6

The New Old Civil Rights

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As the authors of *The 100-Year Life*[1] inform us, a child born today in the West has a 50 percent likelihood of living to be a centenarian. This longevity revolution has been described as "the most important phenomenon of our time in the world, more than the bomb, the Pill, or the Internet."[2] The groundswell of individuals in older-age cohorts – whom I will call the "new old" – could activate a world-historical social movement. To fulfill its potential, however, that movement must resist the temptation to advance age-based civil rights solely within shopworn frameworks established by race or sex. The "new old" should seek instead to fashion an innovative antidiscrimination paradigm that honors distinctive age-related concerns.

In Section 6.1, I describe how legislation and doctrine create the temptation to build "like race" or "like sex" paradigms for age. In Section 6.2, I argue that advocates should resist this temptation for both empirical and strategic reasons. In Section 6.3, I show how unmooring the age discrimination paradigm from traditional civil rights models allows us to apprehend it better by considering the distinctive fears older individuals conjure about our own mortality. In Section 6.4, I consider how such insights might be incorporated into antidiscrimination law and politics.

6.1 UNDERSTANDING THE ANALOGY

Courts interpreting the Age Discrimination in Employment Act (ADEA) and the Equal Protection Clause have traditionally parsed age discrimination through analogy to race or sex discrimination. When courts or legislatures accept this analogy, they afford age discrimination plaintiffs more relief. When such bodies reject that analogy, they look less kindly on those plaintiffs. This pattern presses advocates of older individuals to cast age as analogous to race and sex.

[1] Lynda Gratton & Andrew J. Scott, The 100-Year Life: Living and Working in the Age of Longevity 2 (2016).

[2] Ashton Applewhite, This Chair Rocks: A Manifesto against Ageism 22 (2016) (quoting unnamed journalist at 2012 Age Boom seminar).

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6.1.1 *ADEA's Genesis in Analogy and Disanalogy*

Congress fashioned the Age Discrimination in Employment Act of 1967[3] on the premise that age discrimination differed from other forms of discrimination. Congress considered and rejected the proposal to add age[4] to the other classifications protected under Title VII of the Civil Rights Act of 1964 – race, color, religion, sex, and national origin.[5] Instead, the 1964 Act commissioned the secretary of labor "to make a full and complete study of the factors which might tend to result in discrimination in employment because of age."[6]

In 1965, Secretary W. Willard Wirtz submitted *The Older American Worker: Age Discrimination in Employment*.[7] Because the Wirtz Report spurred the enactment of the ADEA, courts rely on it as legislative history.[8] The report began by describing the consensus "that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth."[9] "Having accepted this truth," the report continued, "the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging."[10] The report then dropped the hammer: "This would be easy – and wrong."[11]

Adopting a more nuanced approach, the Wirtz Report sketched how age discrimination converged with and diverged from the discrimination addressed by Title VII. On the one hand, the report observed that age, like other classifications, sometimes triggered "arbitrary discrimination" based on "assumptions about the effect of age . . . when there is in fact no basis for these assumptions."[12] The report argued that such discrimination "can and should be stopped."[13]

On the other hand, the report underscored some critical differences between age and other classifications. It noted that while no legitimate discrimination existed

[3] 29 U.S.C. §§ 621–634.

[4] *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586–587 (2004) ("Congress chose not to include age within discrimination forbidden by Title VII of the Civil Rights Act of 1964, being aware that there were legitimate reasons as well as invidious ones for making employment decisions on age.").

[5] 42 U.S.C. § 2000e-2(a)(1) (deeming it unlawful for a covered employer "to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

[6] 42 U.S.C. § 2000e-14.

[7] W. Willard Wirtz, Report of Sec'y of Labor: The Older American Worker – Age Discrimination in Employment (June 30, 1965) [hereinafter "Wirtz Report"].

[8] *See*, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005); *Cline*, 540 U.S., at 587, 590; *Western Air Lines v. Criswell*, 472 U.S. 400, 409 (1985).

[9] Wirtz Report, *supra* note 7, at 4.

[10] *Id.* at 4–5.

[11] *Id.* at 5.

[12] *Id.* (emphasis omitted).

[13] *Id.* at 31.

where "race or religious discrimination are concerned," such justified discrimination "clearly does exist so far as the age question."[14] Specifically, the Wirtz Report alluded to two distinctive features of age. First, it noted what I call the "universality" argument that "the process of aging is inescapable, affecting everyone who lives long enough."[15] Second, it credited what I call the "real difference" argument that "there is in fact a relationship between [an individual's age] and his ability to perform the job."[16]

In rehearsing these themes, the report strongly implied that the more age was like race or sex, the more protection it deserved. That implication has cast a long shadow over subsequent legislation and doctrine.

6.1.2 *Age Discrimination Plaintiffs Win When Courts Accept the Analogy*

Courts interpreting the ADEA favor age discrimination plaintiffs when they deem their claims analogous to race or sex discrimination. In the 1985 case of *Western Air Lines v. Criswell*,[17] the Court considered an airline policy that required flight engineers to retire at age sixty. The ADEA generally prohibits mandatory retirement, but allows for a bona fide occupational qualification (BFOQ) defense.[18] This defense permits the employer to take "any action otherwise prohibited" where age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[19] The airline asserted that it had a BFOQ defense because of the increased safety risk posed by older flight engineers.[20]

The BFOQ defense originated in Title VII, which permits the defense in cases alleging discrimination on the basis of religion, sex, and national origin.[21] Title VII affords no BFOQ defense against race discrimination.[22] Even where Title VII permits the defense, courts have construed it narrowly.[23] Seeking to escape that narrow construction, the employer in *Criswell* argued that the ADEA only required employers to show their policy was "reasonable."[24] In rejecting that claim, the Court observed that the ADEA had taken "a concept and statutory language from Title

[14] *Id.*
[15] *Id.* at 9.
[16] *Id.* at 5.
[17] 472 U.S. 400 (1985).
[18] *Id.* at 402–403.
[19] 29 U.S.C. § 623(f)(1).
[20] *Criswell*, 472 U.S., at 403.
[21] 42 U.S.C. § 2000e-2(e)(1).
[22] *Id.*; *see also Malhotra v. Cotter & Co.* 885 F.2d 1305, 1308 (7th Cir. 1989).
[23] *See*, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) ("We are persuaded by the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition on the basis of sex.").
[24] *Id.* at 419.

