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Age, Time, and Discrimination

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ABSTRACT

Discrimination scholars have traditionally justified antidiscrimination laws by appealing to the value of equality. Egalitarian theories locate the moral wrong of discrimination in the unfavorable treatment one individual receives as compared to another. However, discrimination theory has neglected to engage seriously with the socio-legal category of age, which poses a challenge to this egalitarian consensus due to its unique temporal character. Unlike other identity categories, an individual's age inevitably changes over time. Consequently, any age-based legal rule or private discrimination will ultimately yield equal treatment over the lifecourse. This explains the weak constitutional protection for age and the fact that age-based legal rules are commonplace, determining everything from access to health care to criminal sentences to voting rights. The central claim of this Article is that equality can neither adequately describe the moral wrong of age discrimination nor justify the current landscape of statutory age discrimination law. The wrong of age discrimination lies not in a comparison, but instead in the deprivation of some intrinsic interest that extends throughout the lifecourse. Thus, we must turn to non-comparative values, such as liberty or dignity, to flesh out the theoretical foundation of age discrimination law. Exploring this alternative normative foundation generates valuable insights for current debates in discrimination theory and the legal regulation of age.

INTRODUCTION

Richard Posner caused a stir in 2017 when he advocated for a mandatory retirement age of 80 for federal judges.[1] His comments were particularly pointed, given the retirement rumors that swirled around Justice Anthony Kennedy (then aged 80), and Posner's simultaneous attacks on the intellectual quality of current and former members of the Supreme Court.[2] While Posner was being characteristically provocative, his proposal would not be unique in our legal regime, which is full of age-based rules.[3] The

[1] Joel Cohen, Richard A. Posner, & Jed S. Rakoff, *Should There be Age Limits for Federal Judges?*, SLATE (July 5, 2017 5:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/should_there_be_age_limits_for_federal_judges.html ("I believe there should be mandatory retirement for all judges at a fixed age, probably 80." . . . "There are loads of persons capable of distinction as Supreme Court justices; no need for octogenarians.").

[2] *See id.* ("Anyone think there's a giant or giantess on the Supreme Court today?"). To his credit, Posner retired last year before his own age cutoff. *See* Jason Meisner & Patrick M. O'Connell, *Richard Posner Announces Sudden Retirement from Federal Appeals Court in Chicago*, CHI. TRIB. (Sep. 1, 2017), http://www.chicagotribune.com /news/local/breaking/ct-judge-richard-posner-retires-met-20170901-story.html.

[3] *See* JOHN MACNICOL, AGE DISCRIMINATION 4 (2006) ("Age distinctions, age stratifications, age judgments, and 'age-appropriate behaviours' are subtly woven into our patterns of thinking, as a way of making sense of the world.").

Constitution has no fewer than four age requirements for voting and running for elected office.[4] Federal regulations use age as a factor in determining criminal sentences as well as Social Security Disability benefits.[5] And at the state level, age is used to determine when you can enter into contracts,[6] get married,[7] or have sex.[8] The government is permitted to draw these types of age distinctions because they are subject only to rational basis review in the Equal Protection constitutional regime.[9]

At the same time that legal rules extensively employ age, antidiscrimination statutes prohibit its use in a variety of domains. For example, federal law prohibits discrimination on the basis of age in any program receiving federal financial assistance as well as in private employment decisions.[10] Many states prohibit age discrimination in housing as well.[11] In 2017, the California legislature went so far as to prevent the Internet Movie Database from publishing actors' ages so as to inhibit the use of that information in hiring decisions.[12] Age-based legal regulation even

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[4] *See* U.S. CONST. art I, § 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years"); *id.* at art I § 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years"); *id.* at art II § 1 ("neither shall any Person be eligible to that Office [of President] who shall not have attained to the Age of thirty five Years"); *id.* at amend. XXVI, § 1 ("The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.").

[5] *See* 21 U.S.C. 859(a) (2012) (doubling the penalty if the perpetrator is above eighteen and distributed a controlled substance to someone younger than twenty one); U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2010) ("Age (including youth) may be relevant in determining whether a departure is warranted"); Medical-Vocational Guidelines, 20 C.F.R. § Pt. 404, Subpt. P, App. 2 (2008) (describing the guidelines that incorporate age in evaluating eligibility for benefits).

[6] *See* 5 RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:3 (4th ed. 2010) (discussing the contractual age of majority in various jurisdictions).

[7] *See, e.g.*, N.J. STAT. ANN. § 37:1-6 (West 2016) (setting the age to marry at eighteen); OR. REV. STAT. ANN. § 106.010 (West 2016) (seventeen); TEX. FAM. CODE ANN. § 2.101 (West 2016) (eighteen).

[8] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1405(A) (2010) (setting the age of consent at eighteen); 720 ILL. COMP. STAT. ANN. 5/11-1.50(b) (West Supp. 2015) (seventeen); NEV. REV. STAT. ANN. § 200.364(6) (LexisNexis Supp. 2013) (sixteen).

[9] *See* Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement for foreign service officers at age sixty permissible under the Equal Protection Clause); Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (holding that police officers over the age of fifty did not constitute a suspect class).

[10] *See* 42 U.S.C. § 6102 (2012) (prohibiting age discrimination in "any program or activity receiving Federal financial assistance."); 29 U.S.C. §623 (2012) (prohibiting age-based employment discrimination).

[11] *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-64c (West 2017) (prohibiting the refusal to sell or rent because of age); VT. STAT. ANN. tit. 9, § 4503 (West 2016) (same).

[12] *See* CAL. CIV. CODE § 1798.83.5 (West 2017) ("A commercial online entertainment employment service provider . . . shall not . . . (1) Publish or make public the subscriber's date of birth or age information in an online profile of the subscriber."). This law was ruled

affects online dating: In early 2018, a court ruled that Tinder, the smartphone dating app, could not discriminate against people over thirty by charging them more for expanded in-app services.[13]

Despite this widespread incorporation of age into the law and contrasting legal rejection of private age discrimination, theorists have devoted scant attention to age as compared to other socio-legal categories, such as race, class, or sex.[14] This is unfortunate, as age is a salient social trait that is distinct from other identity categories in interesting and important ways. On the one hand, age is considered immutable because it is outside one's control, similar to race or sex.[15] On the other hand, it is also clearly mutable—like religion, class, and disability—because one's age changes over time.[16] Unlike these other mutable characteristics, however, age's mutability is deterministic rather than being a consequence of choice or chance. In other words, people *inevitably* age.[17] Thus, any legal rules that incorporate age inherently implicate either our past, present, or future selves.[18] These traits give age a unique temporal character, which influences determinations of when age-based distinctions might be wrongful.

Most discrimination scholars base their moral theories of discrimination—i.e. why discrimination is wrong and why the law should intervene to prevent that wrong—on the value of equality.[19] While capable

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unconstitutional on First Amendment grounds. *See* IMDB.com v. Becerra, No. 16-cv-06535-VC (N.D. Cal. Feb. 20, 2018) (order granting summary judgment).

[13] *See* Candelore v. Tinder, Inc., No. B270172, 2018 WL 580246, at *1 (Cal. Ct. App. Jan. 29, 2018) (concluding that this age distinction was contrary to law because it constituted "an arbitrary, class-based, generalization about older users' incomes").

[14] *See* Shaun Ossei-Owusu, *Racial Horizons and Empirical Landscapes in the Post-ACA World*, 2016 WIS. L. REV. 493, 504 (noting how age receives less attention than other categories such as race, class, and gender). Ageism, too, remains understudied. *See* Michael S. North & Susan T. Fiske, *An Inconvenienced Youth? Ageism and Its Potential Intergenerational Roots*, 138 PSYCHOL. BULL. 982, 982 (2012) ("[S]urprisingly scant research examines age-based prejudice, compared with racism and sexism.").

[15] *See* Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27, 32–33 (1979) (noting that an age-based rule "classifies individuals on the basis of a characteristic that is immanent and inescapable to them, one suggestive of neither culpability nor demerit.").

[16] *See* Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to A Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 236 (2010) ("Chronological age is mutable in the sense that it changes over time.").

[17] *See* FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 129–30 (2003) ("After all, it is not too far off the mark to observe that all of us fall into one of two categories: we are either old or hoping to get there.").

[18] *See* JENNIFER RADDEN, DIVIDED MINDS AND SUCCESSIVE SELVES 18–20 (1996) (describing how time renders the self heterogeneous).

[19] This makes sense insofar as equality exerts a steady influence on Western thought and the language of equality appears in the Constitutional text. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); AMARTYA SEN, INEQUALITY REEXAMINED 3 (1992) ("[T]he major ethical theories of social

of many formulations, equality is at its core a comparative value, which means that the wrong of discrimination derives from the differential treatment one person receives as compared to another similarly-situated individual.[20] The dominance of this comparative method in discrimination law has led some to call the field "equality law."[21]

The central claim of this Article is that equality can neither adequately describe the moral wrong of age discrimination nor justify the current landscape of statutory age discrimination law.[22] Equality fails to pinpoint the moral wrong of age discrimination in a wide range of cases because the relevant comparator in the analysis is always simultaneously someone of a different age as well as a past or future self.[23] In other words, age-based rules and private age discrimination will inevitably apply to everyone if they are fortunate to live long enough. Thus, it makes little sense to complain of unequal treatment—being denied the right to vote until age eighteen or being forced to retire at age eighty—so long as everyone is treated equally over their lifetimes.[24] Time serves to cure these momentary instances of age discrimination, whereas it does not do so for other forms of discriminatory treatment.

Thus, we must turn to non-comparative values, such as liberty or dignity, to flesh out the theoretical foundation of age discrimination law. Non-comparative values locate the wrong of discrimination in its violation of some continuous right or interest, regardless of whether or not other people are similarly deprived.[25] The substantive content of this interest may be

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arrangement all share an endorsement of equality in terms of *some* focal variable, even though the variables that are selected are frequently very different between one theory and another."); Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693, 697 (2000) ("The norm of equality, with its distinctive logic and force, has powerfully shaped the analysis of a range of critical social issues."); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 575 (1983) ("No value is more thoroughly entrenched in Western culture than is the notion of equality.").

[20] *See* Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 900 (2016) ("According to the comparative conception of discrimination, we determine whether X has suffered wrongful discrimination by looking at the treatment X has received . . . and comparing it to the treatment accorded to at least one other individual.").

[21] *See* Olatunde C.A. Johnson, *Equality Law Pluralism*, 117 COLUM. L. REV. 1973, 1993–97 (2017) (arguing for expanding equality law beyond antidiscrimination approaches); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1367 (2017) (analyzing equality law as if it were antidiscrimination law).

[22] This Article is not the first to question the value of equality or to contrast it with non-comparative approaches. For example, Peter Westen famously critiqued equality as lacking substantive content and as engendering intellectual confusion. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). This Article does not engage in such a wholesale critique of equality. The narrower focus is on how equality falters in pinpointing the moral wrong of age discrimination due to age's unique temporal character.

[23] *See infra* Part II.A.

[24] *See infra* Part II.B.

[25] *See infra* Part III.

fleshed out in various ways, such as access to fundamental human capabilities,[26] the freedom to deliberate free of costs imposed from morally irrelevant traits,[27] or the ability to avoid opportunity "bottlenecks."[28] For the purposes of grounding a theory of age discrimination, it only matters that these entitlements are conceptualized non-comparatively. These types of interests must generally be respected at all points in time, avoiding the temporal problems of a comparative equality analysis.[29] Thus, in evaluating whether an age-based legal rule or private action wrongfully discriminates, we must focus our inquiry on the intrinsic wrongfulness of deprivation rather than the relative wrongfulness of comparison.

This Article is a scholarly contribution on three fronts. First, it illuminates the moral foundation of age discrimination law, which remains largely undertheorized in the legal and philosophical literature.[30] This theoretical foundation is useful for explaining the current state of Equal Protection jurisprudence with respect to age. It also serves to normatively ground age discrimination statutes that are currently on the books. Second, it intervenes in the nascent and vigorous debate among discrimination scholars on the theoretical foundation of discrimination law more generally.[31] By demonstrating that some non-comparative value is necessary to identify the moral wrongfulness of at least one type of discrimination, it

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[26] *See* MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 76–78 (2006) (detailing a list of ten fundamental human capabilities).

[27] *See* Sophia Moreau, *What is Discrimination?*, 38 PHIL. & PUB. AFFAIRS 143, 147 (2010) ("In a liberal society, . . . we are each entitled to a set of 'deliberative freedoms,' freedoms to deliberate about and decide how to live in a way that is insulated from pressures stemming from extraneous traits of ours.")

[28] *See* JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 13 (2014) (defining a bottleneck as "a narrow place in the opportunity structure through which one must pass in order to successfully pursue a wide range of valued goals.").

[29] *See* Geoffrey Cupit, *Justice, Age, and Veneration*, 108 ETHICS 702, 708–09 (1998) ("Thus, even if (eventually) everyone's turn to be discriminated against on grounds of age comes around, it does not follow that such discrimination is just. All that follows is that the injustice does not arise from the comparison of one person's lot with another's.").

[30] *See* Juliana Bidadanure, *Discrimination and Age*, *in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 243, 245 (Kasper Lippert-Rasmussen ed. 2017) ("[I]ssues of age-based inequalities in general and age discrimination in particular remain under-theorized."); Pnina Alon-Shenker, *The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination*, 25 CANADIAN J. L. & JURISPRUDENCE 243, 244 (2012) ("[T]here is no comprehensive theory of age discrimination that would explain when and why age-based distinctions are wrongful."); Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1813, 1814 (1996) (claiming that "the normative foundation of the ADEA remains uncertain" and accepting that "the ADEA cannot be justified on traditional distributive or rights-based grounds").

[31] *See* Deborah Hellman & Sophia Moreau, *Introduction*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 1, 1 (Deborah Hellman & Sophia Moreau eds., 2013) [hereinafter PHILOSOPHICAL FOUNDATIONS] (noting that the philosophical discussion of issues in discrimination is a "relatively young field of inquiry").

lends support to a more pluralist vision of discrimination law.[32] Third, it adds to the new and growing literature examining the role of time and temporal analysis in legal scholarship.[33] In addition to these theoretical contributions, this intervention is also well-timed. With the aging of the population and renewed interest in intergenerational justice among the young, age-based rules and antidiscrimination statutes will inevitably come under further scrutiny.[34] We must understand their conceptual foundation in order to better evaluate whether they should be maintained, scaled back, or expanded going forward.

This Article proceeds in three Parts. Part I provides the theoretical background for the argument. It examines age as a socio-legal category, defines discrimination, and describes the dominant egalitarian theories of discrimination law. This sets the stage for Part II, which argues that age's temporal dimension renders egalitarian theories unable to identify the moral wrong of many forms of age discrimination. This helps to explain constitutional Equal Protection jurisprudence, which is not protective of age. However, it also highlights that we lack both a descriptive account of why statutory law operates to prohibit age discrimination and a normative account of why and when the law should do so. Part III fills this gap by sketching out the contours of a non-comparative approach to age discrimination law and discusses some of its notable implications for discrimination theory and the legal regulation of age.

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[32] *See infra* Part III.C.1.

[33] *See generally* ELIZABETH F. COHEN, THE POLITICAL VALUE OF TIME (2018) (viewing time as an essential element of our political economy); FRANK FAGAN & SAUL LEVMORE, THE TIMING OF LAWMAKING (2017) (examining how legislative and judicial functions should be influenced by timing); Mark Glover, *The Timing of Testation*, 107 KY. L. J. __ (2018) (empirically evaluating when people execute wills); Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825 (2017) (examining how time intersects with remedies for race discrimination); Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1 (2016) (exploring the temporal dimension in sexual consent); Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361, 372 (2007) (assessing the temporal frame for understanding voting rights violations).

