Putting ADEA Into Historical Context

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"Age Discrimination in Employment" (Bessey and Ananda 1991 [this issue]) makes much of the fact that "ADEA is actually a hybrid of two different pieces of legislation" (p. 416). The antidiscriminatory practices to be remedied by the 1967 legislation resemble those enunciated in Title VII of the landmark Civil Rights Act (CRA) of 1964. ADEA's enforcement provisions, however, are derived from the 1938 Fair Labor Standards Act (FLSA), as amended. This hybridization of models, in the authors' opinion, has affected ADEA's impact. Congressional intent remains subject to intense judicial scrutiny. In a series of cases, for instance, the courts have stipulated the circumstances under which a plaintiff is entitled to a jury trial, an option not specifically included in the enabling legislation. (Invoking precedents does not clarify matters: FLSA provided for its availability, but Title VII did not.) Definitions of age discrimination also have been reinterpreted over time.

ADEA's legislative history is even more "hybrid" than Bessey and Ananda (1991) imply. The language used in Title VII to define CRA's legislative scope comes from the Equal Employment Opportunity Act of 1962, which aimed "to provide a solution for the problem of continuing arbitrary employment discrimination because of race, religion, color, national origin, ancestry, or age, and a remedy against continuation of such practice." Note that the problems facing older workers made the list. But lawmakers recognized that more research was necessary before mounting an effective campaign against age discrimination in employment. Accordingly, under section 715 of the 1964 CRA, Secretary of Labor W. Willard Wirtz was asked to study "the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination

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on the economy and individuals affected." Wirtz's interest in this human-resource issue set the stage for responsibility being given initially to the Department of Labor to enforce ADEA. When protection under the 1967 measure was expanded seven years later to include federal employees, the U.S. Civil Service Commission (CSC) assumed oversight responsibility for this segment of the work force. In 1978, President Carter transferred all functions pertaining to ADEA to the Equal Employment Opportunity Commission (EEOC) as part of a reorganization of the executive branch of government.

To a historical gerontologist, it is not surprising that Congress, the courts, the Labor Department, CSC, and EEOC were accountable for enforcing ADEA. Programs for the aging rarely are handled by a single federal office. Consider the number of agencies involved in managing Social Security, the cornerstone of U.S. old-age policies. States set the rules for assistance programs not included in the Supplemental Security Income Program. An independent administrative court system reviews disability claims. The Department of Treasury and the Internal Revenue Service monitor FICA contributions and disbursements. The Department of Labor has jurisdiction over Social Security's "black lung" benefit program. The Health Care Financing Administration oversees Medicare. The Social Security Administration operates local and regional offices and a Washington-based research office, in addition to its headquarters in Baltimore. The bureaucratic apparatus of the "aging enterprise" has become bewilderingly complex: By the 1980s, 119 of the 306 congressional committees and subcommittees had some responsibility for income-maintenance programs benefitting the elderly (Estes 1979; Achenbaum 1986; Berkowitz 1987).

ADEA's hybrid nature, in short, suggests the recent origins of the legislation: "The 20th century marks the full emergence of a welfare administrative state characterized by policy elites, bureaucratic infighting and incremental politics" (Critchlow 1988, p. 24). The (mis)use and abuse of social-scientific statistics in analyzing age discrimination complaints, moreover, have parallels in applied policy arenas as disparate as disability evaluations and measures of children's poverty (Stone 1984; Haveman 1987). Yet efforts to succor the disabled and to ameliorate children's poverty predate the contemporary era. Reformers were deploring the plight of older workers in the early 1900s, if not before (Achenbaum 1978; Graebner 1980; Haber 1983),

so why was no age discrimination legislation enacted until the 1960s? Was age bias considered analogous to race or class in constraining employment opportunities? Has the emphasis on chronological age blinded analysts to other forms of employment discrimination? Let us take up each of these historical questions in turn.

