

Introduction

This is the account of a field of law which is mainly (though not entirely) about problems of old and middle-aged people. The “field” in question is age discrimination and its corollary, the law about mandatory retirement. More generally, it is about what happened in the law as this field emerged out of the primal void, so to speak. It is also about the process of making (and applying) rules.

Normally, new law begins with a distinctive social problem—air pollution, the crime wave—which exists either in the real world or in people’s heads, or both. Age discrimination has a somewhat different character. It is fairly certain that there is a problem here, and in many ways it is a serious one. But no one is sure of its exact contours; and some have argued that the legal interventions here are related (or unrelated) in rather curious ways to the social background. In any event, a body of law did emerge, and crystallize into a “field,” which, most emphatically, set certain forces in motion.

This is also a story about what we might call “legalization”: a process in which “law” spreads its tentacles into problems,

situations, events, and areas of life where it had never penetrated before, or penetrated only in a most imperfect way. In recent years, there has been much discussion of this process. Something seems to be happening in society, and in the legal system, which is producing an outburst of law. The outburst takes many forms. Some people feel there is a "litigation explosion"—too many people suing each other. It is not at all clear whether the figures bear this out, in general; and it is not clear exactly what "litigation" means.¹ But *federal* cases do seem to be rising much faster than population.² Age discrimination cases are mostly federal; they are a small but growing part of the federal "explosion."

There is a lot of myth and humbug about the role of law and the amount of suing in society. Still, feelings about this subject are an important social fact. Many people feel we are suffering from too much law, or at least too much government. Article after article in the popular press complains about the overload—too much law, too many lawsuits, and lawyers; too many rules and regulations. Ronald Reagan's election in 1980 owed something to this feeling; and even liberals talk about cutting back the government. It is more than a matter of taxes. It is a belief that society is staggering under the sheer weight of rules.

Yet "legalization" has its good side as well. One aspect, after all, is the so-called "rights revolution" with its cousin the "due process" revolution. These terms refer, among other things, to advances toward equality and social justice. There have been rapid, amazing changes in practice and law over the last generation, increasing the rights of racial minorities—and of prisoners, school children, and mental patients, for that matter. Many of the changes have been, of course, quite controversial; some people grumble that we have gone too far or too fast; on the whole, nobody wants to go all the way back.

The "due process revolution" is a more complex and controversial form of legal change. Like "legalization" it is hard to describe and define precisely. It refers to a vast expansion of rights, especially procedural rights. The core idea is something along these lines: neither government nor any private power center should be able to take actions that affect a person's vital interests (the constitutional phrase is "life, liberty, or property") without "due process." This means (at least) telling that person about it in advance ("giving notice") and affording him a chance

to argue his side of the issue, together with a decent, genuine crack at fighting back.

Basically, this is a revolt against concentrated power—whether it is power in Washington or city hall; or the power of General Motors; or the power of a big hospital in Phoenix, Arizona. There is a general refusal to accept uncontrolled discretion. Lawsuits, statutes, and the general atmosphere of due process have worked together to transform the structure and life of institutions. In companies, schools, hospitals, prisons—in every organization, as well as in government itself—discretion has been limited, informal norms have stiffened into tough rules and regulations; offhand, informal processes have given way to procedures more or less like those in courts. Where there were no norms at all, or very informal ones, we now have rules of law.

There are dozens of examples of this process at work in modern life. For example, there was a time when a boss could hire and fire as he pleased, whom he pleased, when he pleased. Generally speaking, he could pay what he (or the market) decreed and run his business exactly as he liked. This is certainly no longer true—not for a company of any size. Today the boss is hemmed in by a massive network of rules. Government has forced these on him by and large—rules about overtime pay, about employee bathrooms and cafeterias, about the minimum wage, about “affirmative action.” In many industries, union pressure led to major change in the structure of work relationships; but the unions of course have the force of law (and the National Labor Relations Board) behind them, at least since New Deal days. Labor relations, in short, have been thoroughly “legalized” over the years.

The workplace is not the only legalized domain. “Legalization” of schools is equally dramatic. Of course, public schools were always public, that is, always creatures of law. But the formal law paid only glancing attention to the day-by-day work of the schools. Today, rules about segregation, handicapped children, sex discrimination, bilingual education—the list could go on—have transformed the legal climate of at least the bigger school districts. Teachers, principals, school boards, have all suffered losses to their authority (in theory at least), partly under the pressure of litigation. The lost power has gone, to some degree, partly to students and others who were once without any say in the government of schools. Prisons and hospitals have

traveled along a similar road. The judge who, in 1872, called prisoners “slaves of the state” would be amazed at “prisoners’ rights” as they exist today.³ It is important not to exaggerate this development (prisoners are still prisoners); but some reallocation of power has definitely taken place.

The focus in these pages is on two closely related subjects. Part I is about age discrimination; the legal status of mandatory retirement is the subject of Part II. Both of these topics are, of course, important in their own right, legally and socially; they are also prime examples of legalization. Forty years ago, there was virtually no such thing as the law of age discrimination. The very concept was almost unknown. If an employer wanted to get rid of everybody in his shop or factory over 50, or hire nobody over 40, as a matter of principle, only the market restrained him, if at all. This of course is no longer true. The legal status of forced retirement was also untouched by law until recent time. It was at most an issue for collective bargaining—and even there it is not very old.

I will begin with age discrimination. Age discrimination, as we have said, is legally the merest baby. Its origins do not go back very far—basically, one generation. It is, however, a lusty, healthy baby; it shows every sign of vigor and long life.⁴ Yet, as shall be seen, it is a rather curious field of law. In part, it is about the elderly and their problems; but “age discrimination” as such does not refer to the elderly alone. On the contrary: “age discrimination,” as a legal tool, is most useful for middle-aged people—those over 40 but under 70. Other aspects of the law of age discrimination apply to people of *any* age—20 or 30 or 80—odd as this may seem.

This essay begins with a brief description of the historical background of the law. The main focus is on *impact*. A “field” of law can be important for ideological or symbolic reasons; but surely its effect on the way people live, on the economy, and on social relationships is the heart of the matter. Alas, very little is known about impact, and there are few techniques for learning much. Speculation, of course, is always possible. The “field” of age discrimination also has an effect on the legal order itself. This, too, is important. Here impact can be traced more directly; conclusions about legal change, and their social implications, are here grounded more firmly in fact.