**LABOR LAW LECTURE—APRIL 27, 2000**

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We are gathered here to honor Bernie Meltzer. Bernie has been an academic colleague of mine of more than thirty years, a versatile legal scholar who has made significant contributions to human rights law growing out of his experience as a prosecutor at Nuremberg, and the law of evidence. He is known to all who know him as a lawyer's lawyer, a penetrating critic, an exemplary university citizen, and a survivor unbowed by age. But he is probably best known for his contributions to labor law; and it is labor law accordingly that I will be discussing, although the organizers gave me carte blanche regarding choice of topics.

I have written about the economics of labor law, and economics is never far from my thinking about virtually any subject. But I am going to try in this talk to season the economic approach a little with my judicial experience, and to begin by noting how much labor law has changed, from my judicial perspective at any rate, in my eighteen years on the bench. When I began my career in judging in 1981, and for a number of years afterwards, I associated labor law primarily with the National Labor Relations Act, the Taft-Hartley Act, and the Railway Labor Act, with an occasional foray into the Landrum Griffin Act and a very occasional case under the Fair Labor Standards Act. The cases that arose under these statutes presented many fascinating questions involving federal jurisdiction, preemption, administrative law, and the practice of collective bargaining. We still get cases under these statutes, but far fewer. Part of the reason may be the decline in unionization particularly in the industries covered by these statutes, as distinct from public employment, where unionization has grown. Part may be the fact that these are mature and by now much-construed statutes so that relatively few issues remain open for appellate consideration. Part may be that labor relations have become more professionalized,

and part may be that the NLRB has been denied substantial increments of resources by a Republican Congress. Whatever the reason or reasons, the "old" labor law, as I'll denote the area I've just demarcated, has shrunk as a component of the federal appellate caseload.

It has not, of course, disappeared, and in recent years I have had some fascinating cases involving the definition of supervisor under the NLRA, involving unit determination, and involving the rules for computing and administering the agency fee for members of collective bargaining units who don't want to belong to a union. Just the other day I had a fascinating case involving the question of what qualifications a union may prescribe for candidates for union office. But in my court and the other federal courts as well, the emphasis in labor law has shifted from the statutes regulating unions to the statutes forbidding discrimination in employment on a growing list of grounds that include race, sex, age, and disability. These statutes may actually weaken unions by giving workers a measure of job security independent of a collective bargaining contract; in any event they have become a source of a growing number of federal cases, primarily cases brought by individual workers against their employers or former employers. These cases have largely displaced the "old" labor law so far as judicial consciousness of employment law is concerned.

There is one constant in my experience with the "old" labor law, and that is the very poor quality of the decisions of the National Labor Relations Board. The problem is independent of the party in power. It expresses itself in part in the extraordinary mode of opinion writing that is customary for the Board, and that is to adopt the administrative law judge's opinion and merely indicate disagreement in footnotes. But more distressing than this methodological quirk is the irresponsible attitude of the Board toward its own precedents and the lack of any curiosity about the practical consequences of its doctrines.

I have a theory about the "new" labor law, which will occupy my in the remainder of this talk; and it is that it is largely illusory so far as actual effects on employment practices is concerned. It increases the cost of labor to employers, and most of that cost is probably borne by the workers themselves; it may actually reduce employment opportunities for the protected classes; and it probably does not deter much discrimination. I will illustrate these points primarily with reference to the age discrimination law, because it is the law most likely to have a big effect for reasons I'll explain; but I will make occasional references to race, sex, and disability discrimination as well. Since Bernie is eternally young, he cannot claim credit for being the inspiration for my choice of topic.

