and state and federal age laws. For example, suppose a thirty-year employee, age fifty, is required to retire under the terms of a collective bargaining agreement. The mandatory contractual provision might violate state and federal age laws and sections 8(a)(5) and 8(b)(3) of the Taft-Hartley Act. Forcing an employee to retire at the age of fifty could be a sign of bargaining in bad faith while mandatory retirement at sixty-two appears to be acceptable. An opinion from the Wage and Hour Administrator declares that section 4(f)(2) does not outlaw involuntary retirement at sixty-two years of age if the agreement is otherwise bona fide.³⁴⁸ It seems unlikely that compulsory retirement at sixty-two, especially if the benefits are not reduced, can be challenged under the Taft-Hartley Act. If early retirement is voluntary, there is little likelihood that the agreement can be challenged under either an age law or the Taft-Hartley Act.

In *Murgia v. Massachusetts Board of Retirement*,³⁴⁹ the plaintiff, a state police officer with twenty years of service, was required to retire at age fifty pursuant to Massachusetts law. Since the plaintiff established the unconstitutionality of the state law, the court did not rule upon the question of burden of proof. Aside from the plaintiff's physical fitness and interest in continuing his employment, no facts were set forth to establish a rational basis for the state law. It can be assumed that the law could not be rationalized merely because the morale of the younger members of the force would be improved by the retirement of older officials. Thus, the basic issue in *Murgia* was whether fifty is a reasonable age for mandatory retirement. Unlike *Airline Pilots v. Quesada*,³⁵⁰ where a forced retirement of an airline pilot at sixty was deemed necessary for the public safety, the defendant in *Murgia* did not produce statistical evidence that police officials over fifty years of age were a threat to the public or that they could not satisfactorily perform their jobs.

Merely because an employee is required to retire before sixty-

348. 8 BNA 1974 LAB. REL. REP., F.E.P. MANUAL § 401, at 5215.

349. 8 F.E.P. Cases 18 (D. Mass. 1974).

350. *Air Line Pilots Ass'n, Int'l v. Quesada*, 286 F.2d 319 (2d Cir.), cert. denied, 366 U.S. 962 (1961).

five years of age it is not necessarily a violation of state³⁵¹ or federal law. The Social Security Act permits retirement before sixty-five and after sixty-two years of age,³⁵² but the retiree is forced to accept reduced benefits. It appears likely that compulsory retirement at sixty-two will be accepted by the judiciary under the age laws even if benefits are somewhat reduced. However, the younger the age of forced retirement, the greater the likelihood that the judiciary will make a finding of age discrimination. In fact, if the benefits seem to be grossly inadequate or grossly reduced because of the early retirement, greater suspicion is raised as to the "bona fide" quality of the retirement plan.³⁵³ Requiring people to retire at a relatively young age may be unreasonable, especially if this requirement is not uniformly followed.³⁵⁴ Collective bargaining agreements and retirement benefits change, but changes alone are not signs of disparate administration or unfairness. To date, no decisions have been reported under the federal law where a retirement plan has been labeled unfair because benefits were inadequate or the age was unreasonably young. Since retirees over sixty-two years of age receive Social Security benefits, establishing age discrimination violations due to inadequate benefits will be difficult because employers are, after all, supplementing federal payments.³⁵⁵ Where claims are made that compulsory retirement violates the federal age law, the best method of establishing violations is to show that some claimants are treated differently than others.³⁵⁶

A novel situation arose in *Hodgson v. American Hardware Mutual Insurance Co.*³⁵⁷ After electing not to participate in the firm's retirement plan, the plaintiff was discharged when she reached sixty-two years of age. The plaintiff claimed that the 1967 law was

351. See *Walker Mfg. Co. v. Industrial Comm'n*, 57 L.R.R.M. 2553 (Wis. Cir. Ct. 1964), *aff'd*, 27 Wis. 2d 669, 135 N.W.2d 307 (1965). *Contra*, 30 L.R.R.M. 124 (1952), which states that Massachusetts is an exception to this rule and is an exception to the federal rule. See also *Gebhard v. GAF Corp.*, 5 F.E.P. Cases 1043 (D.D.C. 1973).

352. 42 U.S.C. § 402(a) (1970).

