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# AGE DISTINCTIONS AND THEIR SOCIAL FUNCTIONS

BERNICE L. NEUGARTEN\*

Among social scientists and legal scholars an interest in the relationship between age and the law has been spurred by two recent legislative actions of Congress. The first was the enactment of the Age Discrimination Act of 1975.<sup>1</sup> The ADA bars discrimination on the basis of age in any program receiving federal support if that program was not explicitly aimed at a particular age group. The ADA applies across the age spectrum, to both the young and the old.

The second action was the 1978 amendment to the Age Discrimination in Employment Act of 1967.<sup>2</sup> The original Act barred discrimination in the workplace for persons age 40 to 65.<sup>3</sup> The 1978 amendment raised the protections to age 70,<sup>4</sup> prohibited mandatory retirement in the private sector before age 70,<sup>5</sup> and prohibited mandatory retirement altogether for most federal employees.<sup>6</sup>

These two new laws come at a time when public concern over the legal rights of children and adolescents, the so-called children's movement, has been growing. With reference, then, to both the young and the old, age rights constitute a new focus in the arena of civil rights, and age, like race or gender or physical handicap, is coming into public

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1. Pub. L. No. 94-135, tit. III, §§ 301-308, 89 Stat. 728 (codified at 42 U.S.C. §§ 6101-6107 (1976 & Supp. III 1979)) [hereinafter referred to as the ADA]. The ADA provides:

Pursuant to regulations prescribed under section 6103 of this title . . . no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

*Id.* § 6102.

As originally enacted, the ADA provided that no regulations promulgated for its enforcement would be effective before January 1, 1979. 42 U.S.C. § 6103(a)(5) (1976) (amended 1978). The 1978 amendments to the ADA extended that date to July 1, 1979. 42 U.S.C. § 6103(a)(5) (Supp. III 1979). The United States Department of Health and Human Services subsequently promulgated regulations for the enforcement of the ADA. 45 C.F.R. §§ 90.1-90.62 (1980).

2. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (amending 29 U.S.C. §§ 621-634 (1976)).

3. 29 U.S.C. § 631 (1976) (amended 1978).

4. 29 U.S.C. § 631(a) (Supp. III 1979).

5. *Id.* § 623(f)(2). This section provides that no seniority system or employee benefit plan shall require or permit the involuntary retirement on the basis of age of any individual to whom the Act applies.

6. *Id.* § 631(b). This section sets a lower limit of 40 years of age for the protected federal employees listed in § 633(a) of the Act but sets no upper age limit.

awareness as a dimension of human difference that calls for legal regulation.

A few examples will delineate some of the issues. Under the regulations promulgated by the United States Department of Health and Human Services pursuant to the ADA, each federal agency which extends federal financial assistance to any program or activity is required to conduct a review of the age distinctions it imposes on its recipients by regulations, policies, and administrative practices in order to eliminate those distinctions that are impermissible under the ADA.<sup>7</sup> Similar steps are to be followed by all public and private agencies at the state and local level that are recipients of federal funds.<sup>8</sup> In the interpretation of the ADA made by the Department of Health and Human Services in formulating its regulations, major exceptions were permitted which seem to water down the effects of the ADA.<sup>9</sup> The ADA is nevertheless an important step in setting forth the view that the age of the beneficiary should not itself be a relevant characteristic in the distribution of public funds.

The problems are enormous in implementing the ADA and in deciding what constitutes age discrimination.<sup>10</sup> Is it discriminatory toward younger people when special benefit programs like Medicare are created for older people? And at the state level, is it discriminatory to

7. 45 C.F.R. §§ 90.32-90.34 (1980).

8. *Id.* §§ 90.41-90.50. Indeed, the regulations expressly state that the recipient agencies have primary responsibility to insure that their programs and activities are in compliance with the ADA. *Id.* § 90.42(a).

9. For example, 45 C.F.R. § 90.14 (1980) provides:

A recipient is permitted to take an action, otherwise prohibited by section 90.12, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

- (a) Age is used as a measure or approximation of one or more other characteristics; and
- (b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and
- (c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and
- (d) The other characteristic(s) are impractical to measure directly on an individual basis.

Similarly, 45 C.F.R. § 90.15 (1980) provides:

A recipient is permitted to take an action otherwise prohibited by section 90.12 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

10. See Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979).

require a 65-year-old, but not a 64-year-old, to pass a vision test before obtaining a driver's license or to allow a 16-year-old, but not a 15-year-old, to drive an automobile? Such distinctions are presently legal, but they may come to be regarded as unjust or inequitable as the ADA adds to a rising public consciousness about age distinctions and age rights.