VII."[25] It further pointed out that the BFOQ standard in the ADEA "is one of 'reasonable necessity,' not reasonableness."[26] Applying the "reasonable necessity" standard, the Court unanimously ruled against the employer.[27]

Two decades later, the Court again relied on an analogy to Title VII to establish disparate impact liability in *Smith v. City of Jackson*.[28] Since 1971, Title VII has allowed for a "disparate impact" cause of action.[29] Under this theory, a plaintiff can prevail against an employer even in the absence of discriminatory intent so long as the employer's policies have a disparate impact on a protected class.[30] Because discriminatory intent is often difficult to prove, this cause of action is a vital weapon in a plaintiff's arsenal.

In *City of Jackson*, a group of police and public safety officers brought suit against Jackson, Mississippi. Their disparate impact claim alleged that when the City of Jackson gave raises to all such officials, it gave less generous ones to officers over forty.[31] The Fifth Circuit ruled against the plaintiffs, stating that the ADEA never contemplated disparate impact claims.[32] In an opinion by Justice Stevens, a majority of the Court reversed, holding that the ADEA cognized such claims.[33] While the majority splintered on the rationale, five justices underscored the importance of textual similarities between Title VII and the ADEA.[34]

In an opinion disagreeing on this point, Justice O'Connor emphasized how age differed from race and gender. She noted that the Wirtz Report – "the blueprint for the ADEA" – stressed "that age discrimination is qualitatively different from the types of discrimination prohibited by Title VII."[35] Specifically, Justice O'Connor invoked the report's assertion that "there is in fact a relationship between [an individual's] age and his ability to perform his job."[36]

[25] *Id.* at 412.
[26] *Id.* at 419.
[27] *Id.* at 423.
[28] 544 U.S. 228 (2005).
[29] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[30] *Id.* at 432–433.
[31] *City of Jackson*, 544 U.S. at 230.
[32] *Id.* at 231.
[33] *Id.* at 232.
[34] A four-justice plurality rested its conclusion in part on the ground that "*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA." *Id.* at 236. Justice Scalia, writing separately, observed that while he agreed with the Court's reasoning, he did not find it dispositive. *Id.* at 243. Instead, he found the textual similarity to be a basis to defer to the reasonable view of the EEOC, which he found supported the viability of a disparate impact claim.
[35] *Id.* at 254 (O'Connor, J., concurring). As discussed later, the majority in *City of Jackson* found that while the plaintiffs could assert a disparate impact claim, they had failed to prove one in this case. *Id.* at 243. For this reason, Justice O'Connor's opinion was a concurrence rather than a dissent.
[36] *Id.* at 255 (O'Connor, J., concurring) (quoting Wirtz Report, *supra* note 7, at 5).

6.1.3 *Age Discrimination Plaintiffs Often Lose When Courts Reject the Analogy*

As Justice O'Connor's opinion intimated, courts can be less sympathetic to ADEA plaintiffs when they distinguish age from race and gender. The Court reinforced that point in a different portion of *City of Jackson*. After recognizing disparate impact causes of action under the ADEA, the Court nevertheless held that differences between the ADEA and Title VII conscribed the city's liability.[37]

In this part of its analysis, the *City of Jackson* majority focused on the so-called reasonable factor other than age (RFOA) defense. The ADEA permits an employer to engage in "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age."[38] The RFOA defense is generally applicable to disparate impact claims, while the BFOQ defense is generally applicable to disparate treatment claims. Unlike the BFOQ defense, the RFOA defense has no counterpart in Title VII.[39] The Court deemed the RFOA to be a more lenient version of the "business necessity" defense employers can mount against disparate impact claims under Title VII.[40]

The city asserted an RFOA defense by noting that it had to "raise the salaries of junior officers to make them competitive with comparable positions in the market."[41] The Court acknowledged that the city could have achieved those goals in other ways, suggesting that the rationale was not a "business necessity."[42] Yet because the RFOA only required "reasonableness," the Court ruled for the city. In pinpointing this difference between the ADEA and Title VII, the Court relied on the Wirtz Report to claim that "certain circumstances ... unquestionably affect older workers more strongly, as a group, than they do younger workers."[43] It observed that "Congress's decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[44]

More recently, the Court in 2009 determined that different standards of proof applied under the two statutes. In *Gross v. FBL Financial Services*,[45] the Court grappled with whether the ADEA required the plaintiff to show that age was a "but for" factor or merely a "motivating factor" to prove liability.[46] Under Title VII, the

[37] *Id.* at 240.
[38] 29 U.S.C. § 623(a)(2).
[39] *City of Jackson*, 544 U.S., at 233.
[40] *Id.* at 243.
[41] *Id.* at 242.
[42] *Id.* at 243.
[43] *Id.* at 240–241.
[44] *Id.* at 240.
[45] 557 U.S. 167 (2009).
[46] *Id.* at 180.