353. See *Walker Mfg. Co. v. Industrial Comm'n*, 27 Wis. 2d 669, 135 N.W.2d 307 (1965).

354. See *Retail Clerks Local 770 v. Retail Clerks Int'l Ass'n*, 5 F.E.P. Cases 1131 (C.D. Cal. 1973); *Barry v. Flint Fire Dep't*, 44 Mich. App. 602, 205 N.W.2d 627 (1973); *McIlvaine v. State Police*, 6 Pa. Cmwlth. 505, 296 A.2d 630 (1972), *aff'd*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974). See also *Norman v. United States*, 392 F.2d 255 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1018 (1969).

355. Admittedly, retirement under Social Security at 62 theoretically is voluntary.

356. See *Hodgson v. Earnest Mach. Prods., Inc.*, 5 F.E.P. Cases 1311 (6th Cir. 1973). Discrimination was not established when a 64-year-old part-time employee was retired when she refused full-time work. But note in this case that the employee could have continued to work.

357. 329 F. Supp. 225 (D. Minn. 1971).

on her side since she was not entitled to retirement benefits. Bowing to the expertise of the Department of Labor and its interpretation of section 4(a)(1), the court favored the plaintiff because the employer, without contractual guidance or other precedent, discharged her at sixty-two. The fact that the plaintiff had elected not to participate in the retirement plan was apparently irrelevant. The rationale for the opinion of the court rested on the similarity between a discharge at sixty-two and a refusal to hire and noted that section 4(f)(2) only prohibits the latter when retirement benefits are provided.³⁵⁸ While the discharge of the plaintiff was essentially treated as a subterfuge because retirement was on a selective basis, neither the Department of Labor nor the court expressly stated that the retirement plan violated the law.

In *Stringfellow v. Monsanto Chemical Co.*,³⁵⁹ the plaintiffs were involuntarily retired at an early age by the defendant due to a slack in business. The court did not consider the fact that none of the plaintiffs were represented by a union. The court found for the defendant, who claimed that the selection of those working or retiring was based on eighteen criteria, and was necessitated by the fact that few of the workers were under forty. The plaintiffs felt that seniority should have determined retention, but an employer is not obliged to resort to seniority in the absence of a collective bargaining clause. Furthermore, the plaintiffs could not produce evidence that the defendant's evaluation was biased; in fact, the defendant tried to find other jobs for the plaintiffs.³⁶⁰

CONCLUDING COMMENT

The interpretation so far of the 1967 law seems to follow congressional intent. Employers have a legitimate interest in productivity, and medical evidence to date does not establish a substantial diminution of skill or productivity with age. Not only has medical science uncovered means of controlling many disabilities associated with age, but unions and technology help workers suffering from minor medical and production problems. Unions protect older workers by negotiating protective seniority clauses which eliminate competition for younger employees seeking promotion

358. Note that discrimination in the age of retirement between male employees and female employees violates Title VII of the 1964 Civil Rights Act, which forbids sex discrimination. See *Roper v. Public Serv. Elec. & Gas Co.*, 409 F.2d 775 (3d Cir. 1969); *Hodgson v. American Hardware Mut. Ins. Co.*, 329 F. Supp. 225 (D. Minn. 1971). See also No. 70471, 2 F.E.P. Cases 412 (EEOC 1970); Note, *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U.L. REV. 383, 405 (1966).

359. 320 F. Supp. 1175 (W.D. Ark. 1970).

360. See *Grossfield v. W.B. Saunders Co.*, 1 F.E.P. Cases 624 (S.D.N.Y. 1968).

or retention. In addition, unions have some voice in establishing production standards in the plant, and modern technology has relieved workers of many of the heavy and distasteful jobs. Another important factor is that the huge increase in new jobs since World War II has been greater in white collar than in blue collar employment. This is important when one notes that age has less effect on white collar jobs than blue collar jobs, particularly at the unskilled and semiskilled levels. Given the medical breakthroughs, bargaining strength of unions, and developing technology, workers today are less likely to be troubled by age than workers of the past.

The courts have not been faced with a situation in which a worker with a physical disability that reduces his productive capacity could be helped significantly if the employer would redesign the job or assign him to another job that he could fill.³⁶¹ In fact, the early and compulsory retirement of older workers may not be "bona fide" under these circumstances. Some states, such as Iowa,³⁶² already prohibit employment discrimination against the handicapped. Is an age discrimination law violated where the employer is unwilling to redesign the job or refuses to assign him to another available job? Society's interest in protecting older workers as well as those with physical disabilities lends support to the notion that the law may be violated if the employer is unwilling to lighten the employee's burden.