[34] *See* Mark Mather et al., *Aging in the United States*, 70 POP. BULL. 1, 2–3 (2015) (noting that those aged sixty-five and over are projected to total almost 100 million 2060); David Leonhardt, *Old vs. Young*, N.Y. TIMES (June 22, 2012), http://www.nytimes.com/2012/06/24/opinion/sunday/the-generation-gap-is-back.html (noting intergenerational tension with respect to political beliefs, economic opportunities, and social practices).

I. AGE AND DISCRIMINATION

This Part provides the background for the Article's central arguments. Section A examines age, ageism, and age-based law. Section B explores the concept of discrimination and how the value of equality and its comparative method underlie many theories of discrimination law.

A. Age

Age is a numerical measure of time since birth.[35] The state's extensive birth records allow for easy verification of one's birthdate and thus one's age.[36] While this lends age an air of objective fact, there is nothing intrinsically informative about age as such. Advances in science have demonstrated that various biomarkers such as telomere length may provide a better picture of one's physical state.[37] Aging itself is characterized by diversity rather than homogeneity, as genetic differences interact with varied life experiences to give vastly different content to peoples' lives, even if they might be the same age.[38] Further, age derives much of its meaning from social processes and cultural contexts.[39] That being said, age is not subjectively determined either. Individuals might not "feel" their age, but they would not be able to plausibly claim that they are indeed a different age, even if they might describe themselves as an "old soul" or "young at heart."

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[35] Chronological age is a convenient starting point for this project, but it does not exhaust the definitions or meanings of age. Age has biological, psychological, and social dimensions as well. *See* Richard A. Settersen, Jr. & Bethany Godlewski, *Concepts and Theories of Age and Aging*, *in* HANDBOOK OF THEORIES OF AGING 9, 9–14 (Vern L. Bengtson & Richard A. Settersen, Jr. eds., 3d ed. 2016). These are important for analyzing how discrimination operates, but chronological age is the basis of age-based law and thus is central to the legal analysis.

[36] *See* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1143 (2002) ("States maintain a smorgasbord of public records, covering one's life from birth to death."). At the margins, there might be problems of evidence for individuals who do not have adequate documentation of their age. *See, e.g.*, Ross Pearson, *What's My Age Again? The Immigrant Age Problem in the Criminal Justice System*, 98 MINN. L. REV. 745, 747–48 (2013) (describing how many immigrants may lack birth records due to lack of registration in the country of origin).

[37] *See, e.g.*, Paola Sebastiani et al., *Biomarker Signatures of Aging*, 16 AGING CELL 329, 333–36 (2017) (exploring the relationship between various biomarkers and aging); Jason L. Sanders & Anne B. Newman, *Telomere Length in Epidemiology: A Biomarker of Aging, Age-Related Disease, Both, or Neither?*, 35 EPIDEMIOLOGIC REV. 112, 123 (2013) (concluding that telomere length is associated with aging).

[38] *See* Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 468 (1997) (noting that "most current literature rejects the decline and failure paradigm of normal aging, concluding that both cognitive and physiological changes occur in varying degrees and at individuated rates.").

[39] *See* MACNICOL, *supra* note 3, at 3–4 ("A basic truism of gerontology is that age per se is meaningless: it is always mediated through social processes and cultural attitudes.").

It is precisely age's numerical nature and verifiability—its administrability—that makes it so attractive for use in the law.[40] As a matter of form, perhaps the most frequent use of age in legal directives is its inclusion in bright-line rules as a triggering fact.[41] For example, age plays a major role in demarcating the transition from childhood to adulthood in both the public and private spheres.[42] On the public side, age-based rules determine when you can vote,[43] sit on a jury,[44] obtain a driver's license,[45] stay outside at night,[46] or legally drink alcohol.[47] In the private realm, age determines when you can consent to sex,[48] make medical decisions involving your own body,[49] get married,[50] emancipate yourself from your parents' control,[51] or enter into contracts.[52] Age is used to impose responsibilities as

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[40] *See* Howard Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 860 (1981) ("Rather than a program administrator having to engage in the time-consuming and costly exercise of determining whether a given individual does or does not fit into a programmatic charter, he can rely upon a clear, indisputable fact—the age of the person involved.").

[41] *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (noting that rules "bind a decisionmaker to respond to the presence of delimited triggering facts.").

[42] *See* Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 62 (2016) ("Childhood and adulthood are also socially and legally constructed statuses whose meanings have varied dramatically over time and across cultures.").

[43] *See* U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.")

[44] *See* Act of Apr. 6, 1972, Pub. L. No. 92-269, 86 Stat. 117; 28 U.S.C. § 1865 (2012) (requiring the federal jurors be "a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district"). *See, e.g.*, MO. ANN. STAT. § 494.425 (West 2016) (setting the age at 21); NEB. REV. STAT. ANN. § 25-1601 (West 2016) (setting the age at 19).

[45] *See* Driver's Licenses in the United States, https://en.wikipedia.org/wiki/Driver%27s_licenses_in_the_United_States (collecting different states' requirements).

[46] *See, e.g.*, CHICAGO, IL. CODE 8-16-020 (2017) (creating an offense if a minor stays "in any public place or on the premises of any establishment within the city during curfew hours.")

[47] *See* 23 U.S.C. § 158 (2012) (restricting federal funds to states that have a drinking age below twenty one).

[48] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1405(A) (2010) (eighteen); 720 ILL. COMP. STAT. ANN. 5/11-1.50(b) (West Supp. 2015) (seventeen); NEV. REV. STAT. ANN. § 200.364(6) (LexisNexis Supp. 2013) (sixteen).

[49] *See* Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 AM. J.L. & MED. 409, 427–32 (2002) (discussing the different attempts by states to actualize minor medical decision-making).

[50] *See* Legal Information Institute, *Marriage Laws: Marriage Laws of the Fifty States, District of Columbia, and Puerto Rico*, https://www.law.cornell.edu/wex/table_marriage.

[51] *See* Newburgh v. Arrigo, 443 A.2d 1031, 1037 (1982) (noting that "attainment of an appropriate age" is one way in which emancipation may occur) (citations omitted).

[52] *See* 5 RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:3 (4th ed. 2010) (discussing the contractual age of majority in various jurisdictions). You cannot, however, enter into a contract with a credit card company until you turn twenty one. 15 U.S.C. § 1637(c)(8) (2012)

well. All males must register for the selective service at age eighteen,[53] which is also the age at which the state may execute you for committing serious crimes.[54]

Age-based law is not limited to bright-line maturity rules, however, and it extends into almost every field of law. It appears in criminal law, defining the scope of crimes such as elder abuse and determining the length of criminal sentences.[55] It structures health law, notably through the provision of the Affordable Care Act that permits adult children to stay on their parents' health care plans until they are twenty-six.[56] It is used in tax law through the provision of a higher standard deduction to those who have turned sixty-five.[57] Zoning laws often employ age-based rules to create a supply of housing for an older adult population.[58] In family law, age is a factor in calculating alimony awards at divorce and in determining appropriate parents for adoption.[59] Further, Social Security Disability regulations employ age in the award of disability benefits, making it easier

("No credit card may be issued to, or open end consumer credit plan established by or on behalf of, a consumer who has not attained the age of 21").

[53] *See* 50 U.S.C. § 3803 (2012) (setting an age limit of eighteen to twenty-six years for selective service).

[54] *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that the death penalty cannot be imposed on juvenile offenders).

[55] *See* ILL. COMP. STAT. 5/12-21 (2006) (making it a crime to knowingly act or fail to act to maintain the health of an elderly person, defined as "a person 60 years of age or older who is incapable of adequately providing for his own health and personal care"). *See also* 21 U.S.C. 859(a) (2012) (doubling the penalty if the perpetrator is above 18 and distributed a controlled substance to someone younger than 21); U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2010) ("Age (including youth) may be relevant in determining whether a departure is warranted").

[56] *See* 42 U.S.C. § 300gg-14 (2012) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child until the child turns 26 years of age.").

[57] *See* 26 U.S.C. § 63 (2012) ("The taxpayer shall be entitled to an additional amount of $600--(A) for himself if he has attained age 65 before the close of his taxable year").

[58] *See* 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 23:30 (4th ed. 2017 Supp.) (noting the enactment of "zoning ordinances that provide for development wherein permanent residency is restricted to senior citizens, and has led many private developers to develop similar communities governed by age-restrictive restrictive covenants.").

[59] *See* Bailey v. Bailey, 617 So. 2d 815, 817 (Fla. Dist. Ct. App. 1993) ("In my own mind, the factor of age weighs more heavily in favor of permanent alimony when the spouse requesting permanent alimony is approaching fifty."); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 486 (1996) (noting that "only three variables -- the wife's age, her health, and marital duration -- were significantly correlated with the decision to award alimony for an unlimited time period."). *See also* In re ASF, 876 N.W.2d 253, 263 (2015) (declaring that consideration of the adoptive parents' ages did not violate the law); Matter of Baby Boy P., 664 N.Y.S.2d 340, 341 (1997) (noting that "the age of the prospective adoptive parents is one factor that may be considered" even if it is not decisive).

to qualify for them if you are older, even with the same level of impairments.[60]

This panoply of legal rules highlights the other reason for age's extensive use in the law, which is that it serves a vessel for substantial social meaning.[61] Age is socially salient, ranking among the first identity characteristics that we notice about each other.[62] It functions as a convenient basis for social judgments and decision-making, primarily as a proxy for a variety of target variables of interest.[63] Based on an individual's age, we might assume that a person is wise or immature, well-versed in technology, or going through some kind of age-based "life crisis."[64] It helps people to evaluate who "looks good for their age," and it is an essential descriptor on dating apps that allows users to determine whether someone is acceptable as a potential mate.[65] The use of age extends to the professional sphere, with doctors using it to evaluate whether patients have reached an age at which screening for certain conditions is recommended, such as mammograms for breast cancer.[66] Age

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[60] *See* Medical-Vocational Guidelines, 20 C.F.R. § Pt. 404, Subpt. P, App. 2 (2008) (describing the guidelines that incorporate age in evaluating eligibility for benefits)

[61] *See* GAIL WILSON, UNDERSTANDING OLD AGE: CRITICAL AND GLOBAL PERSPECTIVES 17–19 (2000) (discussing different cultural understandings of age); Liat Ayalon et al., *Macro- and Micro-Level Predictors of Age Categorization: Results from the European Social Survey*, 11 EUR. J. AGING 5, 14–16 (2014) (describing the various ways in which attitudes towards age and aging differ across individuals and societies).

[62] *See* Bernice L. Neugarten et al., *Age Norms, Age Constraints, and Adult Socialization*, *in* THE MEANINGS OF AGE: SELECTED PAPERS OF BERNICE L. NEUGARTEN 24, 24 (Dail A. Neugarten ed. 1996) ("In all societies, age is one of the bases for the ascription of status and one of the underlying dimensions by which social interaction is regulated."). It is this salience that contributes to the wrongfulness of age discrimination and makes age a good candidate for regulation through antidiscrimination law. *See* KASPER LIPPERT-RASMUSSEN, BORN FREE AND EQUAL?: A PHILOSOPHICAL INQUIRY INTO THE NATURE OF DISCRIMINATION 30–36 (2014) (arguing for the importance of social salience in defining wrongful discrimination); TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW at 95–96 (2015) (incorporating salience into the relative disadvantage condition for the norm of discrimination law).

[63] *See* Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CAL. L. REV. 315, 318 (1998) ([P]roxy discrimination is merely a tool used to identify a class of persons or things with a different identifying trait, the 'target'").

[64] *See* Lynda Gratton & Andrew Scott, *Our Assumptions about Old and Young Workers are Wrong*, HARV. BUS. REV. (Nov. 14, 2016), https://hbr.org/2016/11/our-assumptions-about-old-and-young-workers-are-wrong (noting assumptions about older and younger workers and how these groups might have much in common). Conversely, we might infer what a person's age is based on certain characteristics we associate with certain ages.

[65] *See* Mary Ward, *Have Dating Apps Made Age More Important Than Ever?*, THE SYDNEY MORNING HERALD (Oct. 14, 2017), http://www.smh.com.au/lifestyle/life-and-relationships/have-dating-apps-made-age-more-important-than-ever-before-20171005-gyuvta.html ("Imagine if you walked into a bar and everyone was wearing a name tag that instantly told you how old they were. That's what using Tinder is like. But it's weirder, because you've walked into the bar and everyone isn't just wearing age tags: everyone above and below your selected age range isn't there.").

[66] *See* Kevin C. Oeffinger et al., *Breast Cancer Screening for Women at Average Risk*, 314 J. AM. MED. ASSOC. 1599, 1600 (2015) ("Women with an average risk of breast cancer

also has normative force, regulating conduct through the delineation of age-appropriate beliefs or behavior.[67] At times, this may lead to age being used as the basis for treating others poorly, denying them housing, employment opportunities, or medical care.[68]

This raises the specter of ageism, defined as prejudice, stereotyping, or discrimination on the basis of age or perceived age.[69] While ageism is often discussed in reference to older people, it can be directed at any age group.[70] For example, beliefs that young people are inherently irresponsible or that older adults' bodies are disgusting are both ageist. Just as with racism or sexism, ageism can be explicit or implicit.[71] It operates at multiple levels, as individuals, social networks, institutions, and culture can all be ageist.[72] The behavioral component of ageism—age discrimination—imports a normative element into its definition. This is precisely the topic that this Article seeks to illuminate by examining what transforms benign differential treatment based on age into wrongful discrimination and how this should be addressed in the legal sphere. To perform this analysis, it is necessary to delve deeper into age's particular characteristics.

Age is a unique socio-legal category that shares select features with several other identity characteristics.[73] Age, like race or sex, is considered

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should undergo regular screening mammography starting at age 45 years. (Strong Recommendation)").

[67] *See* HOWARD EGLIT, ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM 7 (2004) ("Age also functions informally as a powerful normative device for influencing—and sometimes dictating—attitudes and conduct. . . . 'Act your age' is a common admonition reflecting this phenomenon.").

[68] *See* ERDMAN B. PALMORE, AGEISM: NEGATIVE AND POSITIVE 119–151 (1999) (collecting instances of ageism in the economy, government, family, housing, and health care).

[69] *See* Thomas Nicolaj Iversen et al., *A Conceptual Analysis of Ageism*, 61 NORDIC PSYCHOL. 4, 15 (2009) ("Ageism is defined as negative or positive stereotypes, prejudice and/or discrimination against (or to the advantage of) elderly people on the basis of their chronological age or on the basis of a perception of them as being 'old' or 'elderly'. Ageism can be implicit or explicit and can be expressed on a micro-, meso- or macro-level."). While this is the most comprehensive definition of ageism in the literature, it requires further tweaking to acknowledge that ageism may be directed at any age group, not just the elderly.

[70] *See* North & Fiske, *supra* note 14, at 991 ("Though its focus usually connotes prejudice toward older people, the word *ageism* naturally includes people discriminated against at any age); Jack C. Westman, *Juvenile Ageism: Unrecognized Prejudice and Discrimination Against the Young*, 21 CHILD PSYCHIATRY & HUM. DEV. 237, 240–46 (1991) (describing manifestations of institutionalized ageism against children).

[71] *See* Maria Clara P. de Paula Couto & Dirk Wentura, *Implicit Ageism*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 37, 48–51 (Todd D. Nelson ed. 2017) (comparing implicit and explicit measures of ageism).

[72] *See* JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM 12–14 (1978) (contrasting an individual view of racism and sexism with an institutional analysis).

