

Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967

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Christine, age thirty-nine, and Kevin, age forty, both worked for Corporation *X* for fifteen years. In order to stay ahead of the competition, Corporation *X* decided to computerize its operations. Michael, the president of Corporation *X*, decides that Christine and Kevin are too old to learn the new technology. Michael fires Christine and Kevin and replaces them with two workers who are twenty-four-years old. Under current law, Kevin has a valid claim of age discrimination, while Christine does not.

Amanda is the manager of a fast-food restaurant in Florida. She has an opening at the restaurant. Scott, who is seventeen-years old, applies for the position. Amanda refuses to hire him based on her belief that teenagers are rude and likely to move on to higher-paying jobs. Eventually, Amanda hires a seventy-year-old man to fill the position. At the same time, another fast-food restaurant has an opening. There, the manager refuses to hire Rob, a sixty-eight-year-old, believing that senior citizens are not as productive as younger workers. Instead, the restaurant hires Adam, a sixteen-year-old. Under current law, Rob has a valid claim of age discrimination, while Scott does not.

INTRODUCTION

In 1967, Congress passed the Age Discrimination in Employment Act ("ADEA").¹ At that time, this Act protected individuals age forty to age sixty-five from age discrimination in employment.² Congress later amended the ADEA to eliminate the upper age limit. However, the lower age limit of forty remains. This Note will consider whether Congress should amend the ADEA so that it protects all individuals from age discrimination regardless of age. The purpose of this Note is to show that Congress should indeed eliminate the line at forty years and that the ADEA should prohibit all age discrimination regardless of the age of the individual whom the employer has discriminated against. Congress should amend the ADEA to allow anyone to pursue an age-discrimination claim, not just those individuals age forty or older.

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1. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

2. *See id.* § 12, 81 Stat. at 607 (codified as amended at 29 U.S.C. § 631) ("The prohibitions of this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.").

The ADEA clearly indicates that it protects only individuals age forty or older from age discrimination.³ Numerous courts have found that individuals under the age of forty do not have cognizable claims under the ADEA.⁴ In addition, the Supreme Court recently held that an individual age forty or older can have a valid age-discrimination claim even if the replacement worker is also forty years old or older.⁵ However, it is unclear whether, under current law, an individual has a valid age-discrimination claim when the replacement worker is older than the individual making the claim.⁶

Part I of this Note will provide background information on the ADEA. This information will include the legislative history of the Act and the actual application of the Act. Part II will show that age-based discrimination against individuals under forty does occur. Part III will demonstrate that this discrimination against individuals under forty is a true injustice that needs to be remedied. Finally, Part IV will show that the costs of this change to the ADEA are not so great as to outweigh its benefits.

I. BACKGROUND

A. Legislative History of the ADEA

The issue of age discrimination first received serious congressional attention during discussion of the Civil Rights Act of 1964.⁷ Senator George Smathers sought to include protection from age discrimination in the Act.⁸ The Senate

3. See 29 U.S.C. § 631 ("The prohibitions in this Chapter shall be limited to individuals who are at least 40 years of age.").

4. See, e.g., *Spain v. Ball*, 928 F.2d 61, 62-63 (2d Cir. 1991); *Hahn v. City of Buffalo*, 770 F.2d 12, 15 (2d Cir. 1985); *Philippeaux v. North Cent. Bronx Hosp.*, 871 F. Supp. 640, 647 (S.D.N.Y. 1994); *Settino v. City of Chicago*, 642 F. Supp. 755, 759 (N.D. Ill. 1986); *Crane v. Schneider*, 635 F. Supp. 1430, 1434 (E.D.N.Y. 1986).

5. See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (allowing a 56-year-old worker to bring a claim under the ADEA when replaced by a 40-year-old worker).

6. The Seventh Circuit has held that the ADEA "does not protect the young as well as the old, or even . . . the younger against the older." *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226, 1227 (7th Cir. 1992) (omission added) (quoting *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988)). The Eighth Circuit has also held that "[a] plaintiff need not be replaced by a person outside the protected age group to make out a prima facie case under the ADEA; the plaintiff need only be replaced by a younger person." *Rinehart v. City of Independence*, 35 F.3d 1263, 1265 (8th Cir. 1994) (alteration in original) (quoting *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 366 n.6 (8th Cir. 1987)). In contrast, the Ninth Circuit has held that "replacement by even an older employee will not necessarily foreclose prima facie proof." *Douglas v. Anderson*, 656 F.2d 528, 533 (9th Cir. 1981). In addition, the relevant guidelines of the Equal Employment Opportunity Commission ("EEOC") provide that "if two people apply for the same position, and one is 42 and the other is 52, the employer may not lawfully turn down either one on the basis of age." 29 C.F.R. § 1625.2(a) (1997).

7. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (1994)).

8. See 110 CONG. REC. 9911-13 (1964).

voted down a proposed amendment to the Act.⁹ The House of Representatives also defeated a similar amendment, which Representative John Dowdy had proposed.¹⁰ Even though the Civil Rights Act of 1964 did not include a prohibition on age discrimination, the Act did direct the Secretary of Labor to study the problem of age discrimination.¹¹

Pursuant to this directive, the Secretary issued his report in June of 1965.¹² The report stated that older workers faced discrimination arising out of "assumptions about the effect of age on the ability to do a job *when there is in fact no basis for these assumptions.*"¹³ This discrimination placed a substantial burden on the economy, both in terms of unemployment insurance payments and in lost productivity.¹⁴ It also had adverse psychological consequences on the unemployed individuals.¹⁵ The report focused mainly on arbitrary age discrimination in the form of age-restrictive hiring policies, which employers commonly practiced at the time.¹⁶ Although the report did not recommend an explicit age limit, it dealt with individuals age forty-five or older.¹⁷

In 1967, the Secretary of Labor produced for Congress specific legislative recommendations. These recommendations included protection for individuals from forty-five years of age to sixty-five years of age.¹⁸ The Senate and House committees decreased the lower age limit from forty-five to forty.¹⁹ The Congressmen believed that forty was the age at which discrimination became evident.²⁰ Also, they saw that many states with similar legislation used forty as their age limit.²¹ The committees did consider an even lower age limit based on widespread discrimination by airlines against stewardesses age thirty-two or

9. *See id.* at 13,490-92 (resulting in 28 for, 63 against).