The justification commonly offered for forbidding age discrimination is that people over 40 are subject to a form of prejudice, "ageism," that is analogous to racism and sexism. Such a prejudice could exist in two forms. One, which I'll call "animus discrimination," is a systematic undervaluation, motivated by ignorance, viciousness, or irrationality, of the value of older people in the workplace. There is undoubtedly resentment of and disdain for older people especially in American society, and widespread misunderstandings about aging and old age, some of which are disadvantageous to the old. For example, middle-aged and elderly people may seem old-fashioned because they "cling" to "outmoded" methods, yet the outmoded methods may be "clung to" only because the *incremental* benefit of the latest method is slight, so that anyone who is invested in the old method is rationally reluctant to switch.

But competitive pressures for rational behavior are considerable in private markets and inimical to irrational discrimination, even if one discounts the fact, as I would be inclined to do, that most of the people who make employment policies for corporate and other employers, and most of those who carry out those policies by hiring or firing specific workers, are themselves

middle-aged rather than young. The evidence of age discrimination is weak. Although older workers do have trouble finding new jobs at high wages, this is because the wages in their old jobs will have reflected what economists call "firm-specific human capital"—skills specialized to their particular employment—skills that by definition they abandoned when they left that employment and that they can't readily replace because of the cost of learning new skills, which rises with age, and because the proximity of these workers to (voluntary) retirement reduces the expected return from investing in learning new skills. There are empirical findings that workers 65 or older perform their jobs as well as younger workers in the same enterprise, but these findings are vitiated by selection bias: any demonstrably unsatisfactory older workers will have been fired or nudged into retirement.

The second and more plausible form of ageism (if it should be called that) consists of attributing to all people of a particular age the characteristics of the average person of that age. This is an example of "statistical discrimination," that is, the failure or refusal, normally motivated by the costs of information, to distinguish a particular member of a group from the average member. Age, like sex, is one of the first facts that we notice about a person and use to "place" him or her. We do this because we operate with a strong, though often an unconscious, presumption, echoing the rigid age grading that structures activities and occupations in many primitive societies, that particular attitudes, behaviors, and positions in life go with particular ages. Although the presumption that age matters in these ways is rational, there is a great deal of variance in the capacities, behaviors, and attitudes of persons in particular age groups and, partly as a result, great overlap between the capacities of persons in different age groups. People age at different rates and from different levels of capacity. So if age is used as a proxy for attributes desired or disliked by an employer, some people who are entirely competent to perform to the

employer's specifications will not be hired, or will be fired or forced to retire to make way for young people who actually are less able—though some elderly people may actually benefit from a presumption that "age matters."

But the presumption that age matters doesn't make age discrimination in employment inefficient any more than the substitution in some other field of activity of a rule (for example, do not drive faster than 65 miles per hour) for a standard (do not drive too fast for conditions) need be inefficient. Rules have higher error costs, in the sense of a misfit between the terms of the rule and its purpose, but lower administrative costs; standards have lower error costs but higher administrative costs; the relative size of the two types of cost will determine the efficient choice between the alternative methods of regulation in particular settings. Statistical discrimination is an example of rule-based behavior, and since it is a method of economizing on information costs we can expect it to be more common in settings where those costs are high. Few of us would be comfortable if airline pilots or military officers could not be forced to retire at any age without proof of individual unfitness.

Mandatory retirement—a blanket rule against retaining a worker who has reached a specified age, regardless of the particular worker's actual productivity—may seem a blatant form of age discrimination, yet it has three neutral, non-ageist supports. First, knowing far in advance the age at which one will retire facilitates an individual's financial and retirement planning. A person could always *decide* that he was going to retire at some particular age, yet he might fear that he might change his mind. Second, because full social security benefits are available at age 65 and, until just the other day, were suspended until 70 if the recipient continued working after reaching 65, there are, or rather were, powerful financial advantages to retiring at 65. If, therefore, few workers would want to continue working after that point, the benefits from

individualized assessment of their fitness to do so will be small, yet there are apt to be significant fixed costs of establishing and operating the requisite machinery of assessment. Third, and I think most important, if, as is plausible, a significant decline in a worker's performance is probable within a few years after he reaches 65, the benefits from individualized assessment will be reduced further because they will be realized for only a short period.