Few employers exhibit an interest in protecting older employees by redesigning jobs or shifting them to other suitable jobs.³⁶³ As more people live longer and the birth rate drops, the public interest in protecting older employees will be intensified. Judges and company leaders are generally older than other white collar workers and are perhaps inclined to sympathize with the public view that older workers are entitled to extensive protection.³⁶⁴

The few decisions interpreting the 1967 legislation are perhaps signs of humanizing the depersonalized business world as it strives to maximize profits. To relieve themselves of the burden of making decisions, businessmen seek technological change and standardized conditions of work. These decisions are too frequently made without thought of improving the quality of life or the social responsibility of the firm. Decisions establishing standards are frequently made without hard data. A point has been reached in interpreting social

361. This sometimes is accomplished via a collective bargaining agreement.

362. 8 BNA 1974 LAB. REL. REP., F.E.P. MANUAL § 451, at 401, 403.

363. See 90 MO. LAB. REV. 47 (1967).

364. W. DONAHUE & C. TIBBITTS, POLITICS OF AGE 101-04.

legislation where judges question business standards and adopt an individual rights approach. While probability data like smoking and cancer incidence is medically useful, it can prevent individuals from leading satisfactory lives in industry.

In a limited fashion, those courts looking at the age laws are touching a human nerve by prohibiting the use of impersonal and unverified business policies. While employers prefer the comfort of standards which might deny employment to the fifty-year-old applicant, legislatures and courts, by shifting the burden of proof and other devices, are finding that individuals are paramount. So far, management objection has been muted rather than roaring. Perhaps a sympathetic climate for pro-employee decisions has been created because of the industrial fate befalling those in managerial positions.

There is speculation that many colleges and universities will be hard hit in the near future by the EEOC because of sex discrimination. It can also be anticipated that the institutions of higher learning will soon be faced with many charges of age discrimination.³⁶⁵ Because of the limited funds available and the attitudes of some administrators, older employees who find it difficult to move to other jobs are given only small wage increases. This failure to match the cost of living of older employees while younger and more mobile members fare better proportionately may well be a sign of age discrimination. It seems possible that these institutions are indeed vulnerable to charges of age discrimination. Since the federal laws were amended in 1974 to cover state employment, some fire-works can be anticipated at state universities.

365. See NEWSWEEK, June 17, 1974, at 75-76.

STATE AND FEDERAL AGE DISCRIMINATION LAWS—TABLE 1*

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
U.S.	40-65	Private employers with 20 or more employees Federal employees State employees (civil service) Unions Employment agencies	(1) Bona fide pension plan (2) Bona fide seniority system (3) Bona fide insurance plan Note that in no case shall such "employee benefit plan . . . excuse the failure to hire any individual." (4) Employers with less than 20 employees (5) Elected or executive state officials	(1) Secretary of Labor is to first use conciliation. If this fails, then court action is permitted by Secretary. Secretary of Labor has no jurisdiction over federal employees. (2) Aggrieved individuals can bring court suit, which right terminates if Secretary of Labor brings suit. This does not apply to federal employees.
Alaska	all ages	State and municipal agencies Private employers Unions Employment agencies	(1) Social, charitable, religious and educational nonprofit institutions (2) Bona fide occupational qualification (3) Domestic help in home	(1) Administrative regulation (2) Misdemeanor
California	40-64	State and municipal agencies Private employers Unions Employment agencies	(1) Private employers with less than 6 employees (2) Bona fide pension plan (3) Hiring through high school, universities and trade schools (4) Seniority or company promotion plans (5) Apprenticeship programs (6) Employees of parents, spouse or child (7) Bona fide occupational qualification (8) Social, charitable, religious and educational nonprofit institutions	(1) Administrative regulation (2) Misdemeanor for violating age limitations in apprentice programs

*Data gathered from B.N.A., *Fair Employment Practice Manual Labor Relations Reporter*.

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
Colorado	18-60	Private employers (only applies to discharge)	(1) Age discrimination in hiring	Misdemeanor
Connecticut	40-65	Public agencies Private employers Unions Employment agencies	(1) Bona fide retirement plan (either negotiated or unilaterally installed by employer) (2) Insurance plan (3) Bona fide apprenticeship system or plan (4) Private employers with 3 or less employees (5) Employee is spouse, parent or child (6) Domestic help in home (7) Bona fide occupational qualification	Administrative regulation
Delaware	40-65	Public agencies Private employers Nonprofit organizations Unions Employment agencies	(1) Private employers with less than 4 employees (2) Seniority system (3) Bona fide "welfare or benefit plan" or retirement plan (4) Domestic (5) Agriculture (6) Employees of parents, spouse or child (7) Bona fide occupational qualification (8) Employee lives in employer's residence	(1) Administrative regulation (2) Civil suits by Attorney General of pattern of discrimination charges (3) Criminal charges