[73] *See* Stewart J. Schwab & Garth Glissman, *Age and Disability Within the Scope of American Discrimination Law*, *in* DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN

to be immutable in the law, even if these categories are more unstable than the law might suggest.[74] Nevertheless, while some individuals may be able to "pass" as a different age, you cannot choose your own age, nor can you speed up or slow down the progression of time.[75] On the other hand, age also shares with traits like religion, class, and disability that it is mutable.[76] In other words, one's status within the identity category can change throughout the lifecourse. Just as people convert religions, experience class mobility, or suffer accidents that leave them with impairments, so too do people age and obtain membership in progressively older age groups. However, age differs from these other mutable characteristics in that it is *inevitably* mutable.[77] One may or may not change religions, but it is certain that we will all become older as time passes. Finally, age shares with these other traits that it is morally irrelevant.[78] Moral irrelevance in this context means that a characteristic does not have a relationship to entitlement or desert, nor does it constitute a person as morally superior or inferior.[79]

LAW AND PSYCHOLOGY 145, 154 (Richard L. Wiener & Steven L. Willborn, eds. 2011) (describing how age compares to sex, race, and disability on the dimensions of definitional ease, visibility, empathy, legality, political clout, and size).

[74] *See* Frontiero v. Richardson, 411 U.S. 677, 686, (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."). Age, too, is an accident of birth, specifically when said birth was. While this represents the legal consensus, the reality is more complex. Race is socially constructed and malleable, subject to contestation and judicial adjudication in particular cases. *See* IAN HANEY LÓPEZ, WHITE BY LAW 10TH ANNIVERSARY EDITION: THE LEGAL CONSTRUCTION OF RACE 8 (2006) ("Race is not, however, simply a matter of physical appearance and ancestry. Instead, it is primarily a function of the meanings given to these. On this level, too, law creates races."). Sex is similarly subject to contestation by transgender, genderqueer, and nonbinary individuals, who eschew the sex classifications applied to them at birth. *See* G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir.), cert. granted in part, 137 S. Ct. 369 (2016), and vacated and remanded, 137 S. Ct. 1239 (2017) (involving a transgender boy who wanted access to boys restrooms); Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 392 (2017) (describing the increasing forms of sex/gender identification).

[75] *See* JOHN A. VINCENT, INEQUALITY AND OLD AGE 97 (1995) ("Ageing is a biological process that happens to all of us from the moment we are born. It is a continuous process.").

[76] *See* A. Kohn, *supra* note 16, at 236 ("Chronological age is mutable in the sense that it changes over time.").

[77] *See* Jan Baars, *Concepts of Time in Age and Aging*, *in* THE PALGRAVE HANDBOOK OF THE PHILOSOPHY OF AGING 69, 71–72 (Geoffrey Scarre ed., 2016) (noting how chronometric time is both exact and continuous).

[78] This is not entirely uncontroversial. There is a view, commonly associated with non-Western cultures, that advanced age in fact enhances one's status. *See* Cupit, *supra* note 29, at 714–18 (exploring the "veneration thesis" and concluding that age may in fact enhance moral status by virtue of its entailing that there is more to us as historical beings). This view would at best support age discrimination *in favor* of the aged, not age discrimination tout court. In addition, it is not clear that it holds much sway in the United States context; respect for the aged may in fact derive from more utilitarian grounds that are easily confused with the belief that age enhances status. *See id.* at 715.

[79] *See* Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 800 (1993) ("A difference is morally irrelevant if it has no relationship to individual entitlement or desert.").

While age certainly possesses unique characteristics, it is worth noting that age does not exist in a vacuum. Other traits, such as class, disability, gender identity, race, religion, sex, or sexual orientation, intersect with age to produce different types of lived experiences.[80] Further, the intersection of ageism with discrimination on the basis of other identity characteristics can create particular forms of disadvantage that are unique and more pernicious than just the compound disadvantage that one might experience from each characteristic individually.[81] For example, consider the intersection of sex and age in Hollywood. While age is not necessarily a problem for aging male actors, who continue to find work and roles, older women lack such opportunities.[82] This is directly related both to the sexist judgment of women by their appearance, but also by the ageist judgment that youthfulness is attractive and agedness is not.[83] In this context, these two forms of prejudice combine and reinforce one another.[84]

Whether discrimination derives solely from age or from age in combination with other characteristics, the time is ripe for an inquiry into the moral foundations of age discrimination law. The population is aging, with

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See also Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 117 (1998) ("it is indisputable that race and gender are 'morally irrelevant,' in the sense of not constituting persons as inferior or superior").

[80] *See* PATRICIA HILL COLLINS & SIRMA BILGE, INTERSECTIONALITY 2 (2016) ("[P]eople's lives and the organization of power in a given society are better understood as being shaped not by a single axis of social division, be it gender or race or class, but by many axes that work together and influence each other."); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 768 (1994) (noting how intersectionality allows for those at the intersections to be recognized as "proper legal subjects"); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. L. F. 139, 139–40 (noting the need to center the experiences of those at the intersections).

[81] *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 708 (2001) (noting that "systems of discrimination—e.g., racism, sexism, homophobia, and classism—are themselves intersectional.").

[82] *See* Ann Hornaday, *Hollywood Ageism Punishes Actresses, But the Art House Offers Some Hope*, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/lifestyle/style/hollywood-ageism-punishes-actress-but-the-art-house-offers-some-hope/2017/03/09/ce7e0e24-040c-11e7-ad5b-d22680e18d10_story.html ("[T]here's no doubt that women are far more affected by the movie industry's obsession with sex appeal and physical beauty, resulting in a giant absence in female roles once actresses reach their 50s and 60s.").

[83] *See* TONI CALASANTI & KATHLEEN F. SLEVIN, GENDER, SOCIAL INEQUALITIES, AND AGING 54 (2001) ("Ageism interfaces with sexism to put pressure on women to be a particular shape and size, to portray a youthful image even if old.").

[84] *See* Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 27 (1995) ("The lessons of anti-essentialism and intersectionality are that the oppressions cannot be dismantled separately because they mutually reinforce each other."). The intersection of ageism with other forms of disadvantage would not be news to early theorists of ageism. *See* Robert N. Butler, *Age-Ism: Another Form of Bigotry*, 9 THE GERONTOLOGIST 243, 243 (1969) (using an intersectional example of low-income, black, senior citizens to illustrate ageism, the term he coined).

those older than sixty-five projected to total almost 100 million by the year 2060.[85] The age-based rules that apply to those at the older end of the age spectrum will thus have increasing effect, allocating social resources and shaping attitudes about the appropriate content of various life stages.[86] In addition, there is increasing interest among younger segments of the population in intergenerational justice, specifically as many perceive that current economic conditions offer fewer opportunities to millennials than previous generations.[87] We must understand the conceptual foundation for age-based laws and antidiscrimination statutes in order to better evaluate whether they should be maintained, scaled back, or expanded going forward.

The next Section explores discrimination, antidiscrimination law, and the role of equality in understanding both.

B. Discrimination

Discrimination is a multilayered concept. At a basic level, it is simply the practice of drawing distinctions or engaging in differential treatment.[88] Individuals discriminate in this sense all the time, for instance by choosing one style of clothes over another. Used in this way, being "discriminating" can be seen as a positive trait, if it represents the ability to differentiate between goods of higher or lower quality, such as in the realms of food or art.[89] However, the word discrimination has a value-laden meaning as well. At this normative level, discrimination is the *morally wrongful* drawing of distinctions or differential treatment.[90] The central inquiry here concerns what, if anything, makes age discrimination morally wrongful. In other words, when is it wrong to treat individuals differently on the basis of age? While answering this question does not exhaust all possible normative arguments about age discrimination, it provides an important basis for

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[85] *See* Mark Mather et al., *supra* note 34, at 2–3.

[86] *See* STEPHEN KATZ, DISCIPLINING OLD AGE: THE FORMATION OF GERONTOLOGICAL KNOWLEDGE 60–69 (1996) (discussing how the legal creation of pensions served to structure our understanding of the lifecourse). Further, intergenerational issues must be addressed in various settings, such as the workplace. *See, e.g.*, Michael J. Urick, *Understanding and Managing Intergenerational Conflict: An Examination of Influences and Strategies*, 3 WORK, AGING & RETIREMENT 166, 168 (2016) (describing how the presence of multiple generations in the workplace can lead to heightened tension).

[87] *See* Leonhardt, *supra* note 34 ("Younger adults are faring worse in the private sector and, in large part because they have less political power, have a less generous safety net beneath them.").

[88] *See* DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 2 (2008).

[89] *See id.*

[90] *See* LIPPERT-RASMUSSEN, *supra* note 62, at 24–25 (terming this the "moralized concept of discrimination").

evaluating when it is appropriate to incorporate age into the law or enact laws against age discrimination.[91]

Antidiscrimination laws confer upon individuals certain rights against discrimination, which have four essential components that are useful to define the scope of the current discussion:

> They provide [1] certain grounds (race, sex, age, etc.) on which distinctions should not be made [2] by certain persons (maybe public authorities, legislatures or maybe anyone at all) when dealing with [3] certain people (employees, applicants for jobs, tenants, citizens, etc.) [4] in respect of certain benefits or burdens (jobs, houses, access to the courts, etc.).[92]

This Article is concerned with the ground of age, and with distinctions drawn by either public or private entities. Public age discrimination is the wrongful use of age classifications by the state through its legislative, judicial, and executive branches.[93] In contrast, private discrimination is wrongful differential treatment by individual actors.[94] It should be noted that this Article does not seek to reopen constitutional debates on the appropriate level of scrutiny for age; however, the argument presented in Part II helps illuminate why those debates settled in the way they did.[95] Finally, the Article is concerned with anyone who is subject to age discrimination, whether young or old, with respect to the variety of substantive fields in which it occurs.

There are two main sources of antidiscrimination law. The first is the Equal Protection Clause of the Constitution, which denies the government the ability to engage in certain forms of distinction-drawing.[96] The Supreme Court long ago held that age-based classifications are only subject to rational

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[91] *See id.* at 103 ("By claiming that something makes an act of discrimination wrong, . . . I mean that it is a feature of the action that counts as a reason in favor of its being impermissible to perform."). Other normative arguments for or against age discrimination or age discrimination law might operate in a different normative register. *See, e.g.*, Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780 (1997) (arguing that age discrimination law is a mismatch with the situation of older workers); Jolls, *supra* note 30, at 1829–30 (justifying age discrimination laws on the basis of economic efficiency).

[92] Elisa Holmes, *Anti-Discrimination Rights Without Equality*, 68 MOD. L. REV. 175, 182 (2005).

[93] *See* Neil Gotanda, *A Critique of "Our Constitution in Color-Blind"*, 44 STAN. L. REV. 1, 7 (1991) (discussing the public/private distinction in the context of discrimination).

[94] *See id.*

[95] *See infra* Part II.B.

[96] *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

basis review, making most age-based law permissible.[97] The second source of antidiscrimination law is statutory. There are a number of statutes that prohibit discrimination on the basis of age. One of the most salient at the federal level is the Age Discrimination in Employment Act, which prohibits many employment decisions based solely on age for those over the age of 40.[98] Similarly, the Age Discrimination Act prohibits discrimination on the basis of age in any program receiving federal financial assistance.[99] While at the federal level, age has not been included in the Fair Housing Act, some states have explicit age-based antidiscrimination protections in the realm of housing.[100] Additionally, age is sometimes read into the relevant state antidiscrimination statute even if age is not explicitly mentioned.[101]

Most scholars see antidiscrimination laws and norms as grounded in the value of equality.[102] Equality is capable of many meanings, but at its core it is inherently comparative. In order to evaluate whether the dictates of equality are satisfied, one must compare her situation to that of another person who is similarly situated.[103] While there is a general consensus on this value foundation and comparative method, there is significant disagreement among discrimination theorists about what feature of the equality-based comparison is relevant and which conception of equality is operative in demonstrating the wrongfulness of that feature. In other words, there is disagreement about what version of equality is relevant for the

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[97] *See* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (holding that police officers over the age of fifty did not constitute a suspect class).

[98] *See* 29 U.S.C. §623 (2012) ("It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age").

[99] *See* 42 U.S.C. § 6102 (2012) ("[N]o 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.").

[100] *See* 42 U.S.C. § 3604(b) (West 2016) (including a variety of identity categories but omitting age). *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-64c (West 2017) (prohibiting the refusal to sell or rent because of age); VT. STAT. ANN. tit. 9, § 4503 (West 2016) (same).

[101] *See, e.g.*, Pizarro v. Lamb's Players Theatre, 37 Cal. Rptr. 3d 859, 861 (Cal. Ct. App. 2006) (noting that while age is not explicitly protected in the statute, age discrimination may still contravene it under certain circumstances).

[102] *See, e.g.*, Zatz, *supra* note 21, at 1367 (analyzing equality law as if it were antidiscrimination law); John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583 (1994) (exploring equality in the employment discrimination context). *See also* SEN, *supra* note 19, at 3 ("[T]he major ethical theories of social arrangement all share an endorsement of equality in terms of *some* focal variable, even though the variables that are selected are frequently very different between one theory and another.").

[103] *See* Hellman, *supra* note 20, at 900 ("According to the comparative conception of discrimination, we determine whether X has suffered wrongful discrimination by looking at the treatment X has received . . . and comparing it to the treatment accorded to at least one other individual.").

discrimination analysis and which feature of differential treatment transforms it into wrongful discrimination.

Under the equality umbrella, there are three general camps.[104] First, there are those who are focused on intent. These thinkers draw upon the concept of moral or basic equality, or the notion that each person has equal moral worth and deserves equal respect and concern.[105] On this view, when an actor engages in differential treatment, it is wrongful to the extent that such treatment is the result of a morally defective attitude that some are worthier than others, or deserving of more or less respect and concern.[106]

This type of prejudice can make private acts of discrimination wrongful, but it can also taint legal rules if such prejudice animates or infects the democratic process.[107] This understanding of the wrongfulness of public discrimination developed in the context of Equal Protection jurisprudence, specifically Footnote Four of *Carolene Products*. It reads: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[108] Thus, when legislators actualize their prejudice in the public sphere by targeting minorities for disadvantageous legal treatment, it reveals that those legislators do not think those minorities are worthy of equal concern and respect.[109] This represents a breakdown in the democratic process as there is inadequate representation

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[104] *See* LIPPERT-RASMUSSEN, *supra* note 62, at 7–8 (understanding the three general categories as mental state, objective meaning, and harm).

[105] *See* JEREMY WALDRON, ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY 1–2 (2017) (terming this form of equality "basic equality"); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977) (describing "the right to *treatment as an equal*, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else").

[106] *See* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 192 (1992) ("Biases—except for those reflecting close personal ties that are so central to one's identity they amount to "biases" in favor of one-self—are paradigmatically intrinsically immoral. Biases rest on erroneous judgments of others' inferior moral worth.").

[107] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 158 (1980) (discussing when generalizations are suspect based on "who came up with it and whether it serves their interests").

[108] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[109] *See* ELY, *supra* note 107, at 82 (noting that Equal Protection "preclude[s] a refusal to represent [minorities], the denial to minorities of what Professor Ronald Dworkin has called 'equal concern and respect in the design and administration of the political institutions that govern them.'"). *See also* Michael J. Perry, *Two Constitutional Rights, Two Constitutional Controversies*, 50 CONN. L. REV. __ (forthcoming 2019) ("The right to moral equality entails not only that government may not deny to any human being the status of citizenship based on the view (or on a sensibility to the effect) that she is morally inferior; it also entails the right to *equal* citizenship: Government may not disadvantage any citizen based on the view that she is morally inferior.").

of minority interests, which justifies judicial review.[110] Accordingly, there is a strong emphasis on discovering the "mental state" of Congress when it passes such rules.[111]

The second camp of equality theorists focuses not on the intent of the actor, but on what is communicated by the differential treatment.[112] These expressive accounts also draw upon the idea of basic or moral equality. According to these assessments, discrimination is wrong when it demeans, where demeaning treatment expresses the idea that another does not possess equal moral worth.[113] The act of demeaning has both a social dimension and a power dimension. The social dimension requires establishing that a specific act is a particularly serious or extreme expression of disrespect toward another within a particular cultural and historical context.[114] The power dimension requires that the person or entity engaging in the differential treatment hold a position of power with respect to the object of the act, as demeaning involves someone higher in the power hierarchy targeting someone lower in it.[115] The government clearly qualifies as it has the coercive power of the state behind it, but other entities or individuals might as well, such as an employer who has power over employees or a landlord who has power over tenants.[116]

The third group of egalitarian theorists shifts the focus to the negative and unequal consequences of differential treatment. The basic logic of this family of theories is that discrimination is wrongful when it harms on the

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[110] *See* ELY, *supra* note 107, at 136 ("Benefits . . . that are not essential to political participation or guaranteed by the language of the Constitution, we can call constitutionally gratuitous . . . and malfunction in their distribution can intelligibly inhere only in the process that effected it.").