If employers are forbidden to use efficient methods of evaluation, their labor costs will rise. And it is now generally accepted that increases in payroll taxes or other labor costs are borne largely by the workers themselves, in the form of reduced wages or benefits. Workers as a whole will in effect be taxed for the benefit of elderly workers, though the elderly—who today are prosperous recipients of substantial public largesse—no longer constitute an oppressed class.

Anyway the law cannot, merely by outlawing particular types of discrimination, force employers to judge every worker as an individual. The costs of information are too high, especially since variability in performance in an age cohort tends to grow as the cohort ages. Deprived of the age proxy, some employers will use other proxies for ability or performance, such as test results, thus "discriminating" against workers whose performance those proxies underpredict. Airlines, for example, if forbidden to impose mandatory retirement on their pilots, might raise their standards of physical fitness, with the result that some perfectly competent young pilots might be forced out. Some employers denied the use of the age proxy will throw up their hands and, unable to distinguish between good and bad workers of the same age, treat both groups indiscriminately, with the result that bad workers will benefit at the expense of good ones. This is just another form of statistical discrimination. The victims of the two different forms of statistical discrimination—the victims of lumping together people of disparate abilities though the same age (the form of statistical discrimination that the law encourages), or of

treating separately people who have the same abilities but are of different age (the form of statistical discrimination that the law forbids)—will be different. But there will still be victims. And the victims of the age discrimination law, as distinct from the victims of what the law calls age discrimination, may be people more marginal, more necessitous, than the average elderly worker. Some evidence for this conjecture is that, as we shall see, most plaintiffs in age discrimination cases are not "workers" at all, but managers, professionals, and executives.

It is true that as with other forms of discrimination, statistical discrimination against the aged worker may impose an external cost, a cost that the parties to the employment contract will not take account of. If the exceptional aged—those young in mind, body, and spirit—cannot cash in on their exceptionality in the employment market because very few employers will look behind chronological age in making employment decisions, they will have a suboptimal incentive to invest in their human capital, that is, in skills acquisition, because the payback period will be artificially truncated. But since prohibiting the use of the age proxy just leads to the substitution of other proxies, the problem of underinvestment in human capital is not solved by the age discrimination law. Whoever is "unfairly" disadvantaged by the new proxy, in the sense that it doesn't measure *his* abilities accurately (perhaps he does not do well on pen-and-pencil tests because of deficiencies in his formal education, but is an excellent worker nevertheless), will lack the incentive to make the optimal investment in his human capital. And if the new proxies are less efficient than age—as is likely, because otherwise they would probably have been adopted without government prodding—wages will fall because employers' labor costs will be higher. And with lower wages, there will be less incentive for workers to invest in their human capital.

Let me try to systematize a bit these gloomy assessments of the probable effects of the age discrimination law on elderly workers and on the rest of society. The first thing to note is the misfit between the scope of the law and the concerns of the elderly. The law kicks in when a worker turns 40, and only 10 percent of the plaintiffs in a recent sample of cases (about which more in a moment), including those plaintiffs who challenged mandatory retirement, are 65 or older—a smaller percentage than the percentage of elderly people in the U.S. population as a whole. The main reason is plain enough; most people who are 65 or older are voluntarily retired, so are not protected by the Age Discrimination in *Employment* Act. Yet the Act was "sold" by means of emotional rhetoric concerning the plight of the elderly, in 1967 still viewed as a disadvantaged segment of American society.