Another example is one that deals with the young and with changes in legal definitions of maturity. A California law passed in 1979, known as the Emancipation of Minors Act,<sup>11</sup> is designed to help teen-agers who have fled intolerable family situations. Children who are at least 14 can be declared independent of their parents and, if they are living away from home and supporting themselves, can receive the right to be treated for most legal purposes as adults.<sup>12</sup> A similar law was passed in Connecticut in 1979 whereby minors 16 and older who are seeking emancipation can petition the Superior Court for Juvenile Matters.<sup>13</sup> If the court finds that they are capable of supporting themselves and are willingly living apart from their parents, they may be declared legally emancipated.<sup>14</sup> These two laws are significant examples of changing attitudes towards age distinctions and concepts of maturity.

Implicitly or explicitly, these illustrations involve many of the issues that intrigue social scientists who turn their attention to age and the law. Attempts to analyze the interactions of law and society rest on two fundamental premises: that legal systems exist within an encompassing sociocultural system and that much of the social fabric is woven together with the threads of legal license and mandate.<sup>15</sup> These tenets reflect the further understanding that the legal system and other social systems interact in mutually determining ways. Embedded in that interaction are a number of common issues such as legitimation, authority, social change, the nature of consensus, and conflict resolution. These general points need no elaboration here. But it happens that, with a few notable exceptions, social scientists have given little attention to such issues as they bear upon questions of age and the law.<sup>16</sup>

11. CAL. CIV. CODE §§ 60-70 (West 1980).

12. *Id.* § 64.

13. CONN. GEN. STAT. ANN. §§ 46b-150 to 46b-150e (West Supp. 1981).

14. *Id.* § 46b-150b.

15. See L. FRIEDMAN, *THE LEGAL SYSTEM* (1975); H. HART, *THE CONCEPT OF LAW* (1961).

16. See H. PRATT, *THE GRAY LOBBY* (1976); Cain, *Aging and the Law*, in *HANDBOOK OF AGING AND THE SOCIAL SCIENCES* 342 (1976); Cottrell, *Governmental Functions and the Politics of Age*, in *HANDBOOK OF SOCIAL GERONTOLOGY* 624 (C. Tibbitts ed. 1960); Hudson & Binstock,

The first set of questions that arise for social scientists relate to changing social values and attitudes with regard to age distinctions, how age distinctions become formalized in the legal system, and how legal decisions, whether statutory, regulatory, or judicial, shape these attitudes.

Another set of questions relate to the use of age as a proxy for some other attribute which is deemed significant in making distinctions between members of society. In the case of the emancipation of minors, that attribute might be called social maturity. In the case of mandatory retirement, it might be called incompetence in the workplace. When is it reasonable to use age as a proxy? What is the scientific evidence that age is reliably related to the attribute under discussion? When age is used as a proxy, at what particular ages are the distinctions to be drawn? In the emancipation of minors, why is 14 the age of eligibility in California, but 16 in Connecticut? And in the example of mandatory retirement, why is it permissible to retire persons above but not those below age 70?

A special set of questions arise in determining discrimination under the ADA. Here, discrimination does not relate to an age distinction per se, but to the age distribution of persons served by a given government program when compared to the age distribution of the population eligible for the service. How much discrepancy between the two age distributions constitutes discrimination?

An additional set of questions relate to the individual versus the group. When is it reasonable to treat the individual as a member of the age group to which he belongs, and when must individual differences be respected? For example, in the emancipation of minors, it is only certain 16-year-olds, those who can demonstrate to the satisfaction of the court that they are economically independent, who are given freedom from parents. Yet, in the situation of mandatory retirement, it has been held equitable to retire a person who is performing satisfactorily merely because it can be shown that in the population at large certain

*Political Systems and Aging*, in HANDBOOK OF AGING AND THE SOCIAL SCIENCES 369 (1976); Schmidhauser, *Age and Judicial Behavior: American Higher Appellate Judges*, in POLITICS OF AGE 101 (1962) [hereinafter referred to as *Age and Judicial Behavior*]; Cain, *The Growing Importance of Legal Age in Determining the Status of the Elderly*, 14 GERONTOLOGIST 167 (1974) [hereinafter referred to as *Growing Importance*]; Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, 39 L. & CONTEMP. PROB. 78 (1975); L. Cain, *Counting Backward From Projected Death: An Alternative to Chronological Age in Assigning Status to the Elderly* (March 22, 1978) (paper presented at a conference of the Policy Center on Aging, Syracuse University); J. Schmidhauser, *Changing Age Structure of American Political Leadership* (1977) (paper presented at the 30th Annual Meeting of the Gerontological Society, San Francisco, Cal.).