10. *See id.* at 2596-99 (resulting in 94 for, 123 against).

11. *See* Civil Rights Act § 715, 78 Stat. at 265 ("The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.").

12. *See* U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965).

13. *Id.* at 2 (emphasis in original).

14. *See id.* at 18.

15. *See id.* at 19.

16. *See id.* at 6.

17. *See id.* at 3, 5, 7, 11.

18. *See* HOUSE COMM. ON EDUC. AND LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, H.R. REP. NO. 90-805, at 6 (1967) [hereinafter H.R. REP. NO. 90-805], *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219; SENATE COMM. ON LABOR AND PUB. WELFARE, S. REP. NO. 90-723, at 6 (1967) [hereinafter S. REP. NO. 90-723].

19. *See* H.R. REP. NO. 90-805, *supra* note 18, at 6, *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219; S. REP. NO. 90-723, *supra* note 18, at 6.

20. *See* H.R. REP. NO. 90-805, *supra* note 18, at 6, *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219; S. REP. NO. 90-723, *supra* note 18, at 6.

21. *See* H.R. REP. NO. 90-805, *supra* note 18, at 6, *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219; S. REP. NO. 90-723, *supra* note 18, at 6.

older.²² Although the committees recognized this discrimination, they “felt a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers.”²³ There were, however, several members of Congress who disagreed with this decision.²⁴ In fact, Senator Peter Dominick saw three problems with the legislation.²⁵ First, the bill did not prohibit the discrimination of those over age sixty-five. Later amendments to the ADEA, which eliminated the upper age limit, solved this problem. Second, the bill was unclear whether it prohibited discrimination within the protected class, such as when a sixty-year-old worker is replaced with a fifty-year-old worker. *O'Connor v. Consolidated Coin Caterers Corp.*,²⁶ which held that the ADEA also prohibited age discrimination within the protected class, resolved this issue. Third, the bill did not prohibit the discrimination of those under age forty. This is the only one of Senator Dominick’s three issues which Congress has still yet to address.

Congress expressed the purpose of the ADEA explicitly and concisely in § 621:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age

22. See H.R. REP. NO. 90-805, *supra* note 18, at 6-7, reprinted in 1967 U.S.C.C.A.N. 2213, 2219; S. REP. NO. 90-723, *supra* note 18, at 6-7. The airlines did not practice these flagrant displays of age discrimination against male stewards. See H.R. REP. NO. 90-805, *supra* note 18, at 13, reprinted in 1967 U.S.C.C.A.N. 2213, 2225.

23. H.R. REP. NO. 90-805, *supra* note 18, at 6, reprinted in 1967 U.S.C.C.A.N. 2213, 2219.

24. See *id.* at 13-15, reprinted in 1967 U.S.C.C.A.N. 2213, 2225-27 (statement of Reps. Thompson, Holland, Dent, O’Hara, Hawkins, Gibbons, Ford, Hathaway, Mink, Scheuer, and Meeds opposing the decision); S. REP. NO. 90-723, *supra* note 18, at 15-16 (statement of Sen. Dominick opposing the decision).

25. See S. REP. NO. 90-723, *supra* note 18, at 15-16.

26. 517 U.S. 308 (1996).

discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.²⁷

Congress made it clear in its statement of purposes that Congress intended the ADEA to assist older workers.²⁸ The ADEA has largely been effective in meeting these goals.²⁹ However, Congress also intended the ADEA to eliminate arbitrary age discrimination.³⁰ One can distinguish arbitrary age discrimination from decisions made on the basis of age. Decisions made on the basis of age include considerations which are actually relevant to the decision at hand, while arbitrary age discrimination considers age when it is totally irrelevant to the job requirements.³¹ Employers did not limit this arbitrary age discrimination to individuals forty and older, although Congress desired to prohibit such discrimination.

In 1978 and 1986, Congress amended the ADEA. In 1978, Congress raised the upper age limit from sixty-five to seventy.³² The main purpose of this amendment was to eliminate mandatory retirement before the age of seventy.³³ This was a compromise to those who wanted to eliminate mandatory retirement entirely.³⁴ At the time, Congress was concerned about the economic effect of eliminating mandatory retirement completely.³⁵ In the Senate report for this amendment, the committee noted that some states protected individuals under the age of forty and that the states could enforce their laws in congruence with the ADEA.³⁶ The report also directed the Secretary of Labor to study the possibility of dropping

27. 29 U.S.C. § 621 (1994).

28. *See id.* § 621(a)(1)-(3).

29. *See* Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. RICH. L. REV. 757, 763 (1997) ("ADEA undoubtedly has eradicated the formal upper age limits on hiring upon which the Wirtz Report first focused. Older workers no longer are advised by advertisements . . . not to apply for open positions. They no longer are told that they cannot be hired because of their age.") (footnote omitted).

30. *See* 29 U.S.C. § 621(a)(4).

31. *See* Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 273 (1995).

32. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, sec. 3(a), § 12(a), 92 Stat. 189, 189 (codified as amended at 29 U.S.C. § 631(a)).