By adding to the costs of employing older workers, the Act contributes to the reluctance of employers to employ them. It is true that the Act forbids age discrimination in hiring as well as in firing, demotions, wages, and so forth. But it is largely ineffective against hiring discrimination because of the difficulty of proving substantial damages in such cases. The plaintiff, had he been hired, would probably have received a wage only slightly higher than the wage he could earn elsewhere or was earning elsewhere. For if the job he applied for paid much more than his present job, he'd have great difficulty persuading a jury that he was the best-qualified applicant. The monetary stakes in a discharge case will often be much greater. As I've already intimated, if the discharged employee's wage contained a return for firm-specific human capital, that wage will be higher, maybe much higher, than he could get elsewhere. The difference between what the old worker was paid before he was fired and the much lower wage that is the best he can hope for in a new job provides the measure of his compensatory damages.

So it's no surprise that a large sample of litigated age discrimination cases contained *no* hiring cases; more than two-thirds involved termination (discharge or involuntary retirement), with most of the others involving promotion or demotion. A more recent study, of age discrimination complaints lodged with the Equal Employment Opportunity Commission, finds that 87.9 percent of the complaints in which no other form of discrimination was alleged besides age discrimination involved termination, only 8.6 percent hiring. In a study that I conducted a few years ago of all court cases under the Age Discrimination in Employment Act in which a final decision was rendered in 1993 on other than procedural grounds and was reported in Westlaw, the West Publishing Company's computerized database of judicial decisions, I too found that hiring cases are relatively rare—only 12.3 percent of the total cases in my sample. And plaintiffs won only 2.8 percent of them. In general, plaintiffs did very poorly, winning only 11.6 percent of the cases they brought.

A low winning percentage for plaintiffs in a class of cases is not (provided it exceeds zero!) conclusive evidence that these cases are "losers" for plaintiffs to bring. It could be an effect of *high* damages awards. The higher the award if the plaintiff wins, the likelier he is to sue even if the probability of winning is small. It is like a lottery: the bigger the pot, the longer the odds that the organizers of the lottery can set and still sell tickets. And a winning plaintiff in an age discrimination suit is entitled to reimbursement of his attorney's fees by the defendant, on top of any damages awarded, while a losing plaintiff can be ordered to pay the defendant's attorney's fees only if the suit was frivolous.

But in the 21 cases in which the plaintiff obtained damages in lieu of or in addition to equitable relief, the average damages award was $184,588. This is an unimpressive figure when one considers not only that the risk of winning nothing is very great—so that when averaged

together with the cases in my sample in which the defendant won, the total damages awarded come to only $13,894 per case, a very small expected gain for a federal case litigated all the way to final judgment—but also that cases involving large stakes are likely to be overrepresented in a sample of cases litigated to judgment. For, other things being equal, the greater the stakes in a case, the more likely the case is to be litigated rather than to settle.

And courts usually award the winning plaintiff the attorney's fee he actually incurred, with no multiplier to reflect the risk of loss. In the seven cases in my sample in which the award of attorney's fees is disclosed, the average award of attorney's fees was less than two-thirds of the damages award. Projected to the entire sample, this would raise the expected judgment (damages plus attorney's fees) from $13,984 to $22,633, which is still a very modest amount for a federal case litigated to judgment.

When one considers that 150 million people are employed in the United States, a large percentage of them over 40, the total number of suits that left a trace in Westlaw, and even the 20,000 age-discrimination complaints lodged annually with the EEOC, are meager. The outcomes of the cases in my sample suggest why.

The implications for other types of employment discrimination cases, such as race, sex, and disability cases, are rather staggering. Plaintiffs in age cases are much more likely to be managers than to be workers, which means their expected damages are much higher. The reason I take it is that it is very difficult for a middle-aged manager who loses his job to find a comparable job. If a class of workers with large expected damages have such poor litigation prospects, what of the others?

The potential disemployment effects of antidiscrimination laws are dramatically shown by an empirical study which found that right after the enactment of the Americans with

Disabilities Act in 1990, the percentage of disabled people who were employed plunged. The Act made the employment of such people more costly, and employers reacted exactly as the economist would expect.