types of intellectual decline appear in persons over 70.<sup>17</sup> In the first instance, the law is saying that not every 16-year-old is the same. But in the second instance, the law is saying, in effect, that every 70-year-old is the same.

The lawyer will recognize that such questions relate directly to various legal issues such as whether or not issues of constitutional rights are involved, what are the bases for redress, what is the definition of suspect classes, when is the strict scrutiny or the minimum rationality standard to be used in judicial review, what are the questions of due process and equal protection under the law, when are categories of persons over- or under-inclusive, when are conclusive presumptions operating, and what is prima facie evidence of discrimination. And obviously enough, issues of social equity and justice under the law underlie all the questions raised here. But analyses of the legal, philosophical, and ethical doctrines lie beyond the scope of this paper. The comments which follow are addressed to only a few of the social science questions. The intent is first to describe, in broad strokes, the social processes which give rise to age distinctions and age discriminations, then to illustrate briefly a few of the problems in determining discrimination, and in doing so, to indicate some of the ways in which social scientists and legal scholars come together in pursuing issues of age and the law.

#### AGE-STATUS SYSTEMS

To the anthropologist and the sociologist, age is a major dimension of social organization. To the psychologist, it is a major dimension by which the individual organizes his life course and interprets his life experience. The age organization of society is a socially and psychologically meaningful system. It is within this system that age distinctions are created and age discrimination arises.

All societies rationalize the passage of life time, divide life time into socially relevant units, and thus transform biological time into social time. Certain biological or social events come to be regarded as significant punctuation marks in the life course and to signify the transition points from one age status to the next. Thus, to take a familiar example, puberty is regarded in some societies as the event which marks the entry into adulthood, and elaborate *rites de passage* mark its importance. In other societies like our own, puberty carries little significance with regard to age status, and entry into adulthood is marked

17. See *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), cert. denied, 444 U.S. 906 (1979).

instead by marriage and parenthood or by the achievement of economic independence.

In all societies, age-status systems emerge in which rights, rewards and responsibilities are differentially distributed to socially defined age groups. Life periods in the lives of individuals become parallel with age grades in the society; and age grades in turn constitute an age-stratification structure.<sup>18</sup>

In societies where the division of labor is simple and the rate of social change is slow, a single over-arching age-status system may emerge in which family, work, political, and religious roles are synchronized, allocated, and regulated according to the individual's position in the age structure.

To call attention to such age-graded societies is not to equate a simple society with a modern industrial society, but to help clarify the functions of age distinctions. Thus, in some East African societies, males born over a given period of time are assigned membership in a given age-set and then proceed as a group from one age-grade to the next. In one such society there are six overlapping age-grades after childhood: the junior warrior or "youth," occupied by males aged 14 to 23; the senior warrior, occupied from about 20 to 30; the learning elder status, from 14 until the oldest child is to be circumcised; the junior elder status; the senior elder status; and the priestly status. Men move from warrior to elder status when they marry; they reach priestly status only when all their children are circumcised and when they no longer have wives of childbearing age.<sup>19</sup>

Age-grades and age-status systems are built upon functional age. That is, as the individual's physical, mental, and social competencies change over time, he is able to carry out different social functions. Those competencies are utilized and systematized in the interests of the society at large. Social age distinctions appear, therefore, because they are inherently functional to the society.

In modern, complex societies, plural systems of age-status arise, also based on perception of functional age, but are differentiated in relation to particular social institutions. These multiple systems make use of the common index of chronological age, but age distinctions vary in the extent to which they become explicit and formal. Age-grading in a typical American school, for instance, is much more formal

18. See 3 M. RILEY, M. JOHNSON & A. FONER, *AGING AND SOCIETY—A SOCIOLOGY OF AGE STRATIFICATION* (1972).

19. See A. PRINS, *EAST AFRICAN AGE-CLASS SYSTEMS* (1953); Gulliver, *Age Differentiation*, in 1 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 157 (D. Sills ed. 1968).

than in the typical American family. Social age definitions may be inconsistent from one institutional setting to the next, as in the case when persons marry and become parents and are therefore considered adult in the family system, but at the same time continue in school and are not yet adult in the economic system. In modern societies, then, age-role transitions are often asynchronous.