33. *See* HOUSE COMM. ON EDUC. AND LABOR, AGE DISCRIMINATION IN EMPLOYMENT AMENDMENTS OF 1977, H.R. REP. NO. 95-527, pt. 1, at 6 (1977) [hereinafter H.R. REP. NO. 95-527].

34. *See id.* at 7.

35. *See id.* at 2-3. There was concern expressed about unemployment, pension costs, and the ability of management to terminate incompetent or unproductive workers. *See id.*

36. *See* SENATE COMM. ON HUMAN RESOURCES, AGE DISCRIMINATION IN EMPLOYMENT AMENDMENTS OF 1978, S. REP. NO. 95-493, at 6 (1978), reprinted in 1978 U.S.C.C.A.N. 504, 509.

the age limit below forty.³⁷ However, the conference committee removed this potential study from the amendment in the conference agreement.³⁸

In 1986, Congress completely removed the upper age limit and entirely eliminated mandatory retirement.³⁹ By this time, the public supported the abolition of mandatory retirement.⁴⁰ As Representative Claude Pepper stated during discussion of the amendment: "[A]ge discrimination is as detestable and unjust as racial, religious, or sex discrimination. Our society which prides itself on a system that guarantees equality of opportunity and freedom of choice for all of its people, for too long has tolerated the mean and arbitrary indignity [of age discrimination]."⁴¹ Although Congress recognized this, it still failed to recognize that the ADEA allowed for discrimination against those individuals under the age of forty.

B. Application of the ADEA

A fired fifty-five-year-old white male manager who worked at his job slightly over fifteen years brings the average ADEA claim.⁴² Often, because of the experience necessary to fill these positions, the replacements are over the age of forty, "since even an employer with clear anti-age animus would rarely replace them with someone under 40."⁴³ With this empirical data, Congress cannot justify the ADEA as protecting a disfavored minority group from discrimination, since it protects everyone age forty or older, and individuals over forty are the usual beneficiaries of claims based on allegations of age discrimination. "It is . . . necessary to turn to other justifications for the ADEA. These have yet to be supplied, and if they are not, both the breadth of and the need for the ADEA must be reexamined."⁴⁴ As this Note will show, the elimination of the lower age limit is the necessary change. If the ADEA protected all individuals from age

37. *See id.* at 12, *reprinted in* 1978 U.S.C.C.A.N. 504, 515 ("These amendments also direct the Secretary of Labor to study the question of age-related employment discrimination as it affects persons younger than 40 years of age. . . . The committee contemplates that this aspect of the study will focus primarily on persons 30 to 40 years of age.").

38. *See* HOUSE CONFERENCE REPORT: AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS OF 1978, H.R. REP. NO. 95-950, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 532-33 (announcing that "[t]he House recedes with an amendment which . . . [s]trikes the requirement that the study focus on the feasibility of lowering the minimum age for coverage under the act").

39. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, sec. 2(c), § 12(a), 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. § 631(a) (1994)).

40. *See* HOUSE COMM. ON EDUC. AND LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS OF 1986, H.R. REP. NO. 99-756, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5628, 5630.

41. 132 CONG. REC. 25,427 (1986).

42. *See* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 493-94 (1995).

43. *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1985); *see also* *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 754 (5th Cir. 1980) (stating that an employer will rarely replace a protected worker with a worker outside the protected class, especially in management and technical fields where experience is a necessary prerequisite).

44. Rutherglen, *supra* note 42, at 521.

discrimination, the ADEA would prohibit discrimination against the young as well as discrimination against the old. Then, the ADEA would no longer create a special class, prohibiting instead *all* arbitrary age discrimination.

II. DISCRIMINATION AGAINST THE YOUNG

Employers do not just direct arbitrary age discrimination at the old.⁴⁵ Age discrimination can affect anyone. "Ageism . . . is . . . a form of stereotypical thinking that singles out any age-defined group or individual for adverse treatment because of age."⁴⁶ "When someone is labeled old (or 'young,' or 'middle aged,' for that matter) he or she is thereby set at a psychological arm's length by virtue of that designation: 'you are not one of *us*, you are one of *them*.'"⁴⁷ Admittedly age discrimination against the young is, in some ways, different from age discrimination against the old. Finding a different job is likely to be more difficult for the old worker than for the young worker. However, the ADEA already protects the old from age discrimination. Also, for the old, age is an immutable characteristic, just like race and sex. In contrast, the young individual who an employer has discriminated against knows that he or she will someday outgrow the disability. However, the young individual is still "subjected to a discrimination which cannot, through anything within his control, be overcome. For him, on any given day, his age on that day is immutable, too."⁴⁸ Society can eviscerate this type of arbitrary age discrimination by eliminating any age limits from the ADEA's protection. "The aging of America makes today's youth even more vulnerable to attack. . . . [It] has produced a significantly older population, making the youthful minority more susceptible to discrimination. Compounding the problem is the inexperience of this age group in collective political action."⁴⁹

Age discrimination does occur against the young. Congress recognized this discrimination in 1967, but failed to address it.⁵⁰ The following subsections will show that discrimination against stewardesses, discrimination against applicants for police and fire department positions, and the studies associated with the Age Discrimination Act of 1975 are the best empirical evidence of age discrimination against individuals under forty. In addition, the subsections will show that corporations are open about hiring policies which favor the old over the young and that stereotypical thinking concerning the young does exist.

45. See Howard Eglit, *Health Care Allocation for the Elderly: Age Discrimination by Another Name?*, 26 HOUS. L. REV. 813, 861 (1989).

46. 1 HOWARD C. EGLIT, *AGE DISCRIMINATION* § 1.02, at 1-10 n.30 (2d ed. 1994).

47. *Id.* § 1.02, at 1-10 to 1-11 (emphasis in original).