[111] *See id.* at 136–45 (discussing the difficulties of discerning legislative and administrative motivation). *See also* Washington v. Davis, 426 U.S. 229, 239–40 (1976) (discussing the importance of discriminatory purpose in assessing the constitutionality of laws).

[112] *See* HELLMAN, *supra* note 88, at 33 ("Discrimination is wrong when it demeans. . . . What [this requires] is that laws, policies, and practices not draw distinctions among people in a way that treats some as less worthy than others, however that is interpreted in that culture."); Patrick Shin, *The Substantive Principle of Equal Treatment*, 15 LEGAL THEORY 149, 166 (2009) (arguing for a similar moral analysis of how "treatment can be interpreted for purposes of determining whether it is objectionable.").

[113] *See* HELLMAN, *supra* note 88, at 33 ("To demean is to treat another as less worthy. In this sense, demeaning is an inherently comparative concept. . . . This account neither reduces equality to an entitlement to a specific good or right nor leaves it empty of bite or content.").

[114] *See id.* at 36.

[115] *See id.* at 35 (discussing several examples of power relationships changing the meaning of a given act).

[116] *See id.* at 57 ("Individual actions are less likely to demean than actions by institutions. This is because governments and institutions generally have more status and power than private individuals.").

basis of morally irrelevant characteristics.[117] Scholars in this camp are perhaps the most diverse, often appealing either to distributive equality—the idea that benefits and burdens should be distributed equally in society—or social or relational equality—the view that society should be free from hierarchical relationships or beliefs of moral superiority.[118]

Further, this groups of theorists highlights different aspects of the harm in the discrimination analysis. Some emphasize harms of distribution, or how discrimination produces unequal allocations of resources or opportunities.[119] Others focus on the harms of recognition, which are "rooted in social patterns of representation, interpretation, and communication."[120] Early writers in this vein saw the primary harm as one of stigma, or the psychological effects of unequal legal and cultural treatment.[121] While these various harms may accrue to individuals, many of these theories expressly take the wrong of discrimination to be based in how it negatively affects social groups, which can affect the temporal equality analysis.[122] One highly influential view articulates this as an "anti-caste principle," which objects to discriminatory rules when they have the effect of transforming "highly

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[117] *See* LIPPERT-RASMUSSEN, *supra* note 62, at 154–55 ("The harm-based account of the wrongness of discrimination says that an instance of discrimination is wrong, when it is, because it makes people worse off, i.e. they are worse off given the presence of discrimination than they would have been in some suitable alternative situation in which the relevant discrimination had not taken place."); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1030 (1979) ("Because race is not a factor indicating anything about the moral worth of persons, race is morally irrelevant to state laws and policies.").

[118] *See* IWAO HIROSE, EGALITARIANISM 1 (2015) ("*Egalitarianism*: a class of distributive principles, which claim that individuals should have equal quantities of well-being or morally relevant factors that affect their life."); Samuel Scheffler, *The Practice of Equality*, *in* SOCIAL EQUALITY: ON WHAT IT MEANS TO BE EQUALS 21, 21–22 (Carina Fourie et al. eds., 2015) (distinguishing between distributive equality and a relational or social view of equality).

[119] *See* FRASER, JUSTICE INTERRUPTUS 13–14 (1997) (describing the many forms of socio-economic injustice that these harms represent). *See also* Re'em Segev, *Making Sense of Discrimination*, 27 RATIO JURIS 47, 59–64 (2014) (arguing that discrimination is wrongful when it results in distributive injustice).

[120] FRASER, *supra* note 119, at 14.

[121] *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976) ("Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior."). *See also* IYIOLA SOLANKE, DISCRIMINATION AS STIGMA: A THEORY OF ANTI-DISCRIMINATION LAW 84 (2017) ("[T]he anti-stigma principle should be informed not only by structures of power, but also by patterns of consequences, so as to accommodate the difference between those stigma that will be protected by anti-discrimination law and those that will not.").

[122] *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 147–56 (1976) (advancing a group-disadvantaging principle); *infra* Part II.B.3 (analyzing how group-based theories may evade the temporal question).

visible and morally irrelevant characteristics into systematic social disadvantage across several spheres of life."[123]

The moral wrongfulness of a given act of discrimination serves as the normative foundation for the prohibition of certain legal classifications or the legal regulation of private discriminatory conduct. However, it is merely one factor in deciding how to structure the law. While the wrongmaking feature identified by a discrimination theory may make a certain instance of differential treatment wrongful all other things being equal, there may be other normative considerations that counsel against legal intervention.[124] For example, consider an individual who discriminates on the basis of race in the selection of romantic partners.[125] While this might be morally wrongful, most would balk at the suggestion that the law intervene to prevent discrimination in this domain. Romantic partner selection is typically shielded from state intervention, as maintaining a sphere of privacy in personal decision-making may be morally worthwhile as a general rule.[126]

Even if an act or rule is morally wrongful all things considered, it may further be impractical for the law to intervene. Taking the example above, it would be quite difficult and costly for the state to police romantic partner selection for the entire population. In this case, the moral wrongfulness may be better addressed by cultural rather than legal interventions.[127] Thus, while the moral wrongfulness of a particular form of age discrimination weighs in favor of its legal regulation, such regulation is not a foregone conclusion.

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This Part has examined the socio-legal category of age, which possesses unique temporal qualities. It has also surveyed discrimination law theory, which typically relies on the value of equality. This value requires a comparative method to establish the wrongfulness of discrimination, which

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[123] *See* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411–12 (1994).

[124] *See, e.g.*, Axel Gosseries, *What Makes Age Discrimination Special? A Philosophical Look at ECJ Case Law*, 43 NETHERLANDS J. L. PHIL. 59, 79–80 (2014) (considering some of the additional arguments why differential treatment based on age may be acceptable).

[125] *See generally* CHRISTIAN RUDDER, DATACLYSM: LOVE, SEX, RACE, AND IDENTITY (2014) (reporting on data from OKCupid that indicated strong racial and age preferences in the dating market); Russell K. Robinson & David M. Frost, *LGBT Equality and Sexual Racism*, 86 FORDHAM L. REV. 2739, 2742 (2018) (defining these preferences as sexual racism).

[126] *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

[127] *See generally* LAN CAO, CULTURE IN LAW AND DEVELOPMENT: NURTURING POSITIVE CHANGE (2016) (discussing methods of cultural change).

in turn serves as the basis for an antidiscrimination law or norm. The next Part brings these two strands together, making the case that incorporating a temporal analysis into the subject of age discrimination reveals the significant weaknesses of equality-based theories.

II. EQUALITY AND TIME

Age discrimination is typically seen as less pernicious than other forms of discrimination.[128] This Part offers an argument why: Once the temporal aspects of age are considered, egalitarian theories of discrimination prove unable to identify the moral wrong of age discrimination in many cases. This should not be taken as an argument that there is in fact nothing wrong with ageism and age discrimination. Instead, it is meant to demonstrate that equality alone cannot form the theoretical foundation of this area of law precisely because it does not have the necessary conceptual resources to isolate the wrong of ageism and age discrimination. To the extent that age discrimination is wrong, we must understand its wrongfulness in terms of other values.

Section A begins by describing how an egalitarian analysis requires answering the temporal question of when the comparative analysis should take place. It further presents the consensus answer to this question in philosophy—that the lifetime of the individual is the relevant temporal unit of analysis. Section B explores how this renders many equality-based theories of discrimination law incapable or compromised in recognizing any wrongfulness in age-based differential treatment. As a descriptive matter, this explains the current Equal Protection jurisprudence on age, which explicitly relies on the value of equality. Section C describes the situations in which equality might still decry age discrimination, though these fail to capture many cases of age discrimination. Therefore, equality is insufficient to justify the current statutory antidiscrimination regime or to ground an understanding of the wrongfulness of age discrimination more generally.

A. The Temporal Question

Because equality is a comparative value, it requires an analysis of at least two objects to allow that comparison to proceed. Courts have focused on the

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[128] *See* Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205, 222 (2004) ("[T]he prohibition on age discrimination in employment does not have anything like the same moral standing as the corresponding prohibitions on race and sex discrimination."); Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 852 (2004) (noting that age discrimination "does not elicit the same universal agreement that age distinctions are immoral.").

"Who?" element of the comparison. In deciding antidiscrimination cases, many courts and legal commentators have tried to determine whether a comparator is required for a successful antidiscrimination claim and who the appropriate comparator might be.[129] Philosophers have focused on the "What" element of the comparison. In examining whether a particular outcome is just according to the value of equality, the key question is what we are trying to equalize—resources, utility, capabilities, or something else?[130]

Age forces us to explore the under-examined "When" element of the comparison.[131] The central question is this: what should be the temporal unit of analysis for equality? Specifically, in evaluating differential treatment, do we assess whether that treatment comports with equality based on a moment in time or over a longer time period? The lifetime egalitarianism approach posits that the complete life of an individual is the morally relevant temporal unit.[132] Thus, there must be equality over the complete lifetimes of separate individuals.[133] At any given moment in time, there might be inequalities between individuals, but these may be allowed, justified, or perhaps even required to ensure equality over lifetimes.[134]

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[129] *See* Miller-El v. Dretke, 545 U.S. 231, 241 (2005) (noting that "side-by-side comparisons" of black and white jurors would be relevant to ascertaining race discrimination in jury selection pursuant to a *Batson* challenge); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1993) (noting that employee comparators would be helpful in establishing employer motive); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 748 (2011) ("Comparators become relevant to the analysis, then, because they help expose—whether in the single- or mixed-motive analysis—that "likes" have been treated in an "unlike" fashion and give rise to the inference that discrimination is the reason for that differentiation.").

[130] *See* G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 906 (1989) ("What aspect(s) of a person's condition should count in a fundamental way for egalitarians . . . ?")*;* Amartya K. Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 195, 197 (Sterling M. McMurrin ed., 1980) (initiating the debate on equality of what?). *See also* Amartya Sen, *Capability and Well-Being*, *in* THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY 270, 283 (Daniel M. Hausman ed., 3d ed. 2008) (discussing the different currencies of well-being).

[131] *See* PETER LASLETT AND JAMES FISHKIN, JUSTICE BETWEEN AGE GROUPS AND GENERATIONS 1 (1992) (noting that the "revival of political theory over the past three decades has taken place within the grossly simplifying assumptions of a largely timeless world.").

[132] *See* LARRY TEMKIN, INEQUALITY 233 (1989) ("[O]n a complete lives view, an egalitarian should be concerned about A's being worse off than B to the extent, and only to the extent, that A's life, taken as a *complete whole*, is worse than B's, taken as a *complete whole*.") (emphasis in original).

[133] *See* JOHN BROOME, WEIGHING LIVES 117–139 (2004) (arguing for the separability of lives).

[134] *See* NORMAN DANIELS, AM I MY PARENTS' KEEPER?: AN ESSAY ON JUSTICE BETWEEN THE YOUNG AND OLD 83–95 (1988) (defending age rationing in health care and employment in situations of scarcity based on his Prudential Lifespan Account, a Rawlsian interpretation of the lifetime view). *See also* MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 430–42 (2011) (arguing for lifetime prioritarianism).

The main alternative to lifetime egalitarianism is the time-slice approach.[135] This family of views holds that the relevant temporal unit of analysis is something shorter than entire lifetimes. Thus, egalitarians should be concerned about inequalities that manifest in either simultaneous slices of time across lives, corresponding slices of time within each life, or non-temporally-ranked slices of time within each life.[136] In other words, those momentary inequalities that are permitted or required in lifetime egalitarianism should instead be seen as morally troubling.[137]

Most philosophers have accepted or assumed that the complete life of an individual is the morally relevant temporal unit.[138] There are at least four reasons why this is the case. First, the lifetime view has a certain intuitive and administrative appeal. We often consider our lives as having a "narrative unity," with meaningful relationships between different temporal segments

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[135] *See* Dennis McKerlie, *Equality and Time*, 99 ETHICS 475, 491 (1989) ("Our lives are lived serially through time, and the simultaneous segments view responds to this fact by valuing equality in the simultaneous parts of lives rather than by merely requiring that lives should be equal when viewed timelessly as completed wholes.").

[136] *See* TEMKIN, *supra* note 132, at 233 (describing simultaneous segments egalitarianism (where simultaneous time slice segments are the moral unit of concern), and corresponding segments egalitarianism (where corresponding time slice segments—youth, middle age, old age, for example—of an individual's life are the moral unit of concern); Kasper Lippert-Rasmussen, *Measuring the Disvalue of Inequality over Time*, 69 THEORIA 32, 36 (2003) (adding a third time-slice view of non-time based segments egalitarianism, in which segments of life are compared using some non-temporal measure, such as peaks or lows of welfare).

[137] Those who argue against the lifetime view often use examples of extreme inequalities in slices of time to illustrate their point. *See, e.g.*, DENNIS MCKERLIE, JUSTICE BETWEEN THE YOUNG AND THE OLD 6–7 (2013) (describing a wealthy apartment complex next to a retirement home whose residents live in squalor); TEMKIN, *supra* note 132, at 235–36 (describing how a hypothetical God allows two versions of Job to possess vastly different levels of welfare, only to have their positions switch at the midpoint of their lives). These examples undoubtedly capture some egalitarian intuitions, though these intuitions may derive from violations of relational, rather than distributive equality. *See, e.g.*, Juliana Bidadanure, *Making Sense of Age Group Justice: A Time for Relational Equality?*, 15 PHIL. POL. & ECON. 234 (2016) (noting that what might worry us about such examples is "not that there is a timeslice inequality in distribution as such, but rather that relationships of inequality may pertain at all times."). Alternatively, as this Article suggests, it may be that these examples demonstrate a different problem, which is that these examples represent violations of a non-comparative value such as liberty or dignity.

[138] *See* THOMAS NAGEL, EQUALITY AND PARTIALITY 69 (1991) ("Remember that the subject of an egalitarian principle is not the distribution of particular rewards to individuals at some time, but the prospective quality of their lives as a whole, from birth to death."); R. I. Sikora, *Six Viewpoints for Assessing Egalitarian Distribution Schemes*, 99 ETHICS 492, 502 (1989) (arguing that from various differing perspectives individuals should prefer the lifetime view); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 304–05 (1981) (describing the goal as equality of resources across the lives of each person); JOHN RAWLS, A THEORY OF JUSTICE 78 (1971) (claiming that individuals behind the veil of ignorance would make decisions based on the long-term life prospects that they might face).

that make up our story.[139] This is also reflected culturally at the time of death, when the relevant question is whether a person had a good life rather than a good *part* of a life.[140] This tendency towards lifetime thinking is reflected in a vexing problem for the time-slice approach, which is its difficulty in pinpointing a sub-lifetime period that is morally relevant—one hour, one month, one year, one decade?[141] As a practical matter, if the length of time is defined to be very short, we ignore many of the contextual facts that might be relevant to assessing equality. For example, if the relevant time slice were one hour, and it happens that one individual had to have a root canal that hour, we might be required to compensate her for the pain and cost of that procedure and ignore that others might go through the same experience the next day.[142] As the unit of analysis becomes larger, the conceptual distinction between the time-slice and lifetime views is diminished, and we lose the ability to capture inequalities at moments in time.[143] Whatever size segment is chosen, it will likely be morally arbitrary yet have significant effects on evaluating equality between individuals.[144] The lifetime view provides a simpler and more elegant solution.