But *why* do age discrimination (and other discrimination) plaintiffs fare so poorly, on average, in litigation? I think the answer has to do with the limits of adjudication in determining facts When the Age Employment in Discrimination Act was enacted back in 1967, many employers were practicing age discrimination (primarily of the statistical sort), and doing so openly. It took some time for the message that age discrimination was now an unlawful practice which if continued must be concealed to filter down to the corporate personnel who make the actual employment decisions. They continued for some years blithely to generate "smoking gun" evidence of age discrimination. By now, however, employers have largely succeeded in purging such slogans as "you can't teach an old dog new tricks" from the vocabulary of their supervisory and personnel staffs. Some evidence that age discrimination cases are indeed increasingly difficult for plaintiffs to win comes from comparing the winning percentage of plaintiffs in my sample (less than 12 percent) with the much higher percentage in a sample (32 percent) that was drawn from cases decided between 1968 (the first year after the enactment of the age discrimination law) and 1986.

In the absence of smoking-gun evidence of age discrimination, now difficult to come by, a plaintiff must as a practical matter show that an equally competent but younger employee was treated better. Such proof is difficult because of the intangible elements in evaluating a worker's performance other than in the simplest jobs—and the simplest jobs do not generate the plausibly high damages claims that repay the costs and uncertainties of litigation.

Moreover, a firm that wants to get rid of an older employee can often do so with near impunity by cashiering a younger employee at the same time. One hears rumors that this is a common practice. There is high turnover among young employees anyway and the firm may not yet have invested much in the young employee's firm-specific human capital (a principal reason *why* turnover of young employees is high) and so has little to lose from firing him.

Another thing that makes it hard for the employee to win an age discrimination case is that older employees tend to be more costly to a firm than younger ones, by virtue of receiving a larger package of wages and benefits. The more costly they are, the more difficult it is to ascribe their discharge to their age, as distinct from their expense. The older employee may be more productive by reason of his greater experience, or he may be paid a higher wage either to discourage shirking in his last period of employment or as a reward for not having shirked previously. If he is more productive, then he is not in fact more costly to the firm than a younger, less well paid, but also less productive worker. And if he is being paid a so-called "efficiency" wage either to discourage shirking or to repay the "bond" that he posted as a young employee by accepting a lower salary in exchange for an implicit promise of compensation later if he behaved, he is merely receiving the benefit of his bargain. But a court is not apt to tumble to the reason why the older employer is not *really* being "overpaid" and to see therefore that the employer is reneging on an implicit contract. All the court can see is that the employer had a reason unrelated to age for firing the older worker—he was more expensive. Moreover, the fact that the employer is reneging on an implicit contract for purely financial reasons is not obviously age discrimination.

This analysis suggests that age as such is unlikely to be a good predictor of the likelihood of the plaintiffs winning an age discrimination suit. The length of time the plaintiff was

employed by the defendant is likely to be a better predictor of the likelihood of the plaintiffs winning. It is a proxy for the amount of specific human capital invested in him, hence the amount of his damages, hence the likelihood of his having sufficiently large expected damages to be able to attract a competent lawyer to represent him. This analysis may explain why, in my sample, length of service, which as I have explained is a proxy for the amount of specific human capital and hence for the size of the stakes in the case, has a positive correlation with the probability of the plaintiffs winning but age has—ironically—a negative correlation. Age may be a proxy for not being able to perform to the employer's legitimate (or at least unprejudiced) expectations. And since expected damages are higher in firing than in other age discrimination cases, firing cases are more likely to be brought by plaintiffs whose probability of winning is slight. Moreover, workers who don't expect to find a new job are not worried that by suing their employer or former employer they will get a reputation as a troublemaker that will make it hard for them to find a new job.