48. Howard Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 907 (1981).

49. Ted Galen Carpenter, *The New Anti-Youth Movement*, NATION, Jan. 19, 1985, at 39, 40.

50. See H.R. REP. NO. 90-805, *supra* note 18, at 13-14, *reprinted in* 1967 U.S.C.C.A.N. 2213, 2225-26; S. REP. NO. 90-723, *supra* note 18, at 15.

A. Under Forty, but Too Old

An example of arbitrary age discrimination against the young is the discrimination against stewardesses discussed in Part I.A.⁵¹ The airlines hired these stewardesses with the understanding or the explicit contractual requirement that the airlines would terminate the stewardesses upon their reaching the age of thirty-two or thirty-five.⁵² This age requirement operated outside of both the annual physical examinations and the more frequent grooming and appearance inspections which the airlines also required the stewardesses to undergo.⁵³ This discrimination was boldly explicit, and one can easily imagine this type of discrimination also happening to the "30-year-old [who] is too old to work as a . . . model."⁵⁴ Perhaps even more feasible is the type of discrimination that occurs in a pretextual manner, where the employer does not openly tell the employee that age is the reason for his or her termination or failure to obtain a position. This type of discrimination is even more sinister, since it is harder to fight discrimination when employers do not openly acknowledge it.

With technological changes occurring at an ever increasing pace, it is now more feasible than ever for arbitrary age discrimination to occur at an age less than forty. The age myths which employers associate with individuals forty or older may now include younger individuals. For example, one myth is that older workers are less adaptable and harder to train.⁵⁵ It is not hard to picture a situation where a company fired employees who are in their thirties because the employer believed that they would be harder to train in new computer technology. In such a case, the employer arbitrarily dismissed the workers because of age, yet under current law, they would have no recourse.

In addition, companies seeking to avoid the ramifications of the ADEA may discriminate against workers under the age of forty. One writer held out the hope that the courts would protect these workers: "If an employer were to seek to avoid the ADEA problems by terminating employees at age 39 or less, courts would probably find an ADEA violation on the ground that such statutory protection would be necessary to protect the rights of covered individuals forty or older."⁵⁶ However, it is unlikely that a court will ignore express statutory language limiting protection to individuals forty or older.⁵⁷ Instead of asking a

51. See *supra* note 22 and accompanying text.

52. See H.R. REP. NO. 90-805, *supra* note 18, at 13, reprinted in 1967 U.S.C.C.A.N. 2213, 2225.

53. See *id.* at 14, reprinted in 1967 U.S.C.C.A.N. 2213, 2226.

54. Eglit, *supra* note 48, at 908.

55. See Irving Kovarsky & Dr. Joel Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 845 (1974).

56. Charles B. Craver, *The Application of the Age Discrimination in Employment Act to Persons over Seventy*, 58 GEO. WASH. L. REV. 52, 60 n.40 (1989).

57. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 718 (1978) ("[T]his Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing.").

court to abandon the express language of the ADEA, Congress should eliminate the inequities of the ADEA by eliminating the lower age limit altogether.

B. Under Forty, and Too Young

Employers also discriminate against individuals under age forty for being too young. There are various examples which demonstrate that this type of discrimination exists. One example is the hiring practices of some cities for police and fire personnel.

In Indianapolis all applicants to the police department "must be at least twenty-one (21) years of age and shall not have reached their thirty-sixth birthday."⁵⁸ In addition, "[a]ny resident of the State of Indiana of the age of twenty-one (21) or above and not over the age of thirty-five (35) . . . is eligible to make application to become a member of the [fire] department."⁵⁹ It is apparent that both of these ordinances discriminate against individuals under the age of twenty-one. It is also apparent that both ordinances also discriminate against individuals over the age of thirty-five. The ADEA specifically allows discrimination against individuals over the age of thirty-five applying for public-safety positions.⁶⁰ Proponents of the exemption for public-safety officials argue that individuals over age thirty-five do not have the physical abilities needed to work as police or fire personnel.⁶¹

Proponents of the lower age limit set by Indianapolis cannot justify it on the same grounds as the upper age limit. However, since the ADEA does not currently protect individuals under the age of forty, Indianapolis is under no obligation to justify this discrimination. Some statements from the congressional hearings on the public-safety exemption do indicate that individuals under the age of twenty-one can successfully act as police or fire personnel. For example, one witness stated that "someone who exercises daily in a vigorous way will remain fit—not at the peak of a 20 year old athlete, but quite fit, nonetheless."⁶² From this statement, it appears that twenty years of age is the age of peak physical fitness. In addition, the Director of the Illinois State Police started on the police force when he was twenty.⁶³ This also demonstrates that a twenty-year-old can be successful in the police department. Perhaps Indianapolis does have a valid reason for the age limit at twenty-one years of age. However, with the

58. INDIANAPOLIS AND MARION COUNTY, IND., CODE § 3-313 (1996).

59. *Id.* § 3-333.

60. See 29 U.S.C. § 623(j) (1994).

61. See, e.g., *Hearing on Age Discrimination in Employment Act, Public Safety Exemption: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. 5 (1995) (statement of Frederick H. Nesbitt, Director, Department of Governmental Affairs & Political Action, International Association of Firefighters).

62. *Id.* at 90 (statement of Frank J. Landy, Director, Center for Applied Behavior Sciences) (arguing against the public-safety exemption).

63. See *Age Discrimination in Employment Amendments of 1995: Hearing of the Senate Comm. on Labor and Human Resources on S. 553 and H.R. 849*, 104th Cong. 6 (1996) (statement of Terrance W. Gainer, Director, Illinois State Police) (arguing for the public-safety exemption).

ADEA only protecting individuals age forty and older, Indianapolis is not forced to justify its discrimination, and there will be no discussion of whether the lower age limit is necessary for public-safety positions.