The 1965 Department of Labor report on *The Older American Worker* (Wirtz 1965) identified structural lag—"sluggish human adjustment and impersonal economic accommodation to the present rapid pace of scientific and technological progress"—as the major factor causing age discrimination in employment: "The 'discrimination' older workers have most to fear . . . is not from any employer malice, or unthinking majority, but from the ruthless play of wholly impersonal forces—most of them part of what is properly, if sometimes too casually, called 'progress' " (pp. 21-22). Age discrimination seemed "arbitrary" in the sense that the relevance of age to job performance had never been demonstrated; structures that perpetuated the bias, however, were defended on different grounds (fiscal prudence) than their original purpose (equity). Federal action was necessary: "The possibility of new *nonstatutory* means of dealing with such arbitrary discrimination has been explored. That area is barren" (p. 37). No other level of government offered a suitable alternative. State officials lacked the funds and personnel to remedy the situation.

For most of the 1960s, all federal branches of government paid unprecedented attention to securing and safeguarding the rights of ordinary citizens to due process under law. New initiatives such as the Job Corps, VISTA, and community action programs were designed to broaden employment opportunities. The civil rights movement inspired women, Hispanics, Native Americans, gays, and the handicapped to file class-action lawsuits to fight discrimination. Eager to complete the New Deal agenda and to set standards befitting a Great Society, federal officials took their cues from an activist court and sought a set of antidiscriminatory laws that would permit them to intervene on behalf of quiescent, seemingly powerless, elements of the population.

Not surprisingly, lawmakers and bureaucrats viewed the elderly as yet another group that deserved attention. Congress liberalized Social Security to reduce the threat of old-age dependency. The passage of Medicare and Medicaid in 1965 provided a way to help the aged pay

for some of their hospital costs and physicians' fees. The 1965 Older Americans Act (OAA) made an unprecedented commitment to improve the quality of life for senior citizens. The measure promised, among other things, "to assist our older people to secure equal opportunity to the full and free enjoyment of . . . an adequate income in retirement . . . pursuit of meaningful activity . . . [and] freedom, independence, and the free exercise of individual initiative in planning and managing their own lives." Enabling aging workers to build a retirement nest, to remain productive, and to choose when to stop working surely fit OAA's mandate. Consistent with the logic of incremental policy-making, getting ADEA enacted in 1967 was just a first step, but it would prove an important precedent for future efforts.

Yet to identify a generic pattern in incremental policy-making in the 1960s does not entitle us to homogenize the past. The federal government's efforts to fight age discrimination at first did not extend to those over 65. This is no anomaly: Presuming that the aged were different from younger people, other pieces of Great Society legislation excluded the old from programs, especially those that emphasized education and employment as ways to break the poverty cycle. "We have found no evidence of prejudice based on dislike or intolerance of the older worker. The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages, rather than around the people as such," declared the Wirtz (1965) report. "This issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to the ability to perform work" (p. 23).

Eliminating age discrimination merited federal involvement, but it was not a primary employment issue. In addition, if structural factors were the major culprit in most cases of age discrimination, and if (as the law required) the seniority system were to be allowed to stand, then it was going to be hard to know precisely when prejudice against age presented itself. This concern over policy boundaries was expressed in congressional debate about ADEA. "I am afraid that, in trying to assist those affected by the very real problem of age discrimination, we have pried open a can of legal worms," declared Sen. Peter Domenick (1967, p. 17).

The legal conundra associated with implementing ADEA did not diminish over time, as Bessey and Ananda (1991) rightly report. Nor were the philosophical issues surrounding the measure mitigated by more knowledge and greater experience. A certain ambivalence pervaded discussions of the 1978 ADEA amendments:

> Many would contend that "age" should have the same "suspect" status as race, national origin and alienage. On the surface, age classification for the purpose of mandatory retirement has many of the earmarks of unconstitutionality associated with the other classifications . . . As discussed earlier, however, the courts have upheld almost without exception the constitutionality of mandatory retirement on the basis of age. Proponents of mandatory retirement have been for the most part successful with the courts in maintaining age as a "non-suspect" classification. (U.S. House of Representatives Select Committee on Aging 1977, pp. 37-38)

Economic data generated by the Social Security Administration's Virginia Reno (1971) and Brandeis University's James Schulz (1974), which indicated that less than 10% of a recent cohort of retired male workers was unable to find new jobs, probably defused some of the controversy over raising the ceiling of ADEA protection from age 65 to 70. But the real incentive for amending ADEA was the expectation of savings for the Social Security trust funds. "The relationship between mandatory retirement and the future of the social security system is simple," observed Rep. Mario Biaggi (Congressional Record 1977). "Forced retirement imposes an unnecessary expense on the social security system, an expense which the system cannot afford" (p. 29007). Finding a relatively painless, quick fix for short-term problems tends to drive congressional thinking. The real significance of amending ADEA was that the changes served other, larger purposes.