At least one important aspect of the Age Discrimination in Employment Act has, it might seem, surely been effective without much litigation: the prohibition of mandatory retirement at fixed ages. The existence of a policy of mandatory retirement is not concealable, so it is doubtful that much litigation has been required to extirpate the practice. Yet employers can, without violating the law and often without incurring heavy other costs, manipulate the age distribution of their employees through offers of early-retirement benefits. These needn't be very expensive to the employer. First of all, the more generous the early-retirement offer, the less the employer need pay in wages and other benefits. And second, the risk to an employee of turning down even a rather chintzy such offer may be so great that offers of early retirement need not be princely to induce widespread acceptance. Unless the employee can prove that the

employer's package of retirement and other benefits is not a bona fide benefits plan, but is instead designed to evade the statute's prohibition against age discrimination— and that is not an easy thing to prove—the employer can penalize the employee for refusing an offer of early retirement by offering lower benefits to employees who retire later.

The making of an offer of early retirement, moreover, does not commit the employer to retaining until normal retirement age an employee who turns down the offer. If not many employees take up the offer, and even if many do, the employer may resort to other measures for achieving the desired size and composition of his work force. The employee knows, therefore, that if he turns down an offer of early retirement today, he may be fired or laid off tomorrow. And he knows that this may happen in circumstances in which it will be impossible for him either to prove age discrimination and thus obtain compensation, because the employer can demonstrate the business necessity for his reduction in force.

A 1978 amendment to the Age Discrimination in Employment Act raised the minimum mandatory retirement age from 65 to 70. One might have expected a dramatic increase in the employment of persons aged 65 to 70. Not so. For years after the passage of the amendment, there was no interruption in the steady downward trend in the percentage of persons 65 and older employed, although the downward trend in the labor-force participation rate of elderly men did finally bottom out, in 1985, and it has risen moderately since. (The rise has been greater for women, but this means little; one would expect the labor-force participation rate of elderly women to be growing without regard to any legal changes, simply as a function of the greatly increased participation of women in the labor force in recent decades.) As far as I know, the abolition of mandatory retirement has made a significant difference in the employment of the

elderly only in elite universities, where the workload is so light that full-time employment is not always easily distinguishable from retirement.

[Is mandatory retirement ageist? It is relevant to note that mandatory retirement did not become common until after World War II. Its advent coincided with the provision of pension benefits on a systematic basis by large firms to all their long-time employees. The combination of a pension plan with mandatory retirement protects the worker against a penurious old age and the employer against having to pay a wage to a worker who is no longer productive yet may actually be receiving a wage premium in order to counteract his incentive to slack off in his last period. Even if the worker is not receiving an incentive wage premium, and even if there is no contractual impediment to a reduction in his wage, an age-correlated decline in capability may have reduced his productivity to a point at which the employer would be better off replacing him. The employer could discharge the worker or force him to retire. But in the absence of mandatory retirement at a fixed age the employer would have to make a costly and (to the worker) humiliating determination that the worker had ceased to be sufficiently productive to justify retention. Because of its relation to incentive wage premia, union protections, and concern with avoiding stigma, mandatory retirement at fixed ages, rather than being a symptom of the exploitation of older workers or the operation of a mindless ageism, is correlated with employment terms and practices that favor older workers.

Mandatory retirement may also reduce an employer's agency costs (the costs of aligning employees' incentives with those of the employer). When involuntary retirement is discretionary, employees who want to work past the normal retirement age will have an incentive to forge alliances with their supervisors that may undermine the loyalty of both sets of employee, the supervised and the supervisory, to the employer. This concern may help explain why the

federal civil service was one of the earliest institutions to adopt mandatory retirement. The goal was to sever the "personal ties and informal bonds" that continued to characterize relationships within the civil service long after the formal abolition of the spoils system.]