There is other discrimination against the young in the workplace. Congress has recognized this discrimination with respect to federal programs. However, Congress has not addressed this discrimination in the private labor market. In 1975, Congress passed the Age Discrimination Act ("ADA"),⁶⁴ the purpose of which was to eliminate age discrimination in federal programs.⁶⁵ Congress designed this Act, unlike the ADEA, to protect all ages from discrimination.⁶⁶ This "benefit for the young apparently derived from a spillover of heightened age discrimination consciousness on the part of the legislators."⁶⁷ This Act demonstrates that Congress has at least recognized that employees can be subjected to age discrimination at any age, not just when they are forty or older. "[E]quality requires governments to demonstrate equal concern and equal respect for all whom they govern."⁶⁸

The ADA is also important in this discussion because of the research it generated. The Act directed the Commission on Civil Rights ("Commission") to study age discrimination in federal programs.⁶⁹ The Commission found discrimination against individuals under the age of twenty-two in employment training programs.⁷⁰ The program administrators considered "their public service employment programs to be for persons they believe[d] [we]re in the 'employable' age range—22 to 44."⁷¹ This evidence demonstrates the age discrimination against the young which occurs in the labor market. For if those under the age of twenty-two are not "employable," it can only be the result of age discrimination in the private sector. Congress did not design the ADA to address this discrimination in the labor market, but a change to the ADEA, which would extend its protection to all individuals, would resolve this arbitrary discrimination.

64. Pub. L. No. 94-135, 89 Stat. 728 (1975) (codified as amended at 42 U.S.C. §§ 6101-6107 (1994)).

65. See Howard Eglit, *The Age Discrimination Act of 1975, as Amended: Genesis and Selected Problem Areas*, 57 CHI.-KENT L. REV. 915, 916-17 (1981).

66. See 121 CONG. REC. 9212 (1975) ("[I]ts provisions are broad and it is the intent of the committee that it apply to age discrimination at all age levels, from the youngest to the oldest.") (statement of Rep. Brademas).

67. Eglit, *supra* note 65, at 920.

68. Lee E. Teitelbaum, *The Age Discrimination Act and Youth*, 57 CHI.-KENT L. REV. 969, 981 (1981) (arguing in general that the young do not need protection under the ADA).

69. See 42 U.S.C. § 6106(a):

The Commission on Civil Rights shall (1) undertake a study of unreasonable discrimination based on age in programs and activities receiving Federal financial assistance; and (2) identify with particularity any such federally assisted program or activity in which there is found evidence of persons who are otherwise qualified being, on the basis of age, excluded from participation in, denied the benefits of, or subjected to discrimination under such program or activity.

70. See 2 U.S. COMM'N ON CIVIL RIGHTS, *THE AGE DISCRIMINATION STUDY* 117-70 (1979).

71. *Id.* at 117.

It has become more common for employers to discriminate against the young because of their age. Just as there are myths about old age, there are also myths about young age. Believing that today's youth are rude or lazy and then using that belief to make a hiring decision is a form of age discrimination no less invidious than that seen against the old.⁷² One can see this form of discrimination in industries ranging from fast-food restaurants, to grocery stores, to retail shops. For example, a black forty-year-old supermarket manager said in an interview:

"Man, these black kids just don't want to work, don't know how to work. I tell you, they come to work in smelly old sneakers, cut off jeans and sweatshirts, and always got a toothpick hanging out the side of his mouth. They slouch around, I don't know, man. . . . They just think it's a game. They just don't know what's happenin'. They just got the wrong attitude."⁷³

This quote demonstrates age discrimination against the young. The store manager is not making statements about an individual youth, he is making stereotypical statements about youth in general. When an employer passes over a young adult for a position just because he or she is young, that is arbitrary age discrimination, and society should not tolerate it.

With arbitrary age discrimination against the elderly, a smart employer will not discuss any such discrimination, even if it is occurring, because of the illegality of age discrimination against the old. In contrast, corporations seem unafraid to admit or even boast about such discrimination against the young. For example, McDonald's Corporation encourages the hiring of older workers both in its company-owned stores and in the stores owned by franchisees.⁷⁴ One can see the irony of the situation in the following statement by Jack Ossofsky, President of the National Council on the Aging, when he said that his organization "doesn't want to be a funnel for the replacement of one group of exploited workers—immigrants, or teenagers, for example—with another."⁷⁵ He further maintained that his organization would "not be a party to any program which exploits older workers and maintains them at the minimum wage with no opportunities for upgrading or fringe benefits, and regards them as a group, ultimately, as teenagers."⁷⁶ Mr. Ossofsky is not concerned with the exploitation or the discrimination against the young; he is only worried about his constituents, the old.

72. Cf. Elijah Anderson, *Some Observations of Black Youth Employment*, in YOUTH EMPLOYMENT AND PUBLIC POLICY 64, 71 (Bernard E. Anderson & Isabel V. Sawhill eds., 1980) ("The young black person . . . has come to symbolize danger and to evoke fear in the minds of many urban and suburban whites."); Richard B. Freeman, *Why Is There a Youth Labor Market Problem?*, in YOUTH EMPLOYMENT AND PUBLIC POLICY, *supra*, at 6, 13 ("[E]mployer discrimination against youth, particularly minority youth, is another potential cause of joblessness."). When an employer discriminates against a minority youth, the law protects the person for being a minority but not for being a youth. By not prohibiting both forms of discrimination, some mixed discrimination can slip through the cracks.

73. Anderson, *supra* note 72, at 73 (omission added) (quoting a supermarket manager).

74. See BUREAU OF NAT'L AFFAIRS, OLDER AMERICANS IN THE WORKFORCE 106-07 (1987) (interviewing Vivian L. Ross, home office director of labor relations for the McDonald's Corporation).