Any age system, whether in a simple or a complex society, thus performs two functions. For the individual, it establishes a series of social positions that provides clarity and predictability, regular movement from lower to higher rungs of the age-status ladder, and a certain coherence as new role patterns are automatically assigned with increasing age. For the society, it provides for an effective division of labor, in the broadest sense of that term, thereby establishing a social mechanism for maintaining the economy, the educational system, the family system, and the military, political, and religious systems.

### *Age Distinctions and Age Norms*

Age status systems, by definition, create age distinctions, and along with them, a pattern of norms and expectations regarding age-appropriate behavior. Age norms vary in the degree to which they are formalized and in the strength of the sanctions attached to them. Some operate on the basis of informal consensus; others are stipulated in the laws. In both instances they are mechanisms of social control.

It might be noted, parenthetically, that age norms form a network of expectations that pervade the whole cultural fabric. Men and women are aware of the social clocks that operate in various areas of their lives and they are aware of their own timing. In our society, people readily describe themselves as being early, late, or on time with regard to family and occupational events. In different words, age norms act as prods and brakes upon behavior, in some instances hastening a life event, in other instances delaying it. But age norms also operate in more peripheral areas of life, as when a woman is told, "You're too old to be working so hard," or a man is told, "You're too young to dress like that." Adults as well as children are constantly exhorted to act their age.

Although social scientists have given relatively little attention to age norms, there are at least a few studies that demonstrate a high degree of consensus with regard to age-appropriate behaviors, with common patterns of approval and disapproval expressed by representative groups of adults. It also appears that young persons perceive more age



constraints operating in the society than do middle-aged or older people, a finding that parallels the fact that a great number of laws exist that regulate the rights and responsibilities of young people.<sup>20</sup> Finally, in this connection, there are sets of data indicating that age norms and age constraints may, at least in some ways, be losing their saliency as regulators of the life course<sup>21</sup> at the same time that age distinctions are increasing in the law.

### *Historical Change*

Age status systems become altered over time as they reflect other kinds of social changes. For example, with increased longevity, the timing of the life course has changed. Historians say that in Western societies it was not until the 17th and 18th centuries, with the growth of industrialization, the appearance of a middle class, and the emergence of formal educational institutions, that childhood became a discernible period of life, one with special needs and characteristics.<sup>22</sup> The concept of adolescence took on its present meaning in the last part of the 19th century, but became a widespread concept only in the 20th century.<sup>23</sup> A new stage called youth has emerged in the last few decades as the transition from adolescence to adulthood has been prolonged.<sup>24</sup> And in the second half of the life course, there is now a delineated period called middle age;<sup>25</sup> and more recently still, the recognition that the young-old should be differentiated from the old-old.<sup>26</sup>

As the United States has moved from the agrarian to the industrialized, from small town to metropolis, there have been other alterations in our age-status systems. The family cycle may be said to have quickened as marriage, parenthood, and grandparenthood occur earlier now than in 1900, but as widowhood occurs later. In our economic institutions, points of entry and exit from the labor market are differently

20. See Neugarten, Moore & Lowe, *Age Norms, Age Constraints, and Adult Socialization*, 70 AM. J. SOC. 710 (1965).

21. See P. Passuth, *Continuity and Change in Age Norms and Age Constraints* (April 15, 1981) (unpublished paper in Northwestern University Department of Sociology Library); R. Sills, H. Zepelin & M. Brill, *Age Norms: 1960s and 1980s Compared* (Nov. 14, 1980) (paper presented at the 33d Annual Meeting of the Gerontological Society, San Diego, Cal.).

22. See P. ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (1962).

23. See J. GILLIS, *YOUTH AND HISTORY* (1974); Demos & Demos, *Adolescence in Historical Perspective*, 31 J. MARR. & FAM. 632 (1969).

24. See PRESIDENT'S SCIENCE ADVISORY COMM., *PANEL ON YOUTH, YOUTH: TRANSITION TO ADULTHOOD* (1973); Keniston, *Youth: A New Stage of Life*, 39 AM. SCHOLAR 631 (1970).