plaintiff only needed to show that age was a motivating factor, at which point the burden of production shifted to the employer to show that it would have made the same decision regardless of race.[47] Even though Title VII permitted either cause of action, the Court held that the ADEA required age to be a "but for" factor.[48] It observed that Congress amended Title VII in 1991 to permit the more easily proved "motivating factor" liability. Congress did not, however, amend the ADEA.[49] Justice Stevens, writing for a four-member dissent, noted that the ADEA should require the same burden of proof as Title VII because the operative provisions were the same.[50] The 1991 Amendment was not to the contrary as it simply codified the judicial understanding of Title VII at the time.[51]

To this point, I have only discussed the ADEA, leaving the Equal Protection Clause to one side. This choice may seem quixotic, as the clause is the home of the equality principle in the US Constitution. Yet the Equal Protection Clause is much less relevant because the Court has rendered it close to toothless with regard to age discrimination. It has done so by rejecting the analogy between age, on the one hand, and race and sex, on the other.

The constitutional analysis differs from the statutory one insofar as the clause enumerates no classifications. Instead, it broadly bars states from denying "any person within its jurisdiction the equal protection of the laws."[52] Over the past eight decades, however, the Court has established a framework that affords greater judicial protection to five "suspect" classifications. Three of these – race,[53] national origin,[54] and alienage[55] – receive strict scrutiny. Two others – sex[56] and nonmarital parentage[57] – receive intermediate scrutiny. The Court accords all other classifications so-called rational-basis review. To complicate matters slightly, rational-basis review can take a relatively stringent form – known as "rational basis with bite"[58] – or a highly

[47] *Id.*
[48] *Id.*
[49] *Id.* at 174.
[50] *Id.* at 180.
[51] *Id.* at 186–187.
[52] U.S. Const. Amend. XIV, section 1.
[53] *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).
[54] *Oyama v. California*, 332 U.S. 633 (1948).
[55] *Graham v. Richardson*, 403 U.S. 365 (1971). The heightened scrutiny accorded to alienage has been watered down in ways not relevant for these purposes.
[56] *Craig v. Boren*, 429 U.S. 190 (1976).
[57] *Trimble v. Gordon*, 430 U.S. 762 (1977).
[58] *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *See* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1319 (2018) ("For example, the modern canon also acknowledges that so-called 'animus' doctrine, or 'rational basis with bite,' can involve a deviation from this exceptionally deferential version of rational basis review.") (internal citations omitted).

deferential form – known as "ordinary rational basis."[59] If state action draws anything other than ordinary rational basis, courts will almost invariably invalidate it.[60] If state action draws only ordinary rational basis, courts will almost invariably uphold it.[61]

How does a classification acquire heightened scrutiny? The Court has not relied on a single theory. It has, however, repeatedly stated that the judiciary should intervene to correct failures in the political process. Drawing on a famous footnote in the case of *United States v. Carolene Products*,[62] the Court has expressed its solicitude for "discrete and insular minorities" in need of protection from the prejudices of the majority.

In the 1976 case of *Massachusetts Board of Retirement v. Murgia*,[63] the Court confronted an equal protection challenge to a state statute requiring police officers to retire at fifty. Applying only ordinary rational-basis review to age-based classifications, the Court upheld the statute.[64] The Court acknowledged that "the treatment of the aged in this Nation has not been wholly free of discrimination."[65] Nevertheless, it found that older individuals had not faced a history of discrimination or stereotyping like "those who have been discriminated against because of race or national origin."[66] It elaborated that "old age does not define a 'discrete and insular' group, in need of 'extraordinary protection from the majoritarian political process.'"[67] To the contrary, the Court remarked, "[I]t marks a stage that each of us will reach if we live out our normal span."[68] This passage is the most prominent example of the "universality" argument in the case law.

The Court later expanded on these themes. In the 1979 case of *Vance v. Bradley*,[69] the Court considered an equal protection challenge to a mandatory retirement age of sixty for foreign service officers. It upheld the policy based on the universality and real-difference rationales. In a succinct – if world-weary –

[59] *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); *Williamson v. Lee Optical*, 348 U.S. 483 (1955). *See* Eyer, *supra* note 58, at 1318–1319 ("Rational basis review is a form of review that is 'almost empty,' 'enormously deferential,' and 'meaningless.'") (internal citations omitted).

[60] Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 744 (2014) ("The term 'heightened scrutiny' refers to both strict scrutiny and intermediate scrutiny, with strict scrutiny being the more demanding of the two standards . . . Minor semantic distinctions aside, the two forms of heightened scrutiny are more alike than different in that a plaintiff's chances of prevailing are much greater under either of these forms of heightened review, as compared to deferential rational basis review.") (internal citations omitted).

[61] Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889 (2012) ("Under rational basis review, the plaintiff almost invariably loses.").

[62] *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153 n.4 (1938).

[63] 427 U.S. 307 (1976).

[64] *Id.* at 312.

[65] *Id.* at 313.

[66] *Id.*

[67] *Id.* (quoting *Carolene Products*, 304 U.S. at 152–153 n.4).

[68] *Id.* at 313–314.