75. *Id.* at 108 (quoting Jack Ossofsky).

76. *Id.* at 108-09 (quoting Jack Ossofsky).

America is continually becoming a more service-oriented society.⁷⁷ Great percentages of our population provide these services.⁷⁸ At one time, employers sought to fill service positions with young persons, whom the employers thought were more appealing and vibrant. The ADEA prohibited this stereotype. However, America is "graying,"⁷⁹ and as the population ages, each age stratum will want persons of similar age to serve them. Age is no different from race, gender, and religion in that people are always more comfortable with persons who are like themselves.⁸⁰ For example, some senior-citizen communities do not even allow individuals under the age of eighteen to live there.⁸¹ Recently, an Arizona community evicted a teenager for just such a reason.⁸² These communities base their regulations on stereotypical beliefs, such as that teenagers are too loud.⁸³ Once a community prohibits teenagers from living there, businesses servicing that community may well become less inclined to hire a teenager to work there. When an employer does not hire a youth because of his or her age, there is arbitrary age discrimination against the young, a segment of the population that has no protection under the ADEA. For this reason, Congress should eliminate the forty-year-old-age limit in the ADEA.

III. THE REAL INJUSTICE OF THE ADEA'S CURRENT DISCRIMINATION

The age discrimination described in the previous Part is truly unjust, and Congress should remedy it. Arbitrary age discrimination against the young is more than just unfair. It is unjust because the unprotected group, the young, are

77. See R. Scot Grierson, *State Taxation of the Information Superhighway: A Proposal for Taxation of Information Services*, 16 LOY. L.A. ENT. L.J. 603, 615-16 (1996); Ray Clune, *Textile Jobs Continue Downward in Southeast, as Service Jobs Grow*, DAILY NEWS REC., June 12, 1996, at 12, 12, available in 1996 WL 8653995 ("The U.S., as a whole, is going from manufacturing to service-oriented employment.") (quoting Paul Calhoun, Jr., regional economist for the Bureau of Labor Statistics).

78. In 1970, 25.9% of the population was employed in services. By 1994, 34.9% of the population was employed in services. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 416 (115th ed. 1995) [hereinafter STATISTICAL ABSTRACT]. If farms are excluded, in 1960, 62.3% of the workers were employed in service-producing jobs, while in 1994, 79.2% of workers were employed in service-producing jobs. See *id.* at 424.

79. This term has been used by numerous authors. See, e.g., 1 EGLIT, *supra* note 46, § 1.03, at 1-14; HAROLD L. SHEPPARD & SARAH E. RIX, *THE GRAYING OF WORKING AMERICA* (1977).

80. See Anderson, *supra* note 72, at 71 ("My company tries to assign blacks to black neighborhoods and whites to theirs, you know, so there won't be any misunderstandings.") (quoting a delivery man).

81. In Youngtown, Arizona, a town ordinance requires at least one occupant of a household to be 55 or older, and no one under 18 can live there longer than 90 days. See Jerry Nachtigal, *Teen Evicted; Town Has No Room for the Young*, CHATTANOOGA TIMES, Dec. 24, 1996, at A5.

82. See *Senior Scrooges*, USA TODAY, Dec. 26, 1996, at 8A ("[M]ost everyone agrees . . . [the teenager] hasn't been any trouble.")

83. See Editorial, *Maybe It's Youngtown Residents Who Aren't 'Compatible'*, ARIZ. REPUBLIC, Sept. 2, 1996, at B4 ("We didn't want children living here . . . they grow up, and they're simply not compatible.") (omission in original) (quoting a resident of Youngtown).

represented in neither the political nor the corporate decisionmaking processes. In addition, discrimination against the young is similar in many ways to prior discrimination against women, which Congress prohibited in 1964. Finally, the discrimination against the young allowed by the ADEA is distinguishable from other forms of tolerated discrimination against the young. The significance of employment discrimination exceeds other forms of discrimination. As several Congressmen stated:

The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.⁸⁴

Congress has recognized this by prohibiting other forms of employment discrimination.

A. An Unrepresented Minority

Since 1967, when Congress enacted the ADEA, society has changed so much that the line that Congress drew at age forty is now unjust. First, the population in general has changed. In 1970, only 36.3% of the population was forty or older.⁸⁵ By 1994, 48.4% of the population was forty or older.⁸⁶ In the near future, individuals over the age of forty will make up a majority of the population. Looking just at the numbers, individuals forty or older are not a minority group deserving of special protection. An alternate view of minority status considers the relative power of the group in society.⁸⁷ Even under this alternate definition, individuals forty or older do not deserve special protection. Groups such as the American Association of Retired Persons ("AARP") exemplify the vast political power of the elderly in the United States. In 1988, the AARP, with 30 million members, was the second largest membership group in the United States, trailing only the Roman Catholic Church.⁸⁸ Its membership included nearly one in every five voters.⁸⁹ Because of these numbers, the AARP's lobbyists have "access that few other groups command."⁹⁰ The old are not the ones without a voice. Individuals over the age of forty have much political power and do not need special protection. The point is not that the old do not need protection from age discrimination. The point is that the old do not need the protection to the

84. ADDITIONAL VIEWS ON H.R. 7152 OF HON. WILLIAM M. MCCULLOCH, HON. JOHN V. LINDSAY, HON. WILLIAM T. CAHILL, HON. GARNER E. SHRIVER, HON. CLARK MACGREGOR, HON. CHARLES MCC. MATHIAS, HON. JAMES E. BROMWELL, H.R. REP. NO. 88-914, pt. 2, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2487, 2513.

85. *See* STATISTICAL ABSTRACT, *supra* note 78, at 15.

86. *See id.*

87. *See* F. JAMES DAVIS, *MINORITY-DOMINANT RELATIONS* 3-17 (1978).