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
Georgia	40-65	Private employers (no others)	(1) Retirement plan. Law provides, "When the retirement or insurance benefit program of any employer shall prohibit the employment of any person because of excessive age (employee) shall have the authority, as a condition of employment, to waive the right to participate in any such program. . . ." (2) Bona fide occupational qualification.	Misdemeanor
Hawaii	all ages	Private employers Unions Employment agencies	(1) Minors (2) Bona fide retirement or insurance plan (3) Apprenticeship programs for those under 16 years of age (4) Bona fide occupational qualification	Administrative regulation
Idaho	60 and under	Private employers	Bona fide retirement or pension plan	Administrative regulation
Illinois	45 and over	Public employers Private employers Unions Employment agencies	(1) Bona fide retirement, pension or insurance plans (2) Job training for those over 45 "where . . . safety makes it impractical. . . ." (3) Job training for supervisory positions (4) Bona fide occupational qualifications	Misdemeanor

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
Indiana	40-65	Public agencies Private employers Unions	(1) Nonprofit and religious institutions (2) Domestic help in home (3) Farm labor (4) Bona fide retirement and pension plans (even those in which employer fixes retirement age at less than 65 and older workers are ineligible to participate) (1) Employers with less than 4 employees (2) Employee is spouse, parent or child (3) Domestic help in home (4) Bona fide retirement or pension plan (5) Bona fide occupational qualification (6) Bona fide religious institution	Administrative regulation
Iowa	all ages	Public agencies Private employers Unions Employment agencies	(1) Private employers with less than 8 employees (2) Employees of spouse, parent or child (3) Bona fide seniority system (4) Bona fide pension or retirement plan (5) Bona fide occupational qualification (6) Domestic servant	Administrative regulation
Kentucky	40-65	Private employers Unions Employment agencies Licensing agencies		Administrative regulation

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
Louisiana	under 50	Private employers	(1) "Hazardous occupations or occupations requiring unusual skill and endurance." An opinion by the State Attorney General indicates that bus driving is a hazardous occupation. (2) Bona fide pension or retirement plan (3) Less than 25 employees	Misdemeanor
Maine	all ages	Private employers Unions Employment agencies Public agencies	(1) Religious and fraternal and nonprofit organizations (2) Bona fide retirement, insurance plan, or seniority plan (3) Child labor laws (4) Employee of parents, spouse or child (5) Bona fide occupational qualification	Administrative regulation Civil suit by grievant
Maryland	all ages	Public agencies Private employers Unions Employment agencies	(1) Private clubs (2) Parochial schools (3) Less than 15 employees (4) Public employees who are not civil service (5) Bona fide occupational qualification (6) U.S. or Md. employment agency (7) Bona fide retirement, seniority, pension, or insurance plan	Administrative regulation
Massachusetts	40-65	Public agencies Private employers Unions Employment agencies Insurance and bonding companies	(1) Private employer with less than 6 employees (2) Nonprofit social and religious organizations (3) Domestic help in home (4) Farm labor (5) Employee of spouse, parents or child (6) Bona fide occupational qualifications	Administrative regulation

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
Michigan	18-60	Public agencies Private employers Unions Employment agencies	(1) Private employer with less than 8 employees (2) Individuals over 35 seeking an apprenticeship or on the job training in excess of 4 months (3) Bona fide retirement or pension plan. Such a plan does not create a bona fide exception if employee must retire under 65. (4) Insurance coverage based on employee age (5) Domestic work (6) Bona fide occupational qualification	Administrative regulation
Montana	40-65	Private employers Employment agencies Unions Financial institutions Public agencies Educational institutions	(1) Bona fide retirement plan (2) Insurance coverage based on employees' age (3) Bona fide occupational qualification (4) Nonprofit charitable or religious associations	Misdemeanor Administrative regulation (including temporary relief from the courts)
Nebraska	40-65	Private employers Unions	(1) Private employers with less than 25 employees (2) Public agencies and fire fighters (3) Seniority plans (4) Bona fide retirement, pension or insurance plan (5) Bona fide occupational qualification	(1) Misdemeanor (2) State Equal Opportunity Commission can bring civil suit (3) Aggrieved party can file suit if Commission fails to file suit
Nevada	all ages	Public employers Private employers Unions Employment agencies	(1) Bona fide retirement plan or seniority system (2) Religious and educational institutions (3) Private employers with less than 15 employees (4) Communists & Nat'l Security	Administrative regulation