25. See Neugarten, *The Awareness of Middle Age*, in *MIDDLE AGE AND AGING: A READER IN SOCIAL PSYCHOLOGY* 93 (B. Neugarten ed. 1968).

26. See Neugarten, *Age Groups in American Society and the Rise of the Young-Old*, 415 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 187 (1974).

timed as the growth of technology and the lengthened period of education have led to a delay, particularly for men, in reaching maturity, and as the trend toward earlier retirement has led to an earlier old age as socially defined. In our political institutions, maturity now comes earlier, with the eligibility to vote at 18 rather than 21. And there has been a proliferation of laws relating to pensions, housing, and medical and social services for older persons that, as some have described it, are creating a separate status for the old.<sup>27</sup>

Social lags and social strains are often reflected in age-status systems, and social and legal age definitions that have been functional in one period of history may become dysfunctional in another. To take another example from an African society: There may be times when, to create a group large enough to be functional in the society, the limits of an age-set are widened. When such an age-set reaches the point of becoming junior elders, it may include, as anticipated, men of marriageable age, but it may also include other men who, if the rules of the system were to be followed, would have been held back from marriage and parenthood. This would create intolerable strains both for the individuals involved and for the whole community.<sup>28</sup> Or, when such a society comes into contact with a western culture and many young men move to the city in search of jobs, there are too few males left in the village to carry out the essential social tasks. As a result, the rules of the age-status system are changed to accommodate such situations.

The same general principle operates in more complex societies. In the United States, the presence of large numbers of vigorous older persons, together with the changes in the economy that motivate them to continue in the labor market, produce pressures for change in the systems that regulate retirement. Modifications in the law, as in the ADEA amendment mentioned earlier, constitute change in the age-status system. Another example, also mentioned earlier, is the lowered age of voting. The appearance of large numbers of politically active young people in the late 1960s, their presumed greater maturity as compared to preceding generations, and the fact that 18-year-olds were in the armed forces but were being denied the franchise until age 21—itsself an excellent example of the asynchronous nature of our age systems—led to the 26th amendment. Lowering the voting age to 18 was a change in the rules regarding age status. Still another example arises in

27. See *Growing Importance*, *supra* note 16.

28. See Foner & Kertzer, *Intrinsic and Extrinsic Sources of Change in Life-Course Transitions*, in *AGING FROM BIRTH TO DEATH* 121 (M. Riley ed. 1979).

the present public debate over legalized abortion, where some of the arguments turn on the issue of the age at which a fetus becomes a "person" with rights to legal protection.

In all three examples—the first related to the economy, the second to the political system, and the third to the family—the questions are the same: How and where should an age distinction be created? When does an age distinction become age discrimination?

These points can be summarized as follows: Functional age becomes transformed into social age, and social ages into age distinctions. A pervasive network of age norms and age expectations becomes a system of social control. Some age distinctions become formalized in the laws. In a bureaucratic society like our own, chronological age becomes the index of social age and is used as the proxy for functional age. As the age-status system adapts to other forms of social change, various chronological ages imbedded in the laws lose their original value. Some become outmoded; others become discriminatory in the views of legislators, administrators, and the courts.

### *New Images of Old Age*

Perceptions of age groups are reflected in the social policies of a modern society, and therefore in the laws. These perceptions, as already implied, relate to the size of an age-status group and to the characteristics perceived to be common to members of that group. These issues are taking on new importance in the 1980s with regard to old age. Who is to be regarded as old? What should be the lower age boundary? And because of what characteristics? These are very real questions in political decision-making and in the formulation of government policies and programs.<sup>29</sup>

In the past several decades there has been an image of older people as persons in need. Thus, there are the programs of Supplementary Security Income, Medicare, senior centers, and publicly subsidized housing. All these are legal expressions of the view that older persons are economically disadvantaged, physically ill or vulnerable, diminished in intellectual and social competence, and therefore deserving of special concern and protection.

At the same time, there is the view, based on equally compelling sets of data, that most older people are healthy and active and relatively comfortable financially; that they constitute a major resource in

29. See generally *How Old Is "Old"? The Effects Of Aging On Learning And Working: Hearing Before the Sen. Special Comm. on Aging*, 96th Cong., 2d Sess. (1980).

the nation's economic and community life; and that the policy goal is, therefore, to remove constraints which affect their employment and create various other forms of social segregation.