88. *See* Eric Schurenberg & Lani Luciano, *The Empire Called AARP*, MONEY, Oct. 1988, at 128, 128.

89. *See id.* at 128-29.

90. *Id.* at 138.

exclusion of protection for the young. It is the young who are without a voice within the walls of Congress and who need the baseline protection of dignity which the ADEA can provide.

When Congress passed the ADEA, it picked forty as the lower age limit because Congress considered forty "the age at which age discrimination in employment becomes evident."⁹¹ However, since 1967, America has aged.⁹² The typical ADEA claim helps illustrate this situation. When an employer fires a fifty-five-year-old manager, it is unlikely that an employer could even find a replacement under the age of forty with the necessary experience.⁹³ It is difficult to see the forty-year-old as needing special protection when he or she is the usual replacement for an unlawfully terminated worker.

[T]he people who make employment policies for corporate and other employers and most of those who carry out those policies by making decisions about hiring or firing specific workers are at least 40 years old and often much older. It is as if the vast majority of persons who established employment policies and who made employment decisions were black, federal legislation mandated huge transfer payments from whites to blacks, and blacks occupied most high political offices in the nation. It would be mad in those circumstances to think the nation needed a law that would protect blacks from discrimination in employment.⁹⁴

Because of these changes, the ADEA protects people over forty from themselves. Unprotected are the youth who have no say in either the political process or the corporate decisionmaking process.

B. Similarities to Gender Discrimination

The similarities between gender discrimination and age discrimination against the young illustrate the injustice of such age discrimination. First, both age and gender discrimination are unlike race discrimination in that age and gender discrimination are not usually invidious. People do not usually base their discrimination against the young and women on hatred or beliefs of superiority. Rather, they base it on a paternalistic idea that women and youth do not know what is best for them.⁹⁵ However, these intentions often have the effect of putting the youth or the woman "not on a pedestal, but in a cage."⁹⁶ The statement that a woman is not tough enough to be a vice-president is no different from the statement that a twenty-five-year-old is not tough enough to be a vice-president.

91. H.R. REP. NO. 90-805, *supra* note 18, at 6, *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219.

92. In 1970, the median age in America was 28. In 1994, it was 34. *See* STATISTICAL ABSTRACT, *supra* note 78, at 14. In addition, by 2030, there will be more people 65 or older than there will be people under the age of 18. *See* U.S. SENATE SPECIAL COMM. ON AGING ET AL., AGING AMERICA: TRENDS AND PROJECTIONS at xix (1991).

93. *See* Brief for Amiei Curiae of the American Association of Retired Persons and the National Employment Lawyers Association in Support of Petitioner at 14, *O'Connor v. Consolidated Coin Catchers Corp.*, 517 U.S. 308 (1996) (No. 95-354).

94. RICHARD A. POSNER, AGING AND OLD AGE 320 (1995).

95. *See* *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) ("Traditionally, [sex] discrimination was rationalized by an attitude of 'romantic paternalism' . . .").

96. *Id.*

A second similarity between women and youth is that both make up a large percentage of the population. However, the young, like women, are underrepresented in positions of power and are unable to rectify the discrimination on their own. Congress made gender discrimination illegal in the Civil Rights Act of 1964,⁹⁷ but has continued to allow discrimination against the young.

C. Analogy to Affirmative Action

Although the ADEA is analogous to affirmative action, its differences demonstrate the injustice of the ADEA's line at age forty. The ADEA, like affirmative action in favor of minorities, only gives special protection to a segment of the population. At this point, however, the similarities between the two end. With race, minorities may still feel the effects of past discrimination. For example, if past discrimination against minorities led to culturally biased testing systems or inferior schools, then the past discrimination may still disadvantage today's minorities.⁹⁸ In contrast, there is no residual effect of past discrimination against the old still felt by the old today. Past discrimination against individuals forty or older does not still disadvantage any individual who is forty or older today. In addition, with affirmative action in favor of minorities, the majority can end the special preference whenever society eliminates the need for the special preference. With the ADEA, it is the majority, in terms of power and soon in terms of raw numbers, that is the group receiving the special protection.

D. Discrimination Caused by the ADEA Distinguished from Other Discrimination Against the Young

The differences between the discrimination against the young allowed by the ADEA and other discrimination against the young also demonstrates the injustice allowed by the ADEA. Legislatures create many laws which discriminate against the young. For example, drinking laws discriminate against individuals under age twenty-one, and driving laws discriminate against individuals under age sixteen. However, most of these laws are different from the ADEA in significant ways. Legislatures pass these laws to protect the young when they believe that the individuals are not mature enough to make proper decisions. The ADEA is also an example of a legislature discriminating against the young. The ADEA discrimination against the young, however, in no way protects the young from their own immature decisionmaking. It only allows employers to act on their stereotypical views of the young.

97. See 42 U.S.C. § 2000e-2 (1994).

98. See generally Jeffrey B. Wolff, Comment, *Affirmative Action in College and Graduate School Admissions—The Effects of Hopwood and the Actions of the U.C. Board of Regents on Its Continued Existence*, 50 SMUL REV. 627 (1997) (discussing affirmative-action programs in graduate school admissions).

IV. THE COSTS OF CHANGE

The costs of amending the ADEA to protect all individuals will not outweigh its benefits. The benefit of the change is to prohibit an unjust form of discrimination and to provide society with the contributions that youth would provide through their jobs, if given the opportunity to use their skills. Even after the ADEA is amended, employers can still consider experience or maturity in making employment decisions. Therefore, if an employer does not hire a youth based on a lack of experience or maturity, when experience or maturity is a bona fide occupational qualification for the position, then there is no valid ADEA claim. In addition, the federal government already prohibits age discrimination in federal programs, and many states prohibit all age discrimination in the labor market. Since there is no indication that the government cannot feasibly administer these statutes, it is likely that the government could feasibly administer an amended ADEA, which would just extend the protection of these already existing statutes nationwide.