A second reason why the lifetime view might be superior is because it incorporates a desirable compensation principle. This is the notion that inequalities in one segment of a person's life can be compensated for in another part of that person's life.[145] For example, putting in hard work at law

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[139] *See* HELEN SMALL, THE LONG LIFE 95 (2007) ("'[N]arrative unity' tends to be understood non-literally, and simplifyingly, as a matter of there being significant connections between the different temporal parts or stages of a story and by analogy a life."). This is reinforced by the psychological interconnectedness of different parts of our lives, such that we might experience pleasure or dread while imagining the future, which affects us in the present. *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 972 (1999) (discussing the dread effects of environmental contagion).

[140] *See* Connie S. Rosati, *The Story of a Life*, 30 SOC. PHIL. & POL'Y 21, 22–23 (2013) (noting how we understand our lives in complete narrative form).

[141] *See* Juliana Bidadanure, *On Dennis McKerlie's Equality and Time*, 125 ETHICS 1174, 1177 (2015). ("One problem is that [simultaneous segments egalitarianism] may seem to define the segments that matter (T1, T2, and T3) arbitrarily. In theory, we may always select smaller segments in which case defining the worse-off would become arbitrary. By contrast, complete lives egalitarians seem to have identified the least arbitrary segment to apply the value of equality to: the segment of a life.").

[142] *See* McKerlie, *supra* note 135, at 483 (using the dentist example but not finding it damning).

[143] *See id.*

[144] *See* Larry S. Temkin, *Determining the Scope of Egalitarian Concern: A Partial Defense of Complete Lives Egalitarianism*, 69 THEORIA 46, 55–59 (2003) (critiquing time-slice approaches for arbitrariness that has a large effect on evaluations of equality).

[145] *See* KASPER LIPPERT-RASMUSSEN, LUCK EGALITARIANISM 154 (2016) (arguing that the possibility of compensation is a benefit to the lifetime view); Dennis McKerlie, *Justice Between the Young and Old*, 30 PHIL. & PUB. AFFAIRS 152, 154 (2002) (discussing the compensation principle).

school while taking on student loan debt could be worthwhile if it enhances one's employment and earning prospects for the rest of one's life.[146] Or a couple might adopt a rule that each partner would be able to choose which movie to watch on Fridays in alternating turns. This represents an inequality in power each Friday, but this inequality disappears over time in a way that most egalitarians would find acceptable. In contrast, the time-slice view would only accept compensation if it occurred within the same temporal segment. Thus, it would fail to recognize longer-term life plans that involved tradeoffs in well-being at different parts of the lifecourse.

Third, the lifetime view recognizes the importance of history. Consider two individuals who experience vastly different life circumstances for the first seventy years of their lives, and each have one decade left to live. The first has had a life full of opportunities, happiness, and resources, while the second has experienced health problems, social isolation, and poverty through no fault of her own. According to the lifetime view, we should *not* treat these two individuals equally in the last decade of their lives.[147] Rather, we should try to better the situation of the second individual to account for what she has been through, in an attempt to achieve equality over their lifetimes. The time-slice view might force us to ignore that historical context, which potentially inhibits societal efforts to recognize and address persistent inequalities.

Finally, the lifetime view allows for some consideration of personal responsibility and choice.[148] Many versions of egalitarianism prefer distributive equality between people except when inequalities are due to voluntary choices made by those people.[149] Consider another two individuals. Both experience roughly equal and good lives in terms of welfare, but one individual decides on a whim to sell all her possessions and spend the money on lottery tickets. She does not win the lottery, leaving her

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[146] *See* Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 284 (2014) (finding that "a law degree is associated with an increase of approximately 84 percent in expected mean monthly earnings . . . , a 65 percent increase in mean hourly wages . . . , and reduced risk of unemployment or underemployment.")

[147] *See id.*

[148] *See* Paul Bou-Habib, *Distributive Justice, Dignity, and the Lifetime View*, 37 SOC. THEORY & PRAC. 285 (2011) ("It is widely accepted among theorists of justice that a person's claims of distributive justice at a given moment in time should sometimes reflect her earlier exercises of responsibility.").

[149] *See* SHLOMI SEGALL, WHY INEQUALITY MATTERS: LUCK EGALITARIANISM, ITS MEANING AND VALUE 23–24 (2016) (defending equality as intrinsically valuable so long as inequalities derive only from the fault of one's own actions); Larry Temkin, *Equality, Priority, and the Levelling Down Objection*, *in* THE IDEAL OF EQUALITY 126, 129 (Matthew Clayton & Andrew Williams eds., 2000) ("[Egalitarians] care about *undeserved*, *nonvoluntary*, inequalities, which they regard as bad, or objectionable, because unfair.").

destitute.[150] If we assess these two individuals solely at this point in time, or within only a narrower temporal frame, we would have to bring the second person back to equality with the first. For those who care about incorporating some notion of desert or responsibility into distributions (and not all egalitarians do), lifetime egalitarianism allows for that.[151]

For these reasons, in evaluating differential treatment from the perspective of equality, it is necessary to evaluate whether such treatment leads to equality across the entire lives of separate individuals. This may at first seem to be in tension with a traditional legal analysis, which naturally adopts a time-slice approach by analyzing the outcomes of individual cases.[152] However, cases help to form legal rules that will impact parties and controversies in the future beyond that case. The broader temporal perspective is useful for examining whether legal rules accomplish over time the more substantive policy goals for which they were designed. This is particularly important in the discrimination context, as the pernicious effects of discriminatory laws and private actions might only be revealed when one examines how they impose cumulative disadvantage on members of particular social groups over time.[153]

Thus, age's temporal dimension requires us to expand our analytical window when engaging in the comparative exercise. When considering the wrongfulness of a given age-based legal rule, we must examine how that rule will apply through time to the lifecourses of all individuals who would live long enough to see its application. When considering the wrongfulness of private differential treatment based on age, we must examine how that treatment would apply to that individual or other individuals at ages across the lifespan. The next Section examines how lifetime egalitarianism affects equality-based theories of discrimination.

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[150] *See* Vanessa McGrady, *It's Math: Why You Should Never Play the Lottery*, FORBES (Jan. 8, 2016), https://www.forbes.com/sites/vanessamcgrady/2016/01/08/powerball/ (describing how poor the odds are of winning the lottery).

[151] *See* MCKERLIE, *supra* note 137, at 31 ("So it seems that, to give proper weight to facts about choice and responsibility, we must be prepared in principle to consider the past and the future when assessing a present inequality.").

[152] *See* Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 520–541 (1991) (describing the institutionalization of the case method in legal teaching).

[153] *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 487 (2007) ("[E]ven rational acts of discrimination can aggregate to cause systematic and cumulative disadvantage to members of minority groups."); Brest, *supra* note 121, at 8 ("[B]ecause acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries."). *See also* Anne L. Alstott, *A New Deal for Old Age*, 97 B.U. L. REV. 1933, 1936 (2017) (noting how earning a low income disadvantages you across the lifecourse).

B. Lifetime Egalitarianism

The Supreme Court first seriously engaged with age-based legal rules in the case of *Massachusetts Board of Retirement v. Murgia*.[154] This case involved a Massachusetts state law that required mandatory retirement of police officers at age fifty.[155] Robert Murgia challenged the law, and there was no dispute that his "excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer."[156] While noting that the aged faced discrimination, the Court declined to apply strict scrutiny to the class of police officers over fifty, saying that "even old age does not define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span."[157] As a result, the mandatory retirement rule passed constitutional muster under rational basis review. Other similar age-based constitutional challenges have also failed.[158]

The Court did not spend much time on the temporal dimension of age, but the above quote reveals that the Court implicitly embraced a lifetime egalitarian approach.[159] Since the Court was constrained by its consideration of age distinctions in the context of constitutional jurisprudence, however, it did not engage with the moral wrongfulness of age discrimination in egalitarian theories of discrimination. The next subsections explicitly engage in that missing analysis, concluding that the rational basis level of scrutiny adopted by the Court was likely appropriate from the perspective of equality.

1. Intent

Age-based differential treatment or legal rules might offend equality because they are infected with ageism. In this context, ageism refers to its prejudice or stereotyping components, which have the quality of not

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[154] Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

[155] *See id.* at 308.

[156] *Id.* at 311.

[157] *Id.* at 313–14 (citation omitted).

[158] *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (mandatory retirement for judges at 70 falls within exception of ADEA and does not violate equal protection); Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement for foreign service officers at age 60 permissible under the Equal Protection Clause). However, some state courts have struck down age distinctions under rational basis review. *See, e.g.*, Arneson v. State By & Through Dep't of Admin., Teachers' Ret. Div., 864 P.2d 1245, 1249 (Mont. 1993) (striking down a retirement benefit age distinction).

[159] *See* Eglit, *supra* note 40, at 888–89 (discussing how the court employed a logic of complete lives).

respecting the equal moral worth of individuals in society.[160] According to this line of argument, what makes differential treatment by private actors morally wrongful is that it is animated by this ageist mental state. However, ageism differs from racism and sexism in that it is composed of temporally-triggered biases that have equal application across all individuals' lifetimes.[161] For example, consider an employer who believes that people in their twenties are unreliable because of their age and as a result refuses to hire them.[162] This seems to treat people of that disfavored age as unworthy, which in turn taints the refusal to hire. However, widening the temporal lens reveals that this mental state does in fact respect the equal moral worth of persons, as the aforementioned employer would presumably consider hiring the same individuals as they age.[163]

A comparison to other identity characteristics helps to illustrate the point. A racist attitude does not expire as applied to a given individual, unless one has the privilege to "pass" from one racial category to another unbeknownst to the individual possessing the racist attitude.[164] Therefore, the lifetime view reveals that differential treatment animated by racism will generally yield continuous discrimination over the lifetime of one person as compared to another.[165] This is lifetime inequality, not equality. Differential treatment animated by religious bias, while potentially more mutable like ageist bias, does not inevitably change in application to a given individual, as conversion is neither required nor guaranteed. Thus, in contrast to age, this yields lifetime inequality as well.

In the realm of public discrimination, the argument from intent takes on a slightly different character. What matters here is that ageism taints the

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[160] *See supra* Part I.A. (discussing ageism); Part II.B.1. (discussing intent-based theories of discrimination).

[161] *See* Reaves, *supra* note 128, at 51 (noting the differences between ageism and racism in the employment discrimination context).

[162] *See* Caroline Beaton, *Too Young to Lead? When Youth Works Against You*, FORBES (Nov. 11, 2016), https://www.forbes.com/sites/carolinebeaton/2016/11/11/too-young-to-lead-when-youth-works-against-you/ (describing how workers under thirty can face discrimination based on age).

[163] *See* Howard C. Eglit, *The Age Discrimination in Employment Act at Age Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 676 (1997) ("Ageism is not equivalent, either in its genesis nor its manifestations, to racism.").

[164] *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 47 (1994) ("Passing—the ability of individuals to change race—powerfully indicates race's chosen nature."). *See also* Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 347–52 (2017) (examining transracialism and its relationship to reverse passing); Rebecca Tuvel, *In Defense of Transracialism*, 32 HYPATIA 263 (2017) (considering the phenomenon of racial transition and comparing it to the transgender experience).

[165] *See, e.g.*, John Wooldredge et al., *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants?*, 14 CRIMINOLOGY & PUB. POL'Y 187, 212–17 (2015) (noting the negative effects for black defendants at various stages of the criminal process).

political process, producing normatively objectionable outcomes that do not equally represent the interests and concerns of age minorities in a democracy. When one observes the age-based legal landscape, it does appear that a nontrivial number of age-based rules reflect ageist stereotypes: those younger than twenty-one are presumed unable to drink alcohol responsibly,[166] those under twenty-five are presumed to lack the life experience to serve as Representatives,[167] and those who are fifty and older are presumed incompetent to serve as police officers.[168] Further, age-based rules typically concern the youngest or oldest members of society, who are numerical minorities.[169] This suggests that ageism may have infected the political process, and the interests of these groups have not been adequately represented.

The unique temporal character of age, however, also complicates any analysis of the political process as ageist. Ageism not only represents negative attitudes and feelings towards other people but also represents prejudice against one's past or future self.[170] This understanding of ageism makes the application of an intent theory to public discrimination less

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[166] *See* Judith G. McMullen, *Underage Drinking: Does Current Policy Make Sense?*, 10 LEWIS & CLARK L. REV. 333, 341–42 (2006) (discussing the policy rationales for the drinking age being to protect minors and protect society).

[167] *See* Scott Bomboy, *Why Does a Presidential Candidate Need to be 35 Years Old Anyway?*, CONST. DAILY (July 22, 2016), https://constitutioncenter.org/blog/why-does-a-presidential-candidate-need-to-be-35-years-old-anyway (describing the discussions that led to the constitutional age restrictions for elective office).

[168] *See* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 315 (1976) ("Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age.").

[169] *See* Bernice L. Neugarten, *Age Distinctions and Their Social Functions*, 57 CHI.-KENT L. REV. 809, 821 (1981) (discussing a study that found that the vast majority of Illinois statutory law concerned minors or those above fifty).

[170] *See* Todd D. Nelson, *Ageism: Prejudice Against Our Feared Future Self*, 61 J. SOC. ISSUES 207, 213–14 (2005) (discussing the psychological mechanisms at play in sustaining ageism). This formulation of ageism relies on the concept of continuous personal identity, i.e. that the past or future self is indeed the same person as the one who holds the ageist attitude. *See, e.g.*, ERIC T. OLSON, THE HUMAN ANIMAL: PERSONAL IDENTITY WITHOUT PSYCHOLOGY (1997) (arguing for continuity based on biology); Sydney Shoemaker, *Personal Identity: A Materialist's Account*, *in* PERSONAL IDENTITY 67, 89–91 (Sydney Shoemaker & Richard Swinburne eds., 1984) (advocating for psychological continuity); Ho Mun Chan, *Sharing Death and Dying: Advance Directives, Autonomy and the Family*, 18 BIOETHICS 87, 99–100 (2004) (favoring a relational view of personal identity). *But see* Derek Parfit, REASONS AND PERSONS 205–12 (1984) (arguing that personal identity is more a matter of degree rather than being an all-or-nothing affair). Despite this philosophical controversy, many legal doctrines rely on the idea of continuous personal identity. *See* Nancy K. Rhoden, *The Limits of Legal Objectivity*, 68 N.C. L. REV. 845, 854 (1990) ("The principle 'one body, one person' is a virtual necessity for the criminal justice system, for duties to honor one's contracts, or to pay for one's torts. Without unified personal identity, 'new persons' could spring fully formed into existence and legitimately could deny all family and financial obligations.").

straightforward than it might at first seem. From the perspective of intent and process, age-based legislating appears to be less about inadequate representation of the interests of other age groups in society at one moment in time and more about the failure to represent our own past or future interests across the lifecourse. In other words, age-based legislating merely represents a lack of foresight or hindsight.[171]

Legislating against oneself, however, shows no defect of political process. This is why affirmative action, which draws distinctions to the detriment of the racial majority, is not troublesome from the perspective of this egalitarian theory.[172] The failure to think ahead or remember our pasts is not unique to age-based rules, either, so it fails to provide a unique rationale for the moral wrongfulness of age-based distinctions in this context.[173] These types of laws may still be unwise or expose the problems with mental heuristics humans employ, but these are separate prudential rather than moral considerations.