This disparity of images is well illustrated in the rising debate over changes in the social security system. The social security program began with the premise that it is appropriate and socially desirable for persons to retire at age 65. But the present trend toward abolishing mandatory retirement, and the view that the right to continue to work is a civil right, are based on a contrary premise—that it is appropriate and desirable to prolong the work life of older people.

To take another example: The establishment of senior centers, nutrition sites and elderly housing projects are based on the premise that at least a certain degree of age segregation is reasonable and even desirable. At the same time, such programs as Foster Grandparents or Elderhostels are promoted as a means of combating age segregation. An even more telling example is the paradox that exists within a single law. The 1978 amendments to the Older Americans Act confirmed the age-categorical programs established under that Act, but at the same time added a general prohibition against age discrimination.

If cohesive and rational policies are to be created in the 1980s regarding government responsibility for older people, these disparate images will need to be reconciled. One astute observer has delineated three alternatives.<sup>30</sup> The first stems from the view that age itself is a poor predictor of the adult's capacity, circumstance, or need. Like gender or race, age does not determine health, marital status, economic status, or intellectual or social competence. If the role of government is to provide opportunities commensurate with the individual's abilities and services commensurate with the individual's needs, then programs should be age-neutral rather than age-categorical. Efforts should be targeted at various needy groups rather than at the old as a group.<sup>31</sup>

This view, sometimes called the "age-irrelevant" view, would lead to laws that eliminate age discrimination not only in employment practices, but in credit practices, professional licensing and other public regulatory activities; to age desegregation of publicly subsidized housing; to the conversion of age-based tax exemptions and income transfer programs into income-based eligibility; and to the conversion of Medicare

30. D. Nelson, *Observations on Current and Future Bases for Effective National Policy Advocacy on Behalf of Older People* (Sept. 15, 1980) (paper prepared for the Federal Council on Aging, Washington, D.C.).

31. See Neugarten, *Policy for the 1980s: Age or Need Entitlement?*, in *AGING: AGENDA FOR THE EIGHTIES* 48 (1979).

into an income-based program like Medicaid or a national health insurance program that would cover persons of all ages. Under this view, the goal is to mainstream older people into the larger society; to move away, wherever possible, from the use of age as a proxy; and to move to direct measures of competence or need.

The second alternative is to redefine old age by moving it up to age 75, and to work toward synchronization of the laws in this respect. Thus, instead of the multiple definitions that now exist in the statutes, a single definition would be the basis for special benefits and protections. Such a policy would reaffirm the notion that there is an increased frequency of economic, social, and health needs, as well as an increased prevalence of frailty and impairment, in persons over 75, and that programs should be tailored accordingly. This position would lead to laws prohibiting mandatory retirement until age 75, and laws based on 75 as the age of eligibility for Medicare, subsidized housing, and subsidized social services. Under this alternative, chronological age would still be used as the proxy for need, and the problem of how to avoid an over- or under-inclusive age group would remain, a point which will be discussed below.

The third alternative is called veteranship and is based on the view that old age is an earned status that should provide special rewards and benefits. This alternative recognizes the value of long life experience. Because older persons have contributed throughout their lives to the good of society as parents, workers and community supporters, old age should become the occasion for the community's repayment. Older people are a group who deserve special respect, enhanced authority and prestige. They should be given the status of elders, in the best sense of that term.

In providing a full range of life options for older people, and an end to age segregation and age discrimination, the goal is much the same as in the "age-irrelevant" position. The difference is that the veteranship view would lead to a wide array of laws creating special benefit programs for older people. Chronological age would still be the basis for eligibility, and the problem would remain of determining what particular chronological age should denote admission to the status of veteran or elder.

These alternative views of old age provide a timely example of how perceptions of age groups are changing, and how such changes affect the laws. It remains to be seen which of these views will become the prevailing one in the decade ahead.

## DISTINCTIONS AND DISCRIMINATIONS UNDER THE LAW

As is true in other areas, the laws that establish age distinctions are sometimes proscriptive, sometimes prescriptive, and sometimes permissive. They pervade most areas of life, including the allocation of public resources, the extension and denial of benefits, the imposition of legal burdens, and the relaxation of legal responsibilities. There are other familiar examples. The age of the perpetrator, or even that of the victim, is sometimes an element of a criminal offense; state laws bar the hiring of police officers or firemen over age 35; public schools may bar 3-year-olds; and zoning laws may exclude children, thus creating communities that are only for the elderly. Special legal protections exist for the young and the old, as in guardianship cases where the principle of *parens patriae*<sup>32</sup> is invoked.