[69] 440 U.S. 93 (1979).

encapsulation of both ideas, the *Vance* Court referred to "the common-sense proposition that aging – almost by definition – inevitably wears us all down."[70] Similarly, in 1991, the Court in *Gregory v. Ashcroft*[71] sustained a mandatory retirement age of seventy for state judges against an equal protection challenge. The Court observed that the provision was reasonable given that "[i]t is an unfortunate fact of life that physical and mental capacity sometimes diminish with age."[72]

In both the ADEA and equal protection jurisprudence, courts appear to protect age when it is like race or sex, and not to protect it when it is unlike race or sex. Looking only at such cases, advocates would rightly perceive a massive incentive to force age discrimination onto the Procrustean bed of race or sex discrimination. To borrow from the Wirtz Report, succumbing to that impulse would be "easy – and wrong."[73]

6.2 REJECTING THE ANALOGY

The problem here is a specific form of a general pathology in antidiscrimination discourse. Two decades ago, Janet Halley wrote an essay on how LGBT rights advocates felt impelled to make analogies between sexual orientation, on the one hand, and race and gender, on the other.[74] "Particularly when they argue to judges, who are formally if not actually constrained by precedent, and even when they make more general political appeals, advocates are opportunists looking for a simile," she observed. She mimed the advocate addressing the Court: "Your honor, this is just like a race discrimination case; this is just like a sex discrimination case."[75]

Halley advanced an urbane critique of this strategy. She entertained no illusions that this strategy would disappear. She acknowledged that "analogies are probably an inescapable mode of human inquiry and are certainly so deeply ingrained in the logics of American adjudication that any proposal to do without them altogether would be boldly utopian."[76] Nevertheless, she alerted advocates for LGBT rights to the costs of conformity to the regnant paradigms of civil rights – costs that centrally included the misrepresentation of the minority itself. She argued that the analogy faltered on empirical grounds[77] and, less intuitively, on strategic grounds.[78]

[70] *Id.* at 111–112.
[71] 501 U.S. 452 (1991).
[72] *Id.* at 472.
[73] WIRTZ REPORT, *supra* note 7, at 5.
[74] Janet E. Halley, *Like Race*, *in* WHAT'S LEFT OF THEORY, 40–74 (Judith Butler, Tom Guillory & Kendall Thomas eds., 2000).
[75] *Id.* at 40.
[76] *Id.* at 46.
[77] *Id.* at 52 (noting the rise of the argument that sexual orientation, like race, is a biologically immutable characteristic).
[78] *Id.* (noting the strategic uses of the analogy between sexual orientation and race, even assuming the analogy is not entirely accurate).

Halley's analysis illuminates age discrimination jurisprudence. Courts insist that age is different because it is (1) universal and (2) creates a real difference. Because of the incentives described earlier, advocates for older individuals seek to elide these differences. Their arguments, however, can be challenged on both empirical and strategic grounds.

6.2.1 *Empirical Argument against the Analogy*

Consider a 2018 report by EEOC Acting Head Commissioner Victoria Lipnic titled *The State of Age Discrimination and Older Workers in the U.S.: 50 Years after the Age Discrimination in Employment Act of 1967*.[79] Written on the fiftieth anniversary of the ADEA's date of enforcement, it reviewed changes and continuity since the promulgation of the ADEA. The Lipnic report decried "a central premise of the Wirtz Report . . . that age discrimination is different than other forms of discrimination," a notion that "continues to seep into ADEA jurisprudence today."[80] "When examined through today's understanding of how discrimination operates," the Lipnic report declared, "age discrimination is more like, than different from, other forms of discrimination."[81]

In making that case, the report addressed both the universality argument and the real-difference argument. With regard to universality, the Lipnic report cited a judge questioning a plaintiff in an age discrimination case: "No, age is different because we are all going to get old . . . but when you're talking about gender or race or ethnicity those are immutable characteristics as the Supreme Court has said."[82] The report responded that "[a]lthough the notion of immutability is irrelevant to protections under Title VII of the ADEA, age is 'immutable' in the sense that it is a characteristic the person has not chosen and cannot change."[83]

The Lipnic report's rejoinder sidestepped the true force of the universality argument by focusing on immutability. The judge's point – like the *Murgia* Court's point – was not really about immutability but about the universality of aging. The argument was that age – unlike race or gender – was not as likely to result in empathy failure because everyone would move from the in-group to the out-group. This peculiarity of age distinguishes it from any other classification, whether immutable or not. The immutability of race means that individuals will not shift from being white to being racial minorities. Yet even mutable characteristics like

[79] Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years after the Age Discrimination in Employment Act (ADEA)*, US Equal Employment Opportunity Commission (June 2018).

[80] *Id.* at 13.

[81] *Id.*

[82] *Id.* at 13 (quoting *Waters v. Logistics Management Institute*, 2018 U.S. App. Lexis 3122, *11 (4th Cir. 2018), audio of oral argument at http://coop.ca4.uscourts.gov/OAarchive/mp3/16-2353-20180123.mp3).

[83] *Id.* at 45.

religion do not inevitably entail movement from, say, being Christian to being Muslim. The *Murgia* argument can be rebutted, as we will see below, but not on the ground that age is indistinguishable from race or gender.