A. Experience and Maturity Still Valid Factors

Amending the ADEA to protect all individuals regardless of age would not mean that employers could not use experience or maturity as a factor in employment decisions. The ADEA currently contains a provision allowing consideration of bona fide occupational qualifications.⁹⁹ The experience or maturity of an employee or potential employee can be a bona fide occupational qualification. Employers will have to ensure that experience or maturity is a necessary qualification for the position. Saying that a person is not experienced or mature enough, when experience or maturity is a bona fide occupational qualification, does not necessarily constitute unjust discrimination. Therefore, by amending the ADEA to eliminate the line at age forty, an employer could refuse to hire an individual on the ground that the individual lacks sufficient experience or maturity, but it could not refuse to hire that individual solely on the basis of age. Through this change, an employer would first have to determine that experience or maturity is a bona fide occupational qualification for a position, and then confine consideration of relevant factors in any subsequent decision to that individual's experience or maturity, not his or her age.

B. The Expense of Extension Will Not Be Great

The additional expense of preventing the age-based discrimination against any individual, regardless of age, would not be great. Throughout the history of the ADEA, business interests have maintained that the costs of preventing age discrimination are prohibitive. For example, business interests argued that

99. See 29 U.S.C. § 623(f) (1994) ("It shall not be unlawful [to discriminate on the basis of age] . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .").

increasing the ADEA's upper age limit would hinder their ability to terminate incompetent and unproductive employees.¹⁰⁰ However, businesses did eventually adapt to the 1978 ADEA amendments rather easily.¹⁰¹ Together, the ADA (through analogy) and the existence of many state prohibitions against all age discrimination demonstrate that the extension of protection to those under forty would not greatly increase costs to society.

The ADA, discussed *supra* in Part II.B, prohibits age discrimination against any individual in the administration of federal programs. Even though this law protects individuals under age forty, there is no indication that the law is prohibitively expensive to administer or that there is an excessive number of lawsuits by those under age forty.¹⁰² The amendment of the ADEA to include all individuals would only extend the protection against age discrimination—which the ADA already provides in the federal-program setting—to the labor market.

The existence of state laws also demonstrates the cost feasibility of expanding the ADEA to protect all individuals. There are currently several states with age-discrimination-in-employment statutes that do not have any age limits.¹⁰³ These states have had the statutes in effect for many years.¹⁰⁴ These state statutes show the feasibility of a federal age-discrimination statute with no age limits. If states can prohibit all age discrimination without the laws being cost prohibitive, then there is no indication that the costs of expanding the ADEA would outweigh the benefits of such an expansion.

In addition, the reporting costs of businesses should not increase much, if they do increase at all. The EEOC currently requires businesses to keep records on all employees, not just those over the age of forty.¹⁰⁵ Therefore, there are no obvious additional records that a business would need to keep if the ADEA's protection were extended to cover all individuals.

100. See H.R. REP. NO. 95-527, *supra* note 33, pt. 1, at 3-4.

101. See *The Removal of Age Ceiling Cap Under the Age Discrimination in Employment Act: Joint Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor and the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 99th Cong. 13 (1986) ("The Labor Department's studies indicate that business adapted quite easily to the 1978 ADEA amendments These same studies conclude that eliminating mandatory retirement altogether would have no greater impact") (report by Rep. Claude Pepper, Chairman, House Subcommittee on Health and Long-Term Care).

102. See David H. Marlin, *Enforcement of the Age Discrimination Act of 1975*, 57 CHI.-KENT L. REV. 1049, 1059-69 (1981).

103. See, e.g., COLO. REV. STAT. ANN. § 24-34-402 (West 1990); ME. REV. STAT. ANN. tit. 5, § 4572 (West 1989); MD. ANN. CODE art. 49B, §§ 14-16 (1994); NEV. REV. STAT. § 613.330 (1996); N.M. STAT. ANN. § 28-1-7 (Michie 1996).

104. The Maine statute has been in effect since 1971. As recently as 1994, courts have noted that the statute is different from the ADEA and has no age limits. See *Graffam v. Scott Paper Co.*, 870 F. Supp. 389 (D. Me. 1994), *aff'd*, 60 F.3d 809 (1st Cir. 1995).

105. See 29 C.F.R. § 1627.3 (1997).

CONCLUSION

In 1967, Congress enacted the ADEA. Congress enacted it with the admirable goal of eliminating arbitrary age discrimination. Concerning individuals age forty or older, this Act has been a success. The ADEA eliminated employers' use of explicit age limits in hiring policies. In addition, the ADEA decreased the use of discriminatory stereotypes against older workers in all employment situations. However, that is not enough.

A large percentage of the U.S. population is not protected from arbitrary age discrimination. The purpose of this Note is to show that Congress should amend the ADEA to protect all individuals from age discrimination. Congress can accomplish this by eliminating the lower age limit of forty years.

Employers discriminate against individuals under the age of forty in the labor market. In some cases, such as stewardesses, employers consider the individuals too old. In other cases, such as police and fire personnel, employers consider the individuals too young. In addition, this type of discrimination is unjust. Absent any compelling paternalistic interest, the ADEA's current age-based discrimination unjustifiably excludes an underrepresented portion of the population from its protection. Finally, the cost of protecting all individuals would not outweigh the benefits of amending the ADEA. Employers could still use the experience or maturity of the individual to make employment decisions. The removal of the age limit from the ADEA would prohibit *all* arbitrary age discrimination in the United States, not just the age discrimination felt by individuals forty or older.