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
New Hampshire	all ages	Public agencies Private employers Unions Employment agencies	(1) Social, fraternal and educational organizations (2) Private employer with less than 6 employees (3) Domestic help in home (4) Employees of spouse, parent or child (5) Bona fide occupational qualification	Administrative regulation
New Jersey	from 21 (no upper age limit)	Private employers Unions Employment agencies	(1) Nonprofit educational, religious or social organizations (2) Domestic help in home (3) Employees working for children, parents or spouse (4) Bona fide pension, insurance or retirement plans (5) Bona fide occupational qualification	Administrative regulation
New Mexico	all ages	Private employers Unions Employment agencies	(1) Private employer with 3 or less employees (2) Bona fide occupational qualification (3) Religious institutions	Administrative regulation

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
New York	40-65	Private employers Unions Employment agencies Public authorities	(1) Bona fide pension or retirement plan (An interpretation indicates that retirement at 60 cannot be required unless the job is too physically demanding, FEP Manual 451:917.) (2) Fire department employees, policemen, guards and other similar positions (3) Domestic help in home (4) Employee of parents, spouse or children (5) Insurance (interpretation made that if insurance too costly because of age, employer can refuse to hire (451:918)) (6) Employers with less than four employees	Administrative regulation Civil action for damages unless person has filed complaint with administrative agency
North Dakota	40-65	Private employers	(1) Bona fide pension or retirement plan (2) Bona fide occupational qualification	Misdemeanor
Ohio	40-65	Private employers		Not indicated
Oregon	18-65 (Private employer) 18-65 (Public agencies)	Public agencies Private employers Unions Employment agencies	(1) Domestic help in home (2) Employee of parent, spouse or child (3) Bona fide pension or retirement plan (compulsory retirement permitted under 65 if required by law) (4) Selection of employees on the basis of "relevant educational or experience requirements or relevant physical requirements. . . ." (451:977) (5) Police officers, firemen, weighmasters and other state civil servants (451:978)	Administrative regulation

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
Pennsylvania	40-62	Public agencies Private employers including religious and nonprofit organizations having government support Unions Employment agencies	<ol style="list-style-type: none"> (1) Domestic help in home (2) Private employers with 3 or less employees (3) Employee of parent, spouse or children (4) Bona fide pension, insurance or retirement plan (even if less than 62; see 451:1019, 1046) (5) Individuals employed in agriculture (6) Individuals, who as part of employment, reside in personal residence of employer 	Administrative regulation
Rhode Island	45-65	Public agencies Private employers Unions Employment agencies	<ol style="list-style-type: none"> (1) Religious and nonprofit organizations (2) Domestic help in home (3) Farm labor (4) Bona fide pension or retirement plan (5) Bona fide occupational qualification 	Administrative regulation with judicial review of director's order within 30 days available

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
Washington	40-65	Public agencies Private employers Unions Employment agencies Licensing agencies	<ol style="list-style-type: none"> (1) Private employers with 7 or less employees (2) Religious and sectarian non-profit organizations (3) Domestic help in home (4) Employee of parent, spouse or children (5) Bona fide pension or retirement plan (6) Variable insurance protection based on age (7) Public and private industry setting variable age categories because the job demands "extraordinary physical effort" or there are other age considerations necessary (8) Bona fide occupational qualification (9) Public employment where the position is physically demanding (10) State, county, or city law enforcement agencies 	Administrative regulation Civil suit
West Virginia	40-65	Public agencies Private employers Unions Employment agencies	<ol style="list-style-type: none"> (1) Private employers with 11 or less employees (2) Employee of parent, spouse or children (3) Bona fide pension or insurance plan (4) Private club (5) Domestic servant (6) Bona fide occupational qualification 	Administrative regulation

Governmental Unit	Ages	Coverage	Exemptions	Enforcement Provisions
Wisconsin	40-65	Private employers Unions Employment agencies Licensing agencies	(1) Private clubs, nonprofit organizations and religious institutions (2) Bona fide retirement or pension plans (3) Insurance coverage geared to age (4) Jobs leading "to supervisory, managerial, professional, or executive positions" (5) Hazardous occupations, including fire fighting and law enforcement (6) Employees of parent, spouse or children	Administrative regulation