*The Pervasiveness Of The Law*

That age distinctions are embodied in the laws is not surprising; however, the extent to which such laws create a system of social control has seldom been documented. A study conducted twenty-seven years ago illustrates one type of research that would be enlightening, research that today, given the advent of the computer, might be more easily undertaken. In 1954, an analysis of the Illinois laws containing references to age disclosed 178 such statutes.<sup>33</sup> Nearly 75 percent of those laws referred to the years of life from birth through age 21. Most of them aimed at the protection of children, and, as might be expected, most of them dealt with the provision of physical care and education, the prohibition of child labor, and responsibility for criminal offenses. Those statutes that referred to ages 16 to 21 were usually enabling in nature, providing for adult participation in the society. There were very few laws dealing with the years between 22 and 50. Of the 20 percent of the statutes that referred to ages above 50, most dealt with pensions or age of retirement in various occupations, or with protections for frail older persons. While this 1954 study of Illinois law may be dated, it is still noteworthy, for it indicates the pervasive role of the law in creating and maintaining the age-status system.

32. *Parens patriae* refers to the role of the state as the sovereign and guardian of persons under a legal disability. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

33. L. Evans, Legal Definition of Age as Contained in Illinois Statute Law (Aug. 1954) (unpublished master's degree thesis in University of Chicago Library).

*Changes In The Legal Culture*

It has been noted above that alterations in age-status accompany other types of social change. As is true of the family or the economy, changes in the legal system itself and in the culture that surrounds it affect the extent to which age distinctions become formalized in the law. The scope of due process under the law has been broadened in this country over the past few decades. More people now have a voice about more things that come before the courts, and the courts have confirmed some rights that formerly did not exist. New branches of the law have emerged, such as consumer law and environmental law, and civil rights law has been applied to new situations. New forums have emerged for the community's intervention in governmental and court decisions.

There has been an increase in the use of the law as a means of social control. Not only have levels of legal activity risen, but perceptions and attitudes about the law have shifted. We have been witnessing the appearance of the so-called litigious society, in which individuals increasingly turn to the courts for the resolution of conflicts that would earlier have been resolved privately.

Again, research is lacking with regard to the effects of these changes on the age-status system, but the two statutes mentioned at the beginning of this paper, the Age Discrimination in Employment Act and the Age Discrimination Act, are good examples of how the legal system now governs new areas of life and how it operates to sharpen age distinctions and discriminations.

*Age As a Proxy*

In discussing the pervasiveness of the laws regarding age, a parallel point which should be noted is that age is used as a proxy for a wide range of characteristics such as intellectual and emotional maturity (e.g., minimum ages for entering school), readiness to assume adult responsibilities (e.g., minimum ages for voting, drinking, driving and marriage), physical strength or speed of response (e.g., maximum ages for policemen, bus drivers, or air-line pilots), economic productivity (e.g., age of retirement), and various types of debility (e.g., ages for eligibility for medical services and social services).

The use of age as a proxy has a major advantage and a major disadvantage. The advantage is that age is a classic example of a "for-

mally realizable rule.”<sup>34</sup> That is, there is little or no discretion needed in determining how to apply it. Either a person is 18 years old or he is not. Thus, the use of age takes on new social functions in a bureaucratic society. It makes decision-making easier for law-makers and government officials, as well as for judges. It is less costly than using more individualized assessments of functional age. Expediency and cost-effectiveness are important social values.

The major disadvantage is that the validity of using age as a proxy depends upon the correspondence between age and the characteristic for which it stands, and the presumed correspondence often is not based on good evidence, but on age stereotypes (e.g., it is often presumed that most older people are poor, but in fact, the proportion of older people who are poor is not much different from the proportion of younger people who are poor). Furthermore, to use age as a proxy means to use particular ages as cut-off points. The age classifications that result are then under-inclusive (some 14-year-olds are as mature as the 16-year-olds who are permitted to drive) or over-inclusive (not all 65-year-olds are in need of tax relief).

Thus, the use of age as a proxy involves a trade-off between different social values—expediency versus accuracy. The extent to which a category is over- or under-inclusive is an important determinant of the constitutionality of legal classifications. But an imperfect classification may be allowed to stand if, in the eyes of the law, it is based on some degree of rationality or “reasonableness.” Thus, it is a legitimate interest of the state to ensure a vigorous judiciary; and it is regarded as reasonable that because persons over 70 are usually less vigorous than younger persons, judges should be retired at age 70. There are sometimes dramatic differences between the legal definition of reasonableness, the social scientist’s definition (as based on evidence of individual differences), and the social ethicist’s definition (as based on the rights of individuals).