2. Meaning

While an intent-based inquiry focuses on the process through which differential treatment came about, objective meaning accounts shift the emphasis to the differential treatment itself. What makes discrimination wrongful is the demeaning message that such treatment might express in a particular context.[174] To be demeaning, a particular instance of differential treatment must come from a person or entity that has power over the person to whom it applies (the power dimension), and the treatment itself must express extreme disrespect that does not acknowledge the equal moral worth of the individual in cultural context (the social dimension).[175] The power dimension will easily be satisfied by public discrimination because the government has power over its subjects, and we can assume for the sake of argument that at least some private actors will be in a position of power as well.

The analysis is more complicated for the social dimension. Age-based decision-making might at first seem to express extreme moral disrespect. In

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[171] *See* EGLIT, *supra* note 67, at 17 (2004) ("These facts lead to the perception that those people who possess power in American society are not likely to exercise that power to hurt themselves today or their future selves tomorrow. . . .").

[172] *See* ELY, *supra* note 107, at 170–72 (discussing how affirmative action is not troublesome from a process theory).

[173] *See* Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89, 99 (1995) (discussing failures in judgment of both foresight and hindsight); Baruch Fischhoff, *Hindsight and Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 73 J. APPLIED PSYCHOL. 305, 306 (1975) (discussing hindsight bias).

[174] *See supra* Part I.B.2. (discussing the objective meaning accounts).

[175] *See* HELLMAN, *supra* note 88, at 33.

the public realm, consider the various maturity rules that grant legal rights to teenagers or those in their early twenties.[176] These rules deprive various individuals who might be developmentally mature of the ability to have sex, contract, or vote because they are just short of turning sixteen, eighteen, or twenty-one.[177] Certainly to those individuals who are developmentally mature but have not yet reached the appropriate age, this represents a demeaning message that they are not full members of the community.[178] Similarly, a denial of services in the private realm on the basis of age could send a similar message.[179]

It is not clear, however, how these types of age-based public rules or private treatment can contain demeaning messages once one evaluates them from the lifetime perspective. Since expressive theories are heavily reliant on analyzing the relevant context to determine if a message is demeaning, it is consistent with this approach to consider the temporal context as well.[180] In the case of maturity rules, minors will inevitably "age out" of these restrictions. In the case of private age discrimination, the demeaning treatment is temporally situated, such that it will not apply indefinitely and will apply inevitably to all. Thus, when examined from the lifetime perspective, treating individuals differently based on age merely expresses that "This is not the appropriate time, yet" or "You are currently the wrong age, but you were not before." It is hard to construe this message as inherently demeaning, provided there is consistency in application of the differential treatment over time. This is notably different from other identity characteristics, such as sex, religion, or disability, which are not temporally dependent in the same way.

3. Harm

Meaning-based egalitarian theories of discrimination concentrate on the objective content of the discriminatory action, but harm-based theories focus instead on their consequences.[181] Law serves as a way of distributing resources or opportunities in society, and it also serves to shape or reinforce

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[176] *See generally* Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1149–50 (2012) (detailing the various types of maturity rules and their relationship with cultural constructs).

[177] *See supra* Part I.A (describing various age-based rules).

[178] This was the essence of the dispute in the early 1970s around reducing the voting age to eighteen, so that it was consonant with the age of the military draft, which was high-salience due to the Vietnam War. *See* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1358 (2003) (detailing the history).

[179] *See* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 264 (2011) (discussing how the Civil Rights Act was purposed towards avoiding the demeaning nature of discrimination).

[180] *See* HELLMAN, *supra* note 88, at 38–41 (discussing the importance of considering context in evaluating social meaning).

[181] *See supra* Part I.B.3 (describing harm-based theories).

oppressive cultural attitudes and representations.[182] The ruling in *Murgia* did both.[183] It permitted the allocation of government positions, in this case, employment opportunities in law enforcement, to those who are under age fifty. It also reinforced the stereotype that older people are physically weak or incompetent.[184] At first glance, this creates an inequality between those who are over fifty and those who are under fifty, on the basis of an immutable characteristic that does not inherently have a relationship with the ability to do the job. To the extent that we are egalitarians, it would seem that we should view this type of age-based distinction with suspicion.

This first take, however, again fails to take a lifetime perspective. As the *Murgia* Court points out, "old age" merely represents a particular span of time within the lifecourse of an individual.[185] Everyone will have the same opportunity to be a police officer because everyone will have that opportunity for the same age range in their lives. Everyone will experience the negative attitudes towards age and aging when they reach the appropriate age, but not before. In addition, they might experience positive age-based stereotypes as well, such as the presumption of wisdom or experience, indicating that travel through the lifecourse is not necessarily a uniformly negative trajectory.[186] When you compare the access that two individuals might have to lifetime employment opportunities in this field or the stigmatic effects that one might experience over a lifetime, there is no difference. From an egalitarian perspective, time serves to cure the negative effects of the discrimination.

Those harm-based equality theories that focus on social groups, rather than individuals, offer the possibility of avoiding the temporal problems of age.[187] These group-based theories of discrimination locate the wrong of differential treatment in how it affects social groups or society as a whole.[188] Age groups do not possess lifetimes, and it thus seems natural to evaluate

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[182] *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 92–93 (1996) (describing the mission of antidiscrimination law as ameliorating both distributive and stigmatic harm).

[183] *See* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 315 (1976).

[184] *See* Leslie A. Zebrowitz & Joann M. Montepare, *"Too Young, Too Old": Stigmatizing Adolescents and Elders*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA 334, 338–344 (Todd F. Heatherton et al. eds. 2003) (discussing how age stigmas affect both those who are older and younger).

[185] *See* Murgia, 427 U.S. at 313–14.

[186] *See* PALMORE, *supra* note 68, at 34–44 (discussing the positive stereotypes, attitudes, and discrimination experienced by those who are older).

[187] *See supra* text accompanying notes 122–23.

[188] *See* Carina Fourie et al., *The Nature and Distinctiveness of Social Equality: An Introduction*, *in* SOCIAL EQUALITY: ON WHAT IT MEANS TO BE EQUALS 1, 1 (Carina Fourie et al. eds., 2015) ("When we appeal to the value of equality, we mean the value primarily of egalitarian and nonhierarchical relationships").

whether legal rules or private discrimination negatively affect certain groups in society in a time-slice fashion.[189]

There are two primary problems with such an approach, one specific to age and one not. First, as we all inevitably progress through the lifecourse, any given group of individuals defined by age is unstable as its membership is constantly and systematically changing.[190] People will always be naturally progressing into a given age group (through birth or aging) and out of it (through further aging or death). This is different from the changing membership of other groups, which is either impossible due to lifetime immutability, or occurs as a matter of choice or random chance. Thus, age groups do not have the caste-like nature that concerns group theorists.[191]

Second, it is not clear that group harms adequately capture or exhaust the wrong of discrimination, either morally or legally. This is a critique that is not unique to age discrimination, though it takes on special resonance when trying to assess moral wrongfulness. At least some portion of the moral wrongfulness of discrimination derives from a personal wrong, as the rest of the egalitarian theories of discrimination recognize. For example, most understand the denial of employment, housing, or medical care to a person on the basis her sex or class as being wrong not just because it contributes to inequality between genders or classes writ large, but also because it negatively impacts that individual.[192] This is even truer of age, as individuals have weaker ties to any given age group as they continue to change group membership throughout their lives. Put another way, discrimination is more tort-like in nature; it constitutes a personal wrong by one person to another, or by the government against its subjects.[193] This is also typically how discrimination law has understood antidiscrimination rights—as individual rather than group rights.[194] This is not to suggest that social or relational

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[189] *See* Bidadanure, *supra* note 137.

[190] *See* Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 GEO. MASON L. REV. 145, 177 (2000) (highlighting that the group logic of antidiscrimination laws exacerbates tensions between distributive and recognition-based forms of justice).

[191] *See* Sunstein, *supra* note 123, at 2411–12.

[192] *See* Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 945–46 (2014) (emphasizing the importance of the individual as well as the group in sex discrimination).

[193] *See* Moreau, *supra* note 27, at 145–46 ("Anti-discrimination laws are commonly structured in such a way as to suggest that discriminators have committed a personal wrong against their victims, akin to a tort."). *See also* William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027, 1032–33 (2014) (describing the recent tendency of the Supreme Court to import tort concepts into discrimination law).

[194] *See* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 141 (2017) (noting that equality law "must recognize social groups to understand how group-based inequality constrains individuals and harms society. But it does not envision social groups as the basic units of analysis or the bearers of rights.").

equality is not a worthy goal, but instead to highlight the fact that the moral wrongfulness of discrimination does not start or end with groups, even if they, too, might experience harm through discrimination.

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Egalitarian theories of discrimination alone provide insufficient guidance in understanding the moral wrongfulness of age discrimination. As a descriptive matter, this fact is illuminating, as it helps explain the current state of constitutional age discrimination jurisprudence, which is not protective of age.[195] In addition, there are powerful arguments why Equal Protection jurisprudence should remain firmly rooted in equality rather than in alternative values such as liberty.[196] However, the fact that an age-based rule is constitutionally permissible does not absolve us of the responsibility to analyze whether age discrimination is wrongful or whether legislatures or agencies should continue to adopt age-based rules or enact antidiscrimination statutes. The flurry of age-based antidiscrimination legislation after *Murgia* suggests that there is some moral understanding that age discrimination can be wrongful and that the law has a role to play in policing it.[197] The next Section examines how equality might be able to justify the legal regulation of age discrimination in a limited set of situations.

C. Equality's Remainders

While age's temporal dimension renders many egalitarian theories of discrimination incapable of pinpointing the wrong of age-based discrimination, it is not the case that equality excuses all forms of age-based discrimination. There are at least two situations of age discrimination that equality may have the theoretical power to identify as wrongful. However, even recognizing equality's utility in these cases, there are many forms of age discrimination that are left unaddressed in an egalitarian scheme. Thus, current age-based antidiscrimination law still requires a different or supplemental theoretical foundation.

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[195] *See supra* note 158.

[196] *See* Deborah Hellman, *Equality and Unconstitutional Discrimination*, *in* PHILOSOPHICAL FOUNDATIONS 51, 51 ("[A]n equality-based conception of wrongful discrimination allows a court to decide cases on the basis of thinner principles than does a liberty-based conception . . . and for that reason is more consistent with liberal constitutionalism.").

[197] *See* Howard Eglit, *Mandatory Retirement*, Murgia, *and Ageism*, *in* EMPLOYMENT DISCRIMINATION STORIES 268, 297–300 (Joel Wm. Friedman ed. 2006) (describing federal legislative responses after *Murgia*).

The first category is intersectional discrimination.[198] In cases where age intersects with other identity characteristics that do not have the same temporal qualities as age, the lifetime perspective does not complicate the egalitarian discrimination analysis.[199] This is because the discrimination will be anchored in more stable identity characteristics or ones that do not possess the same inevitable mutability of age. As a result, several egalitarian theories of discrimination will remain fully capable of explaining why these types of discrimination are wrongful. For example, many states have moved to decrease the age at which minors can be tried as adults in criminal courts, with some going so far as to try children aged thirteen.[200] To the extent that this has disproportionate racial effects because such transfers operate in an environment in which black children are seen as more mature and culpable, it is not a neutral age-based distinction that will even out over the lifecourse.[201] The same can be said for raising the retirement age, which will have a disproportionate impact on certain racial minorities and other groups.[202] Thus, intersectional discrimination will often show its wrongful character through the disparate impact of facially neutral age rules.[203]

The second category is age-based discrimination that has the effect of producing lifetime inequalities due to contextual factors.[204] For example,

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[198] *See supra* text accompanying notes 80–84.

[199] *See, e.g.*, Alexandra Lopes, *Aging and Social Class: Towards a Dynamic Approach to Class Inequalities in Old Age*, *in* AGE DISCRIMINATION AND DIVERSITY: MULTIPLE DISCRIMINATION FROM AN AGE PERSPECTIVE 89, 101–05 (Malcolm Sargeant ed. 2011) (discussing the intersection of class and age to produce cumulative disadvantage over the lifecourse).

[200] *See* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 96 (2006), *available at* https://www.ojjdp.gov /ojstatbb/nr2006/downloads/NR2006.pdf (discussing the trend); 705 ILL. COMP. STAT. ANN. 405/5-805 (permitting prosecution of thirteen year olds under certain conditions).

[201] *See* REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD (2017) (demonstrating that black girls are more likely to be "adultified" and that this has implications for the juvenile justice system); Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERS. & SOC. PSYCH. 526 (2014) (finding that black boys are seen as less childlike than their white peers).

[202] *See* Kathryn L. Moore, *Raising the Social Security Retirement Ages: Weighing the Costs and Benefits*, 33 ARIZ. ST. L.J. 543, 607 (2001) ("[R]aising the Social Security retirement ages is likely to have a greater adverse impact on groups with lower life expectancies, such as men, blacks, and lower-income workers, than on groups with higher life expectancies, such as women, whites, Hispanics, Asians, and higher-income workers.").

[203] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

[204] *See* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 (1986) ("Individual needs and positions may have to be taken into account in any particular situation in order to achieve equality of outcome.").

while usually there is some degree of uncertainty about the exact quality and quantity of the life that an individual will have, sometimes the situation is more certain. This has the effect of dissolving the unique temporal quality of age-based rules, at least as applied in that specific case. To use an extreme case, consider a terminally ill teenager who is developmentally quite mature. This individual will have a tragically short life, and she will be subject to a variety of maturity rules that continue to deprive her of legal rights until she dies. She will not "age out" of her legal disability, as most other minors will. In these situations, these age-based rules might take on a wrongful character because they exacerbate lifetime inequalities. A more common situation would be when a birth cohort experiences a particularly burdensome set of material conditions—such as a depression or natural disaster—such that formal equal legal treatment along several dimensions would create unequal and morally unjust substantive outcomes across a lifetime.[205]

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These examples partially rehabilitate egalitarian theories with respect to age, as they help us to understand the wrongfulness of certain types of age discrimination. However, this is at best an incomplete account of age discrimination as it leaves a large swath of it unexplained. Something more is needed, either to replace or complement egalitarian theories. The next Part explores how a non-comparative approach may offer a better descriptive and normative foundation for the moral wrongfulness of age discrimination and non-constitutional age discrimination law.

[205] *See* Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 353 (2018) ("[T]reating individuals who are alike on one legally salient dimension may not always be appropriate if the material conditions of those two individuals are different."); Thomas Nagel, *Equality*, *in* THE IDEAL OF EQUALITY 60, 60 (Matthew Clayton & Andrew Williams eds., 2000) ("It is a commonplace that real equality of every kind is sensitive to economic factors.").

III. NON-COMPARATIVE AGE DISCRIMINATION LAW

While the value of equality may both explain and justify the current landscape of constitutional law with respect to age, it falters in providing an adequate normative foundation for age-based antidiscrimination norms or the statutory age discrimination law that flows from them. This Part sketches out one version of a non-comparative age discrimination law—specifically one that is grounded in liberty or freedom—which could serve as an alternative or supplemental basis for the field.

Liberty is certainly not the only non-comparative value that one could use to construct such a theory, with another plausible candidate being dignity.[206] But the goal is neither to argue for any particular value nor to elaborate all of the different aspects of a corresponding theory. It is instead to demonstrate the contours of one such theory in enough detail to show that it can serve as a plausible alternative to the equality-based accounts already discussed. In addition, this Part should not be taken as an attempt to replace wholesale the value of equality in age discrimination law. As noted earlier, equality still has some explanatory force both normatively and descriptively for constitutional law and for certain situations of age discrimination. Instead, the best theory may in fact be a pluralist in nature, drawing on both comparative and non-comparative values depending on the specific context at issue.

In elaborating a liberty-based age discrimination law, this Part seeks to answer two basic questions. First, how might one conceptualize the relevant liberty interests in the context of discrimination? Section A addresses this question. Second, since the problems for equality derived from age's temporal dimension, does liberty fare any better in this regard? Section B tackles the relevant temporal issues. Finally, Section C discusses some of the notable implications of a non-comparative age discrimination law for current debates in discrimination theory and law.