*What kind of worker brings an age discrimination suit?* As a judge I have been struck by the number of cases in which a salesman contends that he was fired because of his age. This impression is confirmed by my study. Of 271 cases for which the information is available, 25 (9.2 percent) were brought by salesmen, excluding retail sales clerks. This may be due to two factors. First, selling is more strenuous than most other white-collar work, and while this will induce earlier retirement, it will also induce more discharges of workers who have not yet reached retirement age. Second, salesmen often have a large amount of firm-specific human capital (much of it *social* human capital—a network of valuable customer contacts). This makes it less likely that they will be fired but if they are fired it creates the prospect of very sizable damages, since their alternative wage is likely to be far below what they were receiving when they were fired. The largest award of damages in the sample was in fact obtained by a salesman. Employees whose principal human capital is general rather than specific so that their alternative wage will be close to the wage they were receiving when fired, or whose wages are in any event too small for the prospect of an award of lost wages to warrant the bother and expense of a lawsuit, will rarely show up as plaintiffs in age discrimination suits.

Consistent with this conjecture, most age discrimination suits are brought by management-level as distinct from blue-collar or clerical-type employees, that is, by employees who have high salaries; and most plaintiffs are in their fifties, and so have accumulated a lot of firm-specific capital and therefore can prove substantial damages. In my study, 61 percent of the cases were brought by professional, managerial, or sales employees. This figure exceeds the

share of these classes of workers in the working population as a whole. The largest number of plaintiffs in the sample were in the 55 to 59 age group and the second largest in the 50 to 54 and 60 to 64 groups; only 22.8 percent were younger than 50. Young people would not have accumulated as much firm-specific human capital and therefore would have lower damages; elderly people (only 10.1 percent of the plaintiffs were 65 or older) would be either retired, and therefore no longer protected by a statute protecting employees (unless they had been involuntarily retired), or close to retirement, in which event their expected damages would be low, just as in the case of young workers. Young people are also reluctant to sue because they fear they'll have trouble finding another job if they get a reputation for suing their employer; many of the age discrimination plaintiffs over 50 despair of finding another job and so are less reluctant to sue.

As other studies have shown, blacks and women are underrepresented as plaintiffs in age discrimination cases. One explanation is that blacks and women don't "need" to file an age discrimination suit as much as a white male, because they have other civil rights statutes to base a suit on. This is not a plausible explanation; normally it's advantageous to sue on as many colorable claims as one has. A more plausible explanation is that blacks and women tend to have smaller investments in human capital, including firm-specific human capital, than white males. The smaller that investment, the less the expected gain from bringing an age discrimination suit.

Given who the plaintiffs are, the Age Employment in Discrimination Act cannot realistically be characterized as progressive legislation. To the extent that the employer must factor into his labor costs the expected costs of damages judgments or settlements along with all the other costs of complying with (or violating) the Act, he will pay lower wages. He will try to lower the wages of those classes of workers most likely to bring and win age discrimination

cases, but a perfect match-up cannot be expected, and this means that the costs of the Act will be borne in part at least by average workers. The Act's effect is thus to redistribute wealth from younger to older workers, or, after it has been in effect for many years, from the same workers' youth to their middle age; and, to a lesser extent, from average workers to members of the professional and managerial class (including commissioned salesmen), who account for most age discrimination cases.

Because education steepens the age-income profile—lower wages during the schooling period being made up by higher wages later—earnings peak later for the educated worker and he is therefore more likely to want to work to an advanced age than a less educated worker. This implies that the abolition of mandatory retirement, to the extent effective at all, is likely to have benefited mainly the better-educated, who are also likely to be the abler workers and therefore have higher incomes beyond what is necessary merely to compensate them for their greater investment in human capital. This is further evidence that the Age Discrimination in Employment Act is regressive, though only in the short run. It is neutral in the long run because in the long run the highly educated will pay for the opportunity of working longer than their employer would like by accepting lower wages in their earlier years.

The old labor law was criticized by economists for facilitating the cartelization of labor. The new employment law avoids the specific economic criticisms leveled against the old labor law, but invites, as I have tried to show with the example of the age discrimination act, equally serious economic criticisms. Perhaps some day we'll learn to leave labor markets pretty much alone.

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