With regard to the real-difference argument, the Lipnic report pointed out that "race discrimination also derives from negative views and stereotypes about the abilities of workers of a particular race, like age discrimination does."[84] It also saw "important similarities" between age and sex discrimination, citing "substantial evidence that in the 1960s, people believed that one's gender determined one's abilities, interests and qualifications, just like age."[85]

The Lipnic report's point that race discrimination involved stereotypes may reflect "today's understanding," but it reflected yesterday's understanding as well. The Wirtz report squarely compared race discrimination to "arbitrary discrimination" on the basis of age.[86] The Wirtz report deviated from this commonplace only in noting that race discrimination, unlike age discrimination, was never justified.[87]

This notion – that there are justified and unjustified forms of age discrimination – renders the analogy between age and gender the better one. The Lipnic report is certainly correct to state that gender was unfairly used to limit women's opportunities. Yet the report fails to acknowledge that the courts have allowed discrimination on the basis of gender so long as the distinction is based on a "real difference" between the sexes.[88] In *Nguyen v. Immigration and Naturalization Services*,[89] the Court upheld a facially discriminatory statute that allowed a mother, but not a father, to pass their citizenship automatically to a nonmarital child born in a foreign nation.[90] The Court defended the statute on the ground that mothers were present at the birth of their children, and therefore would be more likely to establish a relationship between the child and the US.[91] "The difference between men and women in relation to the birth process is a real one," it stated, "and the principle of equal protection does not forbid Congress to address the problem at hand in a

[84] *Id.* at 14.
[85] *Id.*
[86] Wirtz Report, *supra* note 7, at 5.
[87] *Id.* (noting that justifiable discrimination "clearly does exist so far as the age question, but does not exist so far as, for example, racial or religious discrimination are concerned").
[88] While the gender-based real difference doctrine comes up most explicitly in the context of constitutional equal protection doctrine, it has cognates in Title VII as well. The cognized forms of the BFOQ defense, for instance, often turn on "real differences" between the sexes. Arthur Larson & Lex K. Larson, Employment Discrimination (2d ed. 2005), § 43.02, at 43–44 ("The clearest [BFOQ case] is that in which a physical feature unique to one sex is essential to the performance of the job" such as a "wet nurse"), cited in Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 Cal. L. Rev. 1, 34 n.164 (2007). Moreover, the absence of a BFOQ defense for race suggests that Congress was unwilling to deem any difference "real" in that domain.
[89] 533 U.S. 53 (2001).
[90] *Id.* at 73.
[91] *Id.* at 65.

manner specific to each gender."[92] In the Court's view, the differential treatment was based on biology, not bigotry.

Like sex discrimination, age discrimination involves some stereotypical thinking about older individuals, but also some justifiable distinctions based on the "real difference" between individuals of different ages. Indeed, the argument for "real differences" in the age context seems vastly stronger than the analogous argument in the gender context. The Court has only upheld legislation under a real-difference rationale with a majority opinion once in the equal protection context. In stark contrast, it has repeatedly upheld age-based legislation under that rationale.[93] And even Justice Marshall, the greatest champion of age discrimination plaintiffs to sit on the Court, acknowledged that "age, unlike sex, is at some point likely to bear a relationship to ability."[94]

As the genesis of the ADEA suggests, age can easily be distinguished from race. While age may be closer to sex, the similarity disfavors age discrimination plaintiffs. Moreover, the similarity is not that great, as age presents much more of a "real difference" in the workplace than sex does. In the end, the attempts to efface these differences seem so implausible that they suggest some other agenda.

6.2.2 *Strategic Argument against the Analogy*

That agenda is, of course, a strategic one. Halley archly described the advocate's posture: "'It doesn't matter that the simile is a little inaccurate,' they would say; 'judges fall for it, and once we secure some legal rights no one will remember the rhetoric we used to obtain them.'"[95] In fairness, advocates for age discrimination plaintiffs do sometimes prevail by papering over the distinctions between age and other classifications. Nonetheless, they also fail, as we see in *Gross*, *City of Jackson*, *Murgia*, *Vance*, and *Gregory*.

Just as importantly – and much more hopefully – the Court has at times engaged in progressive interpretations of age discrimination precisely because it deems age to be different. In *General Dynamics Land Systems, Inc. v. Cline*,[96] the Court confronted the question of whether the ADEA, which clearly "forbids discriminatory preference for the young over the old," also "prohibits favoring the old over the young."[97] The Court held that it did not. To arrive at that conclusion, it had to join a classic debate within antidiscrimination law between classes and classifications. In this debate, scholars have questioned whether equality principles forbid

[92] *Id.* at 73.
[93] *See*, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).
[94] *Vance v. Bradley*, 440 U.S. 93, 121 (Marshall, J., dissenting).
[95] Halley, *supra* note 74, at 52.
[96] 540 U.S. 581 (2004).
[97] *Id.* at 584.

government use of a classification (such as race or age) or forbid the subordination of a particular class (such as Blacks or older individuals) within the classification.[98] Generally speaking, progressives tend to favor the class-based antisubordination view.[99] In contrast to the Court's analysis in other domains,[100] the *Cline* Court embraced that view.

Importantly, the *Cline* Court arrived at this conclusion by emphasizing the ways in which age was *not* like race or sex. The Court acknowledged that "age" could be interpreted either to mean "any number of years lived, or as a common shorthand for the longer span and concurrent aches that make youth look good."[101] In adopting the latter view, it noted that "the term 'age' employed by the ADEA is not ... comparable to the terms 'race' or 'sex' employed by Title VII."[102] The Court said that while race was not commonly understood "to refer only to the black race," nor sex "to refer only to the female," age was generally understood to mean only "old age."[103]

Cline does not stand alone. In the 1996 case of *O'Connor v. Consolidated Coin*,[104] the Court considered the age discrimination claim of a fifty-six-year-old plaintiff, James O'Connor, who had been replaced by a forty-year-old employee.[105] The Fourth Circuit rejected the plaintiff's claim by applying a framework developed in the Title VII context. In the lower court's view, the plaintiff had to show that he "was replaced by someone of comparable qualifications outside the protected class."[106] Given that the ADEA protects individuals forty and over, O'Connor failed that requirement.[107]

The Supreme Court unanimously reversed the lower court. In an opinion by Justice Scalia, the Court found that "there can be no greater inference of *age* discrimination ... when a 40-year-old is replaced by a 39-year-old than when a

[98] *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 487 (1998) ("A classification-based view of equal protection seeks to treat all classes created by a classification the same, while a class-based view privileges the disadvantaged class(es) created by a classification. [A classification-view] tends to ignore differences between the classes created by a classification.").