The prevailing political culture shapes laws. But recognizing this fact is not the only reason why aging-policy development must be interpreted as a reflection and response to the times. Sensitivity to the "big picture" reveals blindspots. The dynamics inherent in the hybrid, categorical, incremental evolution of particular policies like ADEA may have distracted lawmakers and analysts alike from the "subtle revolution" (Smith 1979) transforming the workplace. A majority of women, regardless of marital status and number of young children,

are now in the labor force. There is no question that Title VII has had a major impact on protecting women's employment rights—despite the fact that the issue was added at the last moment to the intent of the 1964 CRA. The depth of ADEA's interest in older women is harder to gauge. The 20th Annual Report of the EEOC, then chaired by Clarence Thomas, stressed that a reduced staff was able to manage a greater number of "aged" cases in under 300 days. Yet in its tables detailing the basis of discrimination being charged, sex, age, and equal pay are listed in separate categories. Most of the notable ADEA cases reported involve older men. Might not an excessive concern with age have confounded people's understanding of the gender-specific variations associated with aging, differences that are reshaped by historical time?

Far more must be done to put ADEA into historical context. Getting the legal framework right is a first step. It is essential to determine how much the dominant values of the Kennedy and Johnson administrations, which gave rise to ADEA, have been undercut by neoconservative currents in all branches of the federal level. To what extent have ideas about age, women, and rights taken on new shades of meaning during the past quarter-century? Yet for all of the change, an issue challenging policymakers in the 1960s remains critical: how important has chronological age per se been in fueling discrimination in the labor force of an aging society—and how confident are experts in their answers?

REFERENCES

Achenbaum, W. A. 1978. *Old Age in the New Land.* Baltimore, MD: Johns Hopkins Press.

———. 1986. *Social Security.* New York: Cambridge University Press.

Berkowitz, E. D. 1987. *Disabled Policy.* New York: Cambridge University Press.

Bessey, Barbara L. and Srijati M. Ananda. 1991. "Age Discrimination in Employment: An Interdisciplinary Review of the ADEA." *Research on Aging* 13:413-57

Congressional Record. 1977. September 13, Pp. 29006-8.

Critchlow, D. T. 1988. "Introduction." Pp. 3-27 in *Federal Social Policy*, edited by D. T. Critchlow and E. Hawley. University Park: Penn State University Press.

Domenick, P. H. 1967. "Individual Views." Pp. 15-16 in U.S. Senate, 90th Cong., 1st sess., "Age Discrimination in Employment Act of 1967," report 723.

Estes, C. L. 1979. *The Aging Enterprise. San Francisco: Jossey-Bass.*

Graebner, W. 1980. *A History of Retirement.* New Haven, CT: Yale University Press.

Haber, C. 1983. *Beyond Sixty-Five.* New York: Cambridge University Press.

Haveman, R. H. 1987. *Poverty Policy and Poverty Research.* Madison: University of Wisconsin Press.

"The Older Americans Act of 1965." U.S. Public Law 89-73.

Reno, V. 1971. "Why Men Stop Working At or Before Age 65." *Social Security Bulletin* 34(June):3-16.

Schulz, J. H. 1974. "The Economics of Mandatory Retirement." *Industrial Gerontology* 1(Winter):1-22.

Smith, R. E., ed. 1979. *The Subtle Revolution.* Washington, DC: Urban Institute.

Stone, D. A. 1984. *The Disabled State.* Philadelphia, PA: Temple University Press.

U.S. House of Representatives, Select Committee on Aging. 95th Congress, 1st session. 1977. *Mandatory Retirement,* Pub. 95-91. Washington, DC: U.S. Government Printing Office.

Wirtz, W. W. 1965. *The Older American Worker.* Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964. Washington, DC: U.S. Government Printing Office.

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