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[206] *See, e.g.*, Denise G. Reaume, *Discrimination and Dignity*, 63 LA. L. REV. 645, 666–71 (2003) (tracing the importance of dignity in Canadian discrimination jurisprudence). Dignity, however, is a notoriously slippery concept that has less salience in United States law. *See* Oscar Schachter, *Human Dignity As a Normative Concept*, 77 AM. J. INT'L L. 848, 849 (1983) (noting that dignity's "intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors."). That being said, depending on how you define it, dignity may intersect in interesting ways with both liberty and equality in the context of discrimination law. *See generally* Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007) (exploring dignity and its relationship to equality and liberty).

A. Liberty

Liberty can have many meanings. At its core, it is concerned with self-determination.[207] This is the ability to author one's own life, choosing both what goals to value and the path to take in pursuit of those goals.[208] Beyond this, the consensus dissolves, but the differences can be mapped in the following ways:

> Whenever the freedom of some agent or agents is in question, it is always freedom from some constraint or restriction on, interference with, or barrier to doing, not doing, becoming, or not becoming something. Such freedom is thus always [1] *of* something (an agent or agents), [2] *from* something, [3] *to do*, not do, become, or not become something; it is a triadic relation.[209]

Perhaps the most common construal of the value comes from libertarian scholars, who understand it as negative freedom, or freedom from interference by the state.[210] However, this conception has little to say about what antidiscrimination norms we should pursue, and legal scholars working in this vein have used this understanding of liberty to critique the very types of antidiscrimination laws that this Article seeks to justify.[211] Thus, a liberty-based antidiscrimination law must understand the value in a different way.

A more robust understanding of liberty would conceptualize it as a set of capabilities. A capability is the freedom of an agent to achieve certain functionings, which encompass "doings", or the ability to do certain things (for example, to participate in the political process or procure gainful employment), and "beings", or the ability to achieve certain states of being

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[207] *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 20 (1988) (understanding autonomy as "a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values")

[208] *See* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[209] Gerald C. MacCullum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312, 313 (1967).

[210] *See* Isaiah Berlin, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND 191, 203–06 (1997) (characterizing this as "negative liberty"). There are several thinkers who work in this vein. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); FREIDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

[211] *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 24–27 (1992) (valorizing freedom of contract and arguing that it is antithetical to the antidiscrimination principle); *id.* at 444–48 (specifically attacking the Age Discrimination in Employment Act).

(for example, having good health).[212] These liberty interests are inherently open-ended, as one is not required to exercise them to achieve the functionings they facilitate.[213]

This implies a more comprehensive understanding of the barriers that one might face in exercising one's freedom. While the government can certainly be a barrier to freedom, it is not the only one. A given person's capabilities are a "product of her internal endowments, her external resources, and the social and physical environment in which she lives."[214] Both private and public discrimination impact the resources or opportunities that one possesses as well as the legal environment that shapes one's lifecourse. For example, private discrimination can cut off access to markets for important goods, while governmental rules can restrict access to legal entitlements that allow one to participate fully as a citizen.[215] This creates the need for an antidiscrimination regulatory regime.

With the nature of the interest delineated, a further question arises: which liberty interests, construed as capabilities, are worthy of antidiscrimination protection? After all, not all capabilities are created equal, nor should they be treated as such. For example, the capability to dress in the most expensive fashions is not on par with the capability to be nourished, even if they both implicate liberty interests. Thus, we must have some understanding of which capabilities are sufficiently important such that we must safeguard them through antidiscrimination norms and law. Fortunately, capabilities theorists have constructed comprehensive lists of human capabilities that are fundamental to a flourishing life.[216] However, a shorthand way of identifying those capabilities that are sufficiently important is to look to current antidiscrimination law. These laws, which prohibit discrimination in

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[212] *See* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 89–96 (2000) (describing the concept of functionings).

[213] *See* Martha C. Nussbaum, *Aging and Human* Capabilities, *in* AGING THOUGHTFULLY: CONVERSATIONS ABOUT RETIREMENT, ROMANCE, WRINKLES, AND REGRET 195, 197 (Martha C. Nussbaum & Saul Levmore eds., 2017) (noting that capabilities form core political entitlements and "with respect to what is on the list, what's protected is an area of choice, and people may choose one way or another).

[214] *See* Elizabeth Anderson, *Justifying the Capabilities Approach to Justice*, *in* MEASURING JUSTICE: PRIMARY GOODS AND CAPABILITIES 96 (Harry Brighouse & Ingrid Robeyns eds., 2010).

[215] *See* Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1250–53 (2013) (describing how legal rules can serve to cut one off from fundamental human capabilities in the context of legal incapacity).

[216] *See, e.g.*, NUSSBAUM, *supra* note 26, at 76–78 (2006) (detailing a list of ten fundamental capabilities, including life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment (political and material)). *See also* KHAITAN, *supra* note 62, at 95–96 (arguing that four goods are essential to the pursuit of a good life and that the role of discrimination law is to ensure their availability: goods to satisfy one's biological needs, negative freedom, an adequate range of valuable opportunities, and self-respect).

realms such as employment and housing, identify those capabilities—the capability to seek employment or the capability to control one's living situation—that are important enough to receive the protection of the law.

Having described liberty and its relationship to discrimination law, a further question arises: what makes discrimination morally wrongful from a liberty perspective? There are at least two possibilities. First, one might find the wrong of discrimination in how it impairs an individual's deliberative freedoms, or the ability to conceptualize and actualize a plan for the good life in domains considered important.[217] The key normative point here is that certain morally irrelevant traits should not factor into an individual's life plans as costs.[218] For example, one should not have to contemplate one's sex as a cost in deciding where to work. Certain workplaces may impose such costs by allowing sexual harassment or maintaining a sex-based wage differential.[219] Age similarly constitutes a morally irrelevant characteristic that should not operate as a cost through the decision-making of others, even if the aging process certainly imposes costs of various types.[220]

Another way of conceptualizing the non-comparative wrong of discrimination is to focus on opportunity "bottlenecks."[221] A bottleneck in the opportunity structure of society is a situation in which there is only one plausible path towards achieving certain desired functionings.[222] For example, if performing well on a standardized test were the only determinant of one's job opportunities and earning potential (rather than being just an entry point into one specific profession), that represents a bottleneck.[223] It

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[217] *See* Moreau, *supra* note 27, at 147 ("In a liberal society, . . . we are each entitled to a set of 'deliberative freedoms,' freedoms to deliberate about and decide how to live in a way that is insulated from pressures stemming from extraneous traits of ours."). *See also* NUSSBAUM, *supra* note 26, at 77 (describing the fundamental capability of practical reason, or "[b]eing able to form a conception of the good and to engage in critical reflection about the planning of one's life.").

[218] *See* Moreau, *supra* note 27, at 149 ("[T]here are certain traits that we believe people should not have to factor into their deliberations, or, more exactly, should not have to factor in *as costs*, even if they are deeply important to the person and relevant to her decisions."). *See also* Alan Carter, *A Distinction Within Egalitarianism*, 108 J. PHIL. 535, 536 (2011) ("[W]e hold as a basic moral principle that persons ought to be treated equally unless there is a morally significant and morally relevant difference between them that justifies unequal treatment.") (footnotes omitted).

[219] *See* Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 187–88 (2011) (discussing how preconceived notions can inappropriately influence the estimated worth of female employees).

[220] *See supra* text accompanying note 78–79.

[221] *See* FISHKIN, *supra* note 28, at 146 (advocating for an anti-bottleneck principle: "As far as possible, there should be a plurality of paths leading to the valued roles and goods, without bottlenecks through which one must pass in order to reach them.").

[222] *See id.* at 13 (defining a bottleneck as "a narrow place in the opportunity structure through which one must pass in order to successfully pursue a wide range of valued goals.").

[223] *See id.* at 130–31.

deprives individuals of multiple potential paths to achieve certain desired functionings and thus hinders the creation of a unique life plan. Identity characteristics can also serve as bottlenecks. For instance, an employer might require that employees possess no mobility impairments to stay on the job, even if it is irrelevant to doing the job.[224] This is a bottleneck based on disability, and age can serve as a bottleneck in the same way to prevent opportunity pluralism. According to this view, discrimination is wrongful when it creates bottlenecks that inhibit the acquisition of important functionings through multiple paths.

B. The Temporal Question

However it is conceptualized, liberty is a plausible basis for understanding the moral wrong of discrimination and for justifying an age-based antidiscrimination regime. But how does it fare with respect to age's temporal dimension? Liberty is a non-comparative value. These types of values protect rights or interests that are independent of the rights or interests of others.[225] Instead of focusing on a comparison to another individual, non-comparative approaches instead examine the rights or interests that one might have by virtue of some quality that the individual possesses, such as being human or a recognized member of a community.[226] In other words, these interests are intrinsic to the person, and they create a baseline of treatment to which one is entitled.[227] Because it does not rely on comparisons, a non-comparative approach avoids the basic temporal question of equality-based approaches, which is *when* the comparison must occur.

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[224] *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 441 (2000) (describing how the design of jobs or the physical environment may disadvantage people with disabilities).

[225] *See* Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 298 (1974) ("[J]ustice consists in giving a person his due, but in some cases one's due is determined independently of that of other people, while in other cases, a person's due is determinable *only* by reference to his relations to other persons. I shall refer to contexts, criteria, and principles of the former kind as *noncomparative*, and those of the latter sort as *comparative*.") (italics in original).

[226] *See* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 36 (2011) (proposing that such capabilities inhere in a notion of life worthy of human dignity); Hellman, *supra* note 196, at 55 ("According to *discrimination as a violation of liberty*, a law or policy wrongfully discriminates when it infringes on a liberty to which each person is independently entitled. The problem is not that Person X is being treated worse than Person Y, without adequate justification. Rather, the problem is that Person X is being denied a right to which she is entitled, period.") (italics in original).

[227] Thus, this version of antidiscrimination law adopts sufficiency, rather than equality, as a moral ideal. *See* HARRY FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 134 (1988) (positing that "what is important from the point of view of morality is not that everyone have the same but that each should have enough.") (first italics omitted).

Instead, it has its own analogous temporal question that it must answer. This is whether the relevant liberty interests must be protected during an entire lifetime or only at certain moments during the lifecourse. A logical preliminary answer is that said liberty interests must be protected at all times.[228] The law already recognizes that self-authorship is a continuous process, and that we retain the intrinsic right to change our goals and the means we use to reach those goals. For example, self-binding contracts do not have the force of law, as they bind a future self to a life plan generated by a past self.[229] Similarly, wills can be written and rewritten as many times as one pleases, as death is the only logical end to the self-authorship process.[230] Thus, in a liberty-based scheme, the moral wrong of discrimination derives from the deprivation of sufficiently-important capabilities rather than the comparison of one's legal or social entitlements to those of another.[231] This forms the normative basis of age-based antidiscrimination law, a task for which equality is ill-suited.

One important conceptual implication of this is that a liberty-based theory of discrimination embraces a critical stance toward a socially or legally prescribed life course. In other words, the pathways that one might take in pursuit of one's life goals should not be dictated by age, and certain opportunities should not be foreclosed solely because of age. For example, according to this view, adoption of children should not necessarily be limited to those of a certain age, allowing flexibility in when to pursue parenthood during one's lifecourse.[232] The healthy skepticism about externally-imposed life paths is not that alien a concept, as this type of liberty-based norm is already reflected in employment discrimination law, which has over time removed any age ceiling on the class of employees protected from age

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[228] *See* Bou-Habib, *supra* note 148, at 302–03 (arguing against time-limited autonomy). *See also* Part III.C.2.

[229] *See* Boni-Saenz, *supra* note 33, at 19–21 (noting that Ulysses contracts are not enforceable); Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357, 359 (1985) ("We have, then, a territory in which 'private ordering' is about all there is. We must devise rules for our own behavior that entail little or no reliance on the courts . . . because the courts refuse to extend us their jurisdiction."). It is also the reason why contracts to sell oneself into slavery are prohibited, as they inhibit future liberty interests to too great a degree. *See* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 960 (William J. Ashley ed., Longmans, Green and Co. 1961).

[230] *See* Matter of Fernandez's Estates, 413 A.2d 998, 1002 (N.J. Super. Ct. Law Div. 1980) ("A will is ambulatory and speaks only as of testator's death.").

[231] *See* Richard Wagland, *A Fair Innings or Complete Life: Another Attempt at an Egalitarian Justification of Ageism*, *in* JUSTICE FOR OLDER PEOPLE 161, 170 (Harry Lesser ed. 2012) (concluding that "an effective anti-ageist argument should appeal to the idea that there are certain synchronic interests that have equal moral value irrespective of the chronological age of the individual who holds them.").

[232] *See, e.g.*, *Chapter 3 the Legal Functions of Adoption*, 41 IUS GENTIUM 79, 87 (2015) (noting that most Western countries include in suitability criteria a maximum age for adoption).

discrimination.[233] This is in notable contrast to European age discrimination law, which more willingly embraces mandatory retirement and a particular life stage in which one retires and receives a relatively generous pension.[234]

The presumption against a prescribed life course does not necessarily mean that we must reject all social or cultural understandings of life stages or a "normal" lifecourse. Many of these could be justified in the name of preserving liberty for others or for oneself at some other point in the lifecourse, promoting efficiency, or honoring some other important competing value. For instance, in certain situations, it makes sense for some activities to take place in a sequence, such as attending law school before becoming a practicing attorney, or engaging in cycles of rest and work.[235] The key is that when the culture or law sets down an age-based expectation or rule, there must be a more searching inquiry to see if it is truly justified or not. The next Section explores some ways in which that might play out with respect to discrimination law and theory.

C. Implications

One of the qualities of a good theory is that it proves fruitful.[236] It should expand our understanding of a particular phenomenon, and a legal theory ideally should also provide guidance for the structure of the law.[237] The non-comparative approach suggested by this Article has already proven fruitful in understanding age discrimination law in light of age's unique temporal qualities as well as in justifying the current range of age-based antidiscrimination statutes. This Section explores some additional ways in which this approach might shed light on various phenomena, specifically in the areas of discrimination theory, age-based distinctions in the law, and antidiscrimination statutes.

1. Discrimination Theory

The field of discrimination law lacks a consensus normative foundation, and a nascent debate has arisen over the value or values that undergird the

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[233] *See* Age Discrimination in Employment Amendments of 1986, Pub. L. 99-592, §2(c) (1986) (removing the age ceiling of the ADEA, which had been previously set at 70).

[234] *See* Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75, 90-97 (2012) (comparing the legal treatment of mandatory retirement in the United States and Europe).

[235] *See* Gosseries, *supra* note 124, at 70–71 (discussing the rationale of sequence efficiency).

[236] *See* THOMAS S. KUHN, THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE 321–22 (1977) (describing the five characteristics of accuracy, consistency, scope, simplicity, and fruitfulness as desirable aspects of a theory).

[237] *See id.* at 322.

domain.[238] Monists believe that a single value forms its normative foundation, though they disagree whether it is equality, liberty, dignity, or something else entirely.[239] As noted earlier, the dominant value is equality, even if theorists understand it differently in the discrimination context.[240] In contrast, pluralists believe that multiple values are at play, and the correct approach is to determine which values operate in a particular context.[241] Finally, there are those who reject the theoretical enterprise entirely, believing the area of discrimination law is hopelessly theoretically incoherent.[242]

Within the monist debate, this Article scores some points for non-comparative values such as liberty as compared with equality, since the former have more explanatory power with respect to age. However, this does not necessarily lead to the conclusion that the monists are correct. There may be a valuable intellectual division of labor between the various values in explaining and justifying different portions of antidiscrimination law, in two ways. First, equality retains explanatory and justificatory power for characteristics other than age, such as race or sex. Nothing in this Article weakens equality's claims on those areas of discrimination law.