[99] *See*, e.g., Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1142 (1997) (describing essay's standpoint, "which does not equate discrimination with 'classification,' but begins instead from the premise that status-enforcing state action is mutable in form").

[100] As the *Cline* dissent pointed out, the Court has adopted the anticlassification view for Title VII classifications. *See Cline*, 540 U.S., at 611 (Thomas, J., dissenting) (noting that the Court has interpreted Title VII to protect whites as well as racial minorities).

[101] *Id.* at 596.

[102] *Id.* at 597.

[103] *Id.* at 598.

[104] 517 U.S. 308 (1996).

[105] *Id.* at 309–310.

[106] *Id.* at 310.

[107] *Id.*

56-year-old is replaced by a 40-year-old."[108] Again, the plaintiff prevailed through disanalogy.

6.3 TRANSCENDING THE ANALOGY

I have argued that distinguishing age from other classifications opens space for alternative progressive interpretations of age discrimination. Thus far, I have relied on doctrinal examples. I now cut deeper by turning to a distinctive feature of age that has not yet surfaced directly in the age discrimination jurisprudence. Social scientists have analyzed age discrimination under a "terror management theory" that suggests that age discrimination arises in part out of a fear of our own mortality – a fear without direct analogues in other realms of antidiscrimination law.

6.3.1 *The Nature of Terror Management Theory*

Terror management theory dates back to the work of cultural anthropologist Ernest Becker, who published his Pulitzer Prize-winning book *The Denial of Death* in 1973.[109] In that work, Becker argued that human beings are distinctive in their capacity to apprehend their own mortality.[110] Given this awareness, much of human activity occurs to manage the panic induced by that threat.[111] As developed by subsequent scholars, terror management theory posits that human beings respond to their consciousness of death by investing in beliefs in literal or symbolic immortality[112] or, perhaps less intuitively, by fortifying their self-esteem.[113]

The point about self-esteem is important for our purposes because it leads to particular views about in-groups and out-groups. As psychologists Jeff Greenberg, Sheldon Solomon, and Tom Pyszczynski demonstrated through a series of experiments, individuals who were primed with their own mortality more strongly favored in-group members and more strongly disfavored out-group members.[114] For instance, one experiment with judges had some of them take a survey about what they believed would happen after their own deaths.[115] All the judges were then asked to sentence a hypothetical sex worker. The judges in the control group imposed, on

[108] *Id.* at 312 (emphasis in original).
[109] Ernest Becker, The Denial of Death (1973).
[110] *Id.* at 69.
[111] *Id.* at 15.
[112] Eva Jonas & Peter Fischer, *Terror Management and Religion: Evidence that Intrinsic Religiousness Mitigates Worldview Defense Following Mortality Salience*, 91 J. of Personality & Soc. Psychol. 553 (2006).
[113] Brandon J. Schmeichel et al., *Terror Management Theory and Self-Esteem Revisited*, 96 J. of Personality & Soc. Psychol. 1077 (2009).
[114] Jeff Greenberg, Sheldon Solomon & Tom Pyszczynski, The Worm at the Core: On the Role of Death in Life (2015).
[115] *Id.* at 12.

average, a bond of $50.[116] The judges who had been primed with their own mortality imposed "a far more punitive bond – on average $455, more than nine times the typical tab."[117]

Multiple studies have corroborated that priming individuals with their mortality leads to harsher assessments of out-groups. In a 2005 article, psychologists Andy Martens, Jamie L. Goldenberg, and Jeff Greenberg focused on how terror management theory affected ageism.[118] Their analysis illuminates both the universality argument and the real-difference argument.

6.3.2 *Terror Management Theory and the Universality Argument*

Terror management theory shows us why the universality argument is flawed. As we observed, the courts repeatedly adduced the universality of aging as a reason for why we should not be particularly concerned about age discrimination. Recall that the *Murgia* Court opined that discrimination against older individuals was less likely, because old age "marks a stage that each of us will reach if we live out our normal span."[119]

The rejoinders to the universality argument tend to paper over the difference that universality makes. As we have seen, the Lipnic report deflected the discussion from universality to immutability. Justice Marshall similarly tried to minimize the impact of "universality." He acknowledged that the class of older individuals "is not 'discrete and insular' because all of us may someday belong to it, and voters may be reluctant to impose deprivations that they themselves could eventually have to bear."[120] Nevertheless, he pointed out that "the time lag between when the deprivations are imposed and when their effects are felt may diminish the efficacy of this political safeguard."[121]

Such rebuttals are too anemic. Applying terror management theory to ageism, the Martens article began with the *Murgia*-like question: "[W]hy should individuals exhibit prejudice toward elderly people, if indeed they represent the best-case scenario for the future?"[122] The authors answered that "ageism exists precisely because elderly people represent our future in which death is certain."[123] They asserted "that negative attitudes and behaviors directed toward elderly people can be explained in large part by people's own fears about aging and death."[124]

[116] *Id.*
[117] *Id.*
[118] Andy Martens, Jamie Goldenberg & Jeff Greenberg, *A Terror Management Perspective on Ageism*, 61 J. OF SOCIAL ISSUES 223 (2005).
[119] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).
[120] *Vance v. Bradley*, 440 U.S. 93, 113–114 n.1 (1979) (Marshall, J., dissenting).
[121] *Id.* at 114 n.1.
[122] Martens et al., *supra* note 118, at 223.
[123] *Id.*
[124] *Id.* at 223–224.