### *Discrepant Age Distributions*

Age discrimination is an elusive enough concept when it relates to an age distinction. But it is also elusive when, as under the ADA, discrimination relates to age distributions: that is, when the age distribution of beneficiaries in a given program is compared to the age

34. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).



distribution of the eligible population in determining whether the two distributions are congruent.

When the ADA was first passed in 1975, Congress recognized that the extent of age discrimination in federal programs was unknown. It instructed the Commission on Civil Rights to undertake a study of the matter, saying that, in the light of the findings, the ADA would be amended as necessary and then implemented. The Commission on Civil Rights studied ten major programs and concluded that age discrimination was present in all of them, sometimes with regard to younger groups, and sometimes with regard to older persons.<sup>35</sup> This method of comparing distributions is, however, only a first step in determining discrimination. For if differences occur, it still must be decided if the discrimination is real or only apparent. Thus, the second step is to determine if the observed disparity is justifiable or not. This requires a value judgement. For instance, it is well known that older people constitute 11 percent of the population of the United States, but that they utilize more than 30 percent of all health expenditures. This fact is not usually regarded as discriminatory toward younger people because it can be demonstrated that older people more often suffer from ill health and therefore have greater need of health services.

This is the problem that arises at the operational level under the ADA. It is the same kind of problem that often arises in cases of alleged race or sex discrimination, where, for example, a whole array of data dealing with the hiring practices of a company as a whole is often scrutinized for evidence of discrimination rather than just the specific data regarding a particular plaintiff.

In relation to the ADA, a study by the Urban Institute focused on the Vocational Rehabilitation Program, one of the programs cited by the Commission on Civil Rights.<sup>36</sup> In this instance, older persons were underrepresented among programs beneficiaries. But in analyzing the data further, there are many factors which can be construed as reasonable bases for differential treatment. One factor is the source of referral. Younger clients are more often referred by educational institutions while older clients are referred by physicians. Many physicians believe older disabled persons should not work, and therefore do not refer them to the program. Another factor is that interactions between federal programs themselves affect the number of persons who apply.

35. U.S. COMM'N ON CIVIL RIGHTS, *THE AGE DISCRIMINATION STUDY (PART I)* (1977).

36. See M. GUTOWSKI & J. KOSHEL, *METHODS FOR ASSESSING AGE DISCRIMINATION IN FEDERAL PROGRAMS* (1977).

Many older persons, if successfully rehabilitated so that they become able to work, would lose other federal benefits. Other older persons are reluctant to be rehabilitated for lower-paying jobs than those they had earlier. Still another factor relates to outcomes, whereby there may be greater difficulty in placing an older worker after rehabilitation than a younger disabled worker. If equal numbers of older persons were to be served under the program, the cost-benefit ratio for the program would be unfavorable.

Thus, the determination of discrimination becomes as complex here as in the first category. Whether the question relates to a particular age distinction or to a distribution of beneficiaries, there is a wide area of discretion left to the administrators who write the regulations and the judges who make the decisions. Over the long term, the decisions will reflect the value patterns of the society and the perceptions of age groups that prevail at a given time in history.

Age distinctions of more subtle types can also arise from the tendency of those in the legal system to perceive age groups in stereotyped ways. These age-based stereotypes may influence legal decisions in a variety of covert ways.<sup>37</sup> These issues, like some of the others mentioned above, have seldom been studied. They are worthy of the research efforts of both social scientists and legal scholars.

#### CONCLUSION

This paper has dealt with only a small number of the issues and the complexities that face us in considering age distinctions, age discriminations, and the law. A case may be made that age is becoming an increasingly significant dimension of social organization. The changing demography is one contributing factor, but there are other factors. Some believe that age segregation is growing, although this itself is not a simple question. Bureaucracy brings with it the increasing use of age in sorting and sifting people. There are increasing numbers of government programs aimed at the young and at the old, and age criteria are increasingly being codified into law. Age is becoming accentuated in the formation of political interest groups. Age and the law will become an important area for scholarship as well as legal practice. It is to be hoped that students of society and students of the law will join together in helping this field to grow.

37. See *Age and Judicial Behavior*, *supra* note 16.