Second, equality has been useful for explaining portions of age discrimination law as well. The temporal analysis introduced in this Article fleshes out how equality underlies the weak constitutional protection for age.[243] Equality also has the theoretical capacity to decry intersectional age discrimination, discrimination in the context of varying social conditions, and discrimination that hinders a group-based social or relational equality.[244] A non-comparative approach, in turn, highlights reasons for relying less on age-based rules as a matter of legislative discretion as well as for promulgating age-based antidiscrimination statutes. Thus, while this Article makes the case that the moral wrongfulness of age discrimination is best

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[238] *See* Deborah Hellman & Sophia Moreau, *Introduction*, *in* PHILOSOPHICAL FOUNDATIONS 1, 1 (noting that the philosophical discussion of issues in discrimination is a "relatively young field of inquiry").

[239] *See* KHAITAN, *supra* note 62, at 6 ("Despite the urgency of the challenge [of finding a normative foundation for discrimination law], theoretical consensus has so far eluded scholars. Candidate theories can (very roughly) be classified into three broad categories: egalitarian, liberal, and dignitarian."); Hellman, *supra* note 20, at 899–900 (discussing the battle between comparative and non-comparative values in Equal Protection jurisprudence).

[240] *See supra* Part I.B.

[241] *See* Lawrence Blum, *Racial and Other Asymmetries: A Problem for the Protected Categories Framework for Anti-Discrimination Thought*, *in* PHILOSOPHICAL FOUNDATIONS 182, 188 (listing eight classes of wrongmaking features that can all serve to justify the moral wrongfulness of discrimination).

[242] *See* George Rutherglen, *Concrete or Abstract Conceptions of Discrimination?*, *in* PHILOSOPHICAL FOUNDATIONS 115, 122–29 (arguing against "conceptual ascent" as theory probably cannot make sense of discrimination law).

[243] *See supra* text accompanying notes 195–97.

[244] *See supra* Part II.C.

grounded in non-comparative values, it embraces a more pluralistic outlook with regard to age discrimination law and discrimination theory more generally. Further, it suggests that those who consider the field as conceptually incoherent have not yet exhausted the more nuanced theoretical possibilities.

2. Age-Based Law

Because age-based distinctions are only subject to rationality review, the government has relatively free reign in employing age in the law.[245] However, the Court has not addressed age-based distinctions in some time.[246] Further, the Court has gradually blurred the tiers of scrutiny and seems more willing to accept hybrid Equal Protection and Substantive Due Process claims.[247] Thus, there may be doctrinal space to present an argument for some form of heightened scrutiny with regard to age, at least in some contexts.[248] This is not to say that the Court is likely to accept such an argument any time soon, but instead to suggest that such an argument is not theoretically foreclosed even if practically it might be.[249]

This raises the question of how this Article might help or hinder such arguments. The short answer is that it might do both. On the one hand, by

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[245] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 64 (2000) ("[A] State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. That age proves to be an inaccurate proxy in any individual case is irrelevant.").

[246] The last time the Court took up age distinctions in the law was in *Vance v. Bradley*. 440 U.S. 93 (1979). Thus, *Murgia* cannot claim the status of a "super precedent." Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006) ("Super precedents are the doctrinal, or decisional, foundations for subsequent lines of judicial decisions (often but not always in more than one area of constitutional law)").

[247] *See* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 455 (2017) ("Although it is often overlooked, one can find many other cases that involve a 'hybrid' or double helix equal protection/due process analysis."); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) ("[S]ometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself."); Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 99 U. ILL. L. REV. 1209, 1222–24 (1999) (arguing that rights and classes are co-constitutive).

[248] *See* Kohn, *supra* note 16, at 231–55 (critiquing the reasoning in *Murgia* and arguing for intermediate scrutiny of classifications that affect those who are older); Eglit, *supra* note 40 at 904–07 (arguing for five "postulates" that would guide judicial evaluation of age distinctions); Martin Lyon Levine, *Comments on the Constitutional Law of Age Discrimination*, 57 CHI.-KENT L. REV. 1081, 1100 (1981) (arguing that "the constitutionality of age discrimination may properly be regarded as not yet settled by holding.")

[249] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) ("[T]he last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, this canon has closed.") (foonote omitted).

elaborating on the truncated equality analysis in *Murgia*, it provides a firmer moral foundation for the implicit lifetime egalitarianism that animates a rational basis level of review. On the other hand, by demonstrating that an alternative moral foundation for the wrongness of age discrimination might be found in non-comparative values, it lends normative strength to hybrid class/rights claims involving age and a significant rights infringement.[250]

Assuming that rational basis is likely entrenched for the moment, the moral case against age discrimination laid out in this Article can only act as guidance to legislators and administrative officials who might contemplate using age-based rules. In short, the guidance is this: age distinctions are morally suspect, and age should be treated as a disfavored legal criterion. Thus, absent other moral or practical concerns, age-based legal distinctions in important social domains should be avoided. I would offer some preliminary thoughts on how this guidance might be applied in two important contexts: maturity rules for minors and public benefits rules for adults.

Given that a liberty-based theory of age discrimination values liberty interests across the lifecourse, it might at first seem difficult to reconcile such a non-comparative theory with the large body of maturity rules. These discriminate against minors on the basis of age by depriving them of certain liberty-based entitlements that would almost certainly be included in one's conception of a flourishing life. In other words, does a non-comparative theory of age discrimination law require the abolition of age-based maturity rules, or can they still be justified?

Many of these rules would survive inspection, for three reasons. First, many maturity rules operate to safeguard one's capability set across the lifecourse. For example, granting the right to have sex at too early an age may have significant consequences, such as pregnancy or sexually transmitted infections, which will seriously impact the capability sets that one might enjoy later in life.[251] This type of rationale was at play with California's recently-passed "Eraser Law," which requires websites to delete upon request content that is posted by minors, as a way of preventing it from haunting them later as adults.[252]

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[250] *See* Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1135 (2004) ("In cases where the Court has confronted claims of not-quite-deprivation of liberty, as experienced by persons in not-quite-suspect classes, it has in practice displayed a willingness to take into account a kind of cross-doctrinal cumulative weighting of the interests involved and the consequences of adverse legal treatment.")

[251] *See* Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1218 (2015) (discussing the consequences of sexual activity in the context of adult incapacity).

[252] CAL. BUS. & PROF. CODE § 22581 (West 2013) (requiring Internet-related entities to "[p]ermit a minor . . . to request and obtain removal of, content or information posted on the operator's Internet Web site, online service, online application, or mobile application by the user."). This law has been subject to extensive criticism, for a variety of reasons. *See, e.g.*, Eric Goldman, *California's New 'Online Eraser' Law Should be Erased*, FORBES (Sept. 24,

Second, adults possess a liberty interest in raising their children as they see fit.[253] Thus, maturity rules must balance parents' liberty interests in this important domain against the emerging liberty interests of their children. The law of child emancipation is the area in which this plays out most explicitly.[254] While the balancing of liberty interests might occur in other contexts, this conflict is inherent and heightened in the parent-child relationship. This identifies what will be a recurring issue in the application of a liberty-based theory to discrimination law, which is how individuals' different liberty interests intersect and conflict. Fortunately, such balancing is not a new issue, and several liberal theories of societal organization have grappled with how to resolve it.[255]

Third, the right to self-determination is at least partially reliant on possessing the mental or physical capacities to exercise it. Age-based distinctions are blunt attempts to calibrate the liberty granted by certain rights to those presumed capacities.[256] The validity of such calibrations, in turn, relies on scientific understandings of developmental capacity across the population as a whole.[257] There is some evidence that the particular age cutoffs employed by several maturity rules are in fact incorrect and should be changed, but the existence of *some* age cutoff can be morally justified.[258] A similar calibration would not be appropriate with respect to old age, given the greater diversity of the aging process, even if there might be capacity issues created by conditions such as dementia in individual cases.[259]

2013), https://www.forbes.com/sites/ericgoldman/2013/09/24/californias-new-online-eraser-law-should-be-erased/#5d53bbdf7a33.

[253] *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 438–45 (2006) (discussing the role of parental rights in constitutional jurisprudence).

[254] *See* Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1995) (reviewing the history of the children's rights movements).

[255] *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 8–10 (1980); RONALD DWORKIN, A MATTER OF PRINCIPLE 191–92 (1985); JOHN RAWLS, A THEORY OF JUSTICE 325–28 (1971).

[256] Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. REV. 1055, 1095–96 (2010) ("The immature have an interest in exercising those specific liberties of which they are capable. Determining which liberties they are capable of exercising, however, can present any number of difficulties—even where researchers have identified normative capacities, for example, there will be individuals whose capacities vary from the norm.").

[257] *See* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 816–17 (2005) (noting that while developmental pathways differ, there are some generalizations that can be made).

[258] *See generally* Elizabeth S. Scott et. al., *Young Adulthood As A Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641 (2016) (critically examining neurobiological evidence and how it relates to criminal law's treatment of younger offenders).

[259] *See, e.g.*, Boni-Saenz, *supra* note 251, at 1234–35 (proposing a legal test for dealing with dementia in the sexual consent context).

Another area in which skepticism of age-based distinctions will have an outsized impact is in the law governing public benefits.[260] In this context, age is used to target populations that may have specific needs.[261] For example, the provision of the Affordable Care Act that allows individuals to stay on their parents' health insurance until they are twenty-six addresses the lack of health insurance among this group.[262] Similarly, Social Security rules only allow the collection of retirement benefits in one's sixties, which addresses the need for income support among this likely retired set.[263] Both of these distinctions, and others, are called into question based on the normative guidance described above. The rationales employed to justify maturity rules are also largely inapplicable in these cases.

This could nudge the law in one of two directions. First, it could lead the government to rely on need, rather than age, as the legal criterion of choice. While this would theoretically achieve more accurate targeting than age, such means-testing has significant disadvantages. It is costly to operate, stigmatizes benefits recipients, and puts such programs in a politically precarious situation.[264] Second, the abandonment of age could lead to the adoption of more universalist approaches.[265] For example, instead of using age or need as the way of maintaining income support programs, one could pursue a basic income—unconditional cash transfers to all citizens or residents not conditioned on personal characteristics.[266] Universalist policies tend to be more expensive but also more politically sustainable.[267] Regardless of which option is chosen, disfavoring age as a basis for public law distinctions will require an analysis of different policy options for accomplishing the goals that age previously did.

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[260] *See* Elizabeth A. Kutza & Nancy R. Zweibel, *Age as a Criterion for Focusing Public Programs*, *in* AGE OR NEED?: PUBLIC POLICIES FOR OLDER PEOPLE 55, 82– 91 (Bernice Neugarten ed., 1982) (discussing the advantages and disadvantages of using age for allocation of social resources).

[261] *See id.*

[262] *See supra* note 56.

[263] *See* What is Full Retirement Age?, 20 C.F.R. § 404.409 (2015).

[264] *See* Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 745 (1991) (noting the problems with means-testing).

[265] *See, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8 (2008) (arguing for vulnerability as a "universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.").

[266] *See* Philippe Van Parijs, *Basic Income: A Simple and Powerful Idea for the Twenty-First Century*, *in* REDESIGNING DISTRIBUTION: BASIC INCOME AND STAKEHOLDER GRANTS AS CORNERSTONES FOR AN EGALITARIAN CAPITALISM 3, 4 (Erik Olin Wright ed., 2006) (defining a basic income as "an income paid by a political community to all its members on an individual basis, without means test or work requirement"). *See also* Miranda Perry Fleischer & Daniel Hemel, *Atlas Nods: The Libertarian Case for A Basic Income*, 2017 WIS. L. REV. 1189, 1270–71 (making the libertarian case for the basic income).

[267] *See* GØSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM 28 (1990) ("All benefit; all are dependent; and all will presumably feel obliged to pay.").

3. Antidiscrimination Statutes

While a non-comparative approach would view age-based distinctions in the public sphere with skepticism, it would likely welcome further statutory regulation of private discriminatory conduct on the basis of age. As a preliminary matter, this would mean including age in the host of antidiscrimination statutes in which it is not present, such as the Fair Housing Act.[268] The argument for inclusion in other antidiscrimination statutes depends on the importance of the domain in question as well as any countervailing moral or practical concerns.[269]

Once age is included in a statutory scheme, a non-comparative approach also provides guidance for how to structure the statute. For example, consider the Age Discrimination in Employment Act and the quality of symmetry.[270] The symmetry principle "mandates that once certain attributes or characteristics are identified as worthy of antidiscrimination protection, all groups within that universal ground must be protected."[271] Symmetry in discrimination law has typically been analyzed using the lens of equality, and it has been debated primarily in the context of affirmative action, a race-based asymmetrical policy.[272] The unequal harm suffered by one side of the protected category justifies the pro-asymmetry position, while symmetry is often favored because it avoids the legal reinforcement of potentially-pernicious social categories.[273]

The Age Discrimination in Employment Act is asymmetrical in two ways: It only protects those over the age of forty,[274] and the Supreme Court has ruled that the Act does not prohibit discrimination against younger

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[268] *See* 42 U.S.C. § 3604(b) (West 2016) (including a variety of identity categories but omitting age).

[269] *See supra* text accompanying notes 124–27.

[270] *See, e.g.*, Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69, 121 (arguing for symmetry); Blum, *supra* note 241, at 185–87 (arguing for asymmetry). *See also* John E. Morrison, *Viva La Diferencia: A Non-Solution to the Difference Dilemma*, 36 ARIZ. L. REV. 973, 1009 n.19 (1994) (collecting scholarly analysis of how courts shift between symmetrical and asymmetrical analysis depending on the issue).

[271] Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1088 (2017).

[272] *See generally* Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989) (discussing how Supreme Court justice draw on different concepts, including symmetry, to justify their stances toward affirmative action).

[273] *Compare* Areheart, *supra* note 271, at 1123–29 (arguing that asymmetry is permissible when traits are not universal and there exists a subordinated group) *with* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law As A Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449–50 (2000) (arguing that in the context of sex discrimination, symmetry assists in eliminating sex stereotypes).

[274] *See* 29 U.S.C. § 631 (2012) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.").

members of that protected class in favor of older ones.[275] A liberty-based analysis underscores the moral dimension of asymmetry and shows its faults. To the extent that the wrong of age discrimination in employment is that it infringes on an intrinsic interest that we all possess, the asymmetrical structure of age-based antidiscrimination laws do not withstand muster. Further, as an empirical matter, the young also suffer from age discrimination in employment.[276] This counsels in favor of removing the age floor and requiring equal treatment for all members of the protected class.

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This Section has demonstrated that a non-comparative theory of discrimination law is not only theoretically valuable, but also generative in the realms of legal theory and law reform. While the practical reforms suggested here would have to contemplate the range of practical objections as well as moral considerations deriving from other values, that conversation is likely to be more focused and productive.

CONCLUSION

Age is unique. No other identity characteristic has a similar relationship with time, and the implications of its temporal character are significant for the normative foundation of age discrimination law. As a descriptive matter, a non-comparative value such as liberty is better suited to explain non-constitutional age discrimination law. As a normative matter, such a value foundation has the conceptual resources to identify the moral wrong of age discrimination and justify the current age-based antidiscrimination law regime, whereas equality does not. It further generates insights that deepen our understanding of several controversies in discrimination law and theory. This Article thus leaves us in a better position to evaluate the morality of age-based distinctions and proposals for law reform.

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[275] *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 584 (2004) ("The question in this case is whether [the ADEA] prohibits favoring the old over the young. We hold it does not.").

[276] *See* Susan Bisom-Rapp & Malcolm Sargeant, *Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States*, 44 LOY. U. CHI. L.J. 717, 741–42 (2013) (describing discrimination against the young).