The issue of universality should not be addressed by sidestepping or minimizing it. Rather we should cheerfully concur that universality distinguishes age from all other classifications. We should then note that this distinction is not a reason why the courts should care less about ageism. It is the reason they should care more.

6.3.3 *Terror Management Theory and the Real-Difference Argument*

Terror management theory also casts the "real-differences" argument in a new light. Let us take for granted that some age-based generalizations are "real differences" and that some are "unreal differences" – that is, stereotypes. These "real differences" make age discrimination more like sex discrimination than race discrimination.

The existence of real age-related differences helps explain some features of ageism. As Becca Levy and Mahzarin Banaji have noted,[125] several aspects of age discrimination are distinctive. First, "[t]here are no hate groups that target the elderly as there are hate groups that target members of religious and racial and ethnic groups."[126] This is presumably what the Wirtz report meant when it noted "no significant evidence" of discrimination based on "dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin."[127] Yet, on the other hand, the authors stressed the "widespread occurrence of socially acceptable expressions of negativity toward the elderly."[128] Finally, older individuals are distinctive in internalizing that negative view of themselves – "members of all groups tested to date – other than the aged – invariably show more positive implicit attitudes toward their own group compared to non-group members."[129] Older individuals were the only stigmatized group that felt as negatively about themselves as nongroup members did.

While they might seem to be in tension, all these features can be explained through "real differences." As the Wirtz report noted, there are some forms of age discrimination that are entirely justified – indeed, the report agonized over whether to even call this "discrimination."[130] And if age distinctions track real differences, it makes sense that there would be little hatred of older individuals, that we could rationally treat them more poorly, and that they would internalize society's negative views of old age.

Unlike the gender context, however, the "real difference" between older and younger individuals is a source of terror. If we have "death panic" in the context of

[125] Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* Ageism: Stereotyping and Prejudice against Older Persons (T. D. Nelson ed., 2002).
[126] *Id.* at 50.
[127] Wirtz Report, *supra* note 7, at 8.
[128] Levy & Banaji, *supra* note 125, at 50.
[129] *Id.* at 55.
[130] Wirtz Report, *supra* note 7, at 5 (noting that this "type of discrimination . . . should perhaps be called something else entirely").

age, we are less likely to be able to sort through what is a fair and what is an unfair distinction. We are much more likely to overascribe traits and behaviors to biology than to bigotry.

6.3.4 *An Exact Inversion*

I close this portion of the analysis with a deliberately provocative point. The civil rights paradigm in the US has been built on the foundation of race discrimination, to which age discrimination is a belated addition. Yet if we regard civil rights through a terror management perspective, we could invert that analysis.

Take philosopher Martha Nussbaum's analysis of age discrimination in her 2017 work *Aging Thoughtfully*.[131] While Nussbaum spoke in terms of disgust rather than terror management, her thinking can be easily assimilated into the terror management framework. She observed that the prejudice toward aging bodies was largely fueled by a particular form of disgust. "With aging the truth is front and center: it really is for oneself that one fears,"[132] she contended. "Stigma learned early and toward others gradually becomes self-stigma and self-exclusion, as one's own aging body is seen as a site of decay and future death – by oneself as well as by others."[133]

Nussbaum maintained that other forms of discrimination could be driven by this fear of mortality. She contended that "[p]eople seek to create a buffer zone between themselves and their own animality, by identifying a group (usually a powerless minority) who can be targeted as the quasi-animals and projecting onto that group various animal characteristics."[134] She elaborated that "[t]he so-called thinking seems to be: if those quasi-animal humans stand between us and our own animal stench and decay, we are that much further from being animal and mortal ourselves."[135]

Under this view, we see an exact inversion of age discrimination and race discrimination. Age discrimination is no mere adjunct to the paradigm case of race discrimination. Rather, age discrimination is the central category, as it most directly engages this fear of death. Other forms of discrimination displace that terror – or disgust – onto other groups.

In saying this, I do not contest the primacy of race-based civil rights – it is this country's original sin. Rather, I am attempting to dislodge the view that age-based discrimination is the peripheral category we often view it to be.

[131] Martha C. Nussbaum & Saul Levmore, Aging Thoughtfully: Conversations about Retirement, Romance, Wrinkles, & Regret (2017).
[132] *Id.* at 114.
[133] *Id.*
[134] *Id.* at 110.
[135] *Id.* at 111.

6.4 DOCTRINAL AND POLITICAL REFORMS

My primary goal here is not to advance legislative or doctrinal reform. Yet because it is easier to dispose than propose, I make some reconstructive gestures as a token of good faith. To respect the difference that age makes is to transform the law and culture of aging.

6.4.1 *Legal Reforms*

As a matter of constitutional law, my analysis means that *Murgia*[136] must be revisited. Luckily the change required here is doctrinally modest. In its equal protection jurisprudence, the Court has moved away from anointing new classifications as suspect.[137] Instead, it has expanded the "rational basis with bite" category to engage in more searching review under that standard. For this reason, a subsequent Court need not overrule *Murgia* with regard to its adoption of rational-basis review. It need only clarify that the rationality standard there has bite, in the same way it had bite in the contexts of sexual orientation,[138] disability,[139] or marital status.[140]

This analysis would also have implications in the legislative domain. Some advocates for older individuals have argued that Congress should amend Title VII to include age.[141] By doing so, one advocate maintains, Congress could obliterate "some of the U.S. Supreme Court's ill-conceived, pro-business opinions that deny equal protection to older workers."[142] I disagree. Given the cogency of the "real-difference" argument, age is sufficiently distinct that it should remain under its own statutory rubric.

At the same time, the existence of real differences will often blind courts to stereotypical thinking.[143] It seems unlikely that the Court will whittle away at the "real-differences" rationale here as they have done in the gender context. Unlike the gender context, the age context deals with more plausible and salient real differences

[136] *Murgia*, 427 U.S., at 307.

[137] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) (noting that "the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977").

[138] *United States v. Windsor*, 570 U.S. 744 (2013); *Romer*, 517 U.S., at 620.

[139] *Cleburne*, 473 U.S., at 432.

[140] *Eisenstadt*, 405 U.S., at 438.

[141] *See*, e.g., PATRICIA G. BARNES, BETRAYED: THE LEGALIZATION OF AGE DISCRIMINATION IN THE WORKPLACE 220–221 (2014) ("Congress must do what it should have done in 1964 – make age a protected class under Title VII.").

[142] *Id.* at 221.

[143] The dissenters in *Nguyen v. Immigration and Naturalization Services*, 533 U.S. 53 (2001) criticized the majority for confusing biology and bigotry. Justice O'Connor observed that "the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization." *Id.* at 86 (O'Connor, J., dissenting).

among cohorts. Moreover, "death panic" means that the line between reality and stereotype may be even more blurred. This point suggests that the real wrong turn in the ADEA occurred in *Gross*,[144] where the Court declined to embrace a "mixed motive" analysis that would require an employer to justify its decision if age was seen as a "motivating" factor. Any time a court recognizes that the employer has used age as a factor, it should adopt a hermeneutics of skepticism.

6.4.2 *Social Reforms*

All of these legal reforms will be for naught unless we change broader social views about older individuals. Again, this is a vast topic, so I will here do no more than identifying one worrisome and one promising solution in Gratton and Scott's *100-Year Life*.

I am pessimistic about Gratton and Scott's endorsement of greater contact as a solution. Gratton and Scott noted their belief that "age segregation is closely connected to ageism, since it sets up sharp distinctions between 'us' and 'them,' and leads to stereotyping and associated prejudices."[145] They noted that as the three stages of life (education, work, and retirement) perforce become "multiple stages," "people from different ages have a chance to engage in similar experiences."[146] Gratton and Scott believed this engagement would have salutary effects on intergroup attitudes. To support that view, they cited Gordon Allport's "classic study" outlining contact hypothesis – the view that stereotypes decrease as contact between groups increases.[147]

Allport's work itself, however, suggests that contact alone will not be enough. Allport underscored that certain conditions need to be met for intergroup contact to diminish prejudice. The groups, for instance, must meet on the terms of relative equality.[148] If that condition does not obtain, contact is not likely to make much of a difference. We see this in the case of gender, where contact between men and women did not, per se, lead to a diminution of stereotyping of women. Indeed, because women were assigned particular roles, this close contact arguably kept those stereotypes in place. So contact alone does not seem to be a sufficient answer.

Gratton and Scott offered a more promising avenue when they discussed a study about how individuals invested differently when they saw their digitally aged avatars.[149] The point of this study was to show that when individuals were shown

[144] *Gross v. FBL Financial Services*, 557 U.S. 167 (2009).
[145] Gratton & Scott, *supra* note 1, at 328.
[146] *Id.*
[147] *Id.* (citing Gordon Allport, The Nature of Prejudice (1954)).
[148] *See*, e.g., Allport, *supra* note 147, at 281 ("Prejudice (unless deeply rooted in the character structure of the individual) may be reduced by equal status contact between majority and minority groups in pursuit of common goals.").
[149] *Id.* at 257–258 (citing Hal E. Hirshfield et al., *Increasing Saving Behavior through Age-Progressed Renderings of the Future Self*, 48 J. of Marketing Research 23 (2019)).

their projected older selves, they tended to save more for their retirement.[150] Yet this project might not just incentivize greater savings by younger individuals but also push to overcome their denial about the aging process. Confronting one's older self could be the first step in having empathy for that self.

The terror management theory might appear to cast ageism as practically ineradicable. After all, it casts ageism as rooted in a fear of death, which cannot be staved off forever. Yet we do know that some cultures view both death and older individuals with less terror.[151] Thus it is not utopian to posit that we could have a different attitude toward death and, therefore, a different attitude toward old age. Comparative study may be particularly useful here.

6.5 CONCLUSION

Ageism is a problem that cries out for an urgent solution in a period of radically lengthened lifespans. It is all very well to say that individuals should begin their second careers at age sixty-five, but this will be impossible if employers will not hire them at that age. As the problem grows ever more urgent, and the constituency affected becomes ever more numerous, we seem due for a tipping point. I predict that the movement for older individuals will soon have a major mobilizing "moment," much as other groups did with Black Lives Matter or #MeToo.

I have attempted to suggest some ways for older individuals to use their power when the revolution comes. The traditional way of recognizing a new social movement is to bring discrimination against the group within the pale of the traditional antidiscrimination canon. I argue that this is a mistake (indeed a particular iteration of a more general mistake). If age is truly to be protected, we should not force the "new old" into old paradigms. The opposite of "old" is not only "young"; it is also "new."

[150] Hirshfield et al., *supra* note 149.

[151] Jill M. Chonody & Barbara Teater, *Why Do I Dread Looking Old? A Test of Social Identity Theory, Terror Management Theory, and the Double Standard of Ageing*, 28 J. OF WOMEN & AGEING 112 (2016) (noting that while the findings are complex, there are transnational differences with regard to ageism and death panic).