

THE AGE OF RACISM

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ABSTRACT

This Essay introduces the concept of aged racism, a distinct species of systemic racism characterized by its intersection with age. This subject has yet to receive significant theoretical attention in the legal scholarship, despite the social importance of both age and race and the many ways in which they are embedded in the law and legal institutions. Aged racism contributes to racial subordination in three unique ways. First, age categories are raced, saddling many people of color, particularly children, with age-based expectations that can lead to punitive or carceral outcomes. Second, due to the differential legal treatment of age and race in the law, age may function as a vehicle for impermissible racial classifications or negative racial effects. Finally, racism exerts an influence over the lifecourse to create cumulative disadvantage for people of color, particularly older adults. This dynamic may convert facially neutral age-based rules into mechanisms of racial inequality. By highlighting aged racism and discussing its legal implications, this Essay puts the fields of law and aging and critical race theory in conversation by considering in tandem the social categories with which each is most concerned.

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INTRODUCTION

Age has long played an underappreciated role in racial subordination. In the eighteenth and early nineteenth centuries, age was not considered a significant identity characteristic, and there was no state apparatus for the collection of birth data.¹ However, there was at least one domain in which age was uniquely salient: the brutal system of chattel slavery.² Enslavers dutifully kept detailed records of the birthdates and chronological ages of enslaved people in order to accurately price their human property.³ Even in abolitionist states like Pennsylvania, emancipation statutes permitted a form of indentured servitude for free Black people that ended at age twenty-four for men and twenty-one for women, three years longer than the same form of servitude for White paupers.⁴ These laws were justified using age-based understandings of Black people as immature and childlike.⁵ In the modern era—and in a notable contrast to the treatment of Black people in those emancipation statutes—many Black and Latinx children are perceived as more adult than their White peers and therefore more dangerous and culpable.⁶ These perceptions are used to justify the overpolicing of these

1. See HOWARD P. CHUDACOFF, *HOW OLD ARE YOU? AGE CONSCIOUSNESS IN AMERICAN CULTURE* 27 (1989) (“American society before the latter half of the nineteenth century was characterized by a lack of sharp age awareness, age norms, and age grading.”).

2. See Corinne T. Field & Nicolas L. Syrett, *Introduction*, in *AGE IN AMERICA: THE COLONIAL ERA TO THE PRESENT* 1, 8 (Corinne T. Field & Nicolas L. Syrett eds., 2015) (“Masters, traders, and tax assessors relied upon chronological age to determine the monetary value of enslaved people, assigning the highest value to those in their mid- to late teens.”).

3. See *id.* (“[M]asters and mistresses were among the most careful recorders of births.”).

4. See Sharon Braslaw Sundue, “*Beyond the Time of White Children*”: *African American Emancipation, Age, and Ascribed Neoteny in Early National Pennsylvania*, in *AGE IN AMERICA*, *supra* note 2, at 47, 52–53 (describing how the emancipation laws in Connecticut, Pennsylvania, New Jersey, and New York included such provisions).

5. See, e.g., *Respublica v. Betsey*, 1 U.S. (1 Dall.) 469, 471–72 (1789) (noting that Betsey should remain in servitude until age twenty-eight because “she would be incapable to take care of herself, and her parents are unable to educate her”).

6. See REBECCA EPSTEIN, JAMILIA J. BLAKE, & THALIA GONZÁLEZ, *GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD* 4 (2017) (describing the ways in which black girls are adultified); Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalia Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 540 (2014) (finding that Black boys and to a lesser extent Latinx boys are seen as less childlike and more culpable than their White peers).

populations and influence the configurations of various legal structures through which children of color are disproportionately directed, such as the immigration and juvenile justice systems.⁷

These are just some examples of what I term “aged racism,” a distinct species of systemic racism that is characterized by its intersection with age. Like other forms of intersectional oppression, aged racism is not simply the additive effect of ageism and racism.⁸ It is the interaction of age, race, and their corresponding social structures that produces the unique forms of racial subordination examined here. Further, this Essay is concerned with one particular system in the structure of society—the law—that can help to propagate aged racism or combat its effects.⁹ Aged racism can exist at the individual level as stereotypes, prejudice, or discriminatory behavior, or at the institutional level, embedded in legal doctrines or systems of social meaning. It can affect all ages, but it is most likely to manifest at points in the lifecourse when age is particularly salient, chiefly but not exclusively at the earliest and latest life stages.¹⁰ These are also the times when aged-based legal regulations are most common, making them a potential site of both racial subordination and resistance.

By introducing the concept of aged racism and mapping out its legal dimensions, this Essay makes two contributions. First, it addresses a gap in critical race theory scholarship. Scholars working with the concept of intersectionality have explored how age and race interact with various other social categories, including gender, sexuality, and class.¹¹ This work has

7. See Sarah L. Hamilton-Jiang, *Children of A Lesser God: Reconceptualizing Race in Immigration Law*, 15 NW. J. L. & SOC. POL’Y 38, 65 (2019) (exploring the role of adultification in racializing Latinx immigrant children); Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399, 422–23 (2018) (describing the different waves of adultification in juvenile justice); Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 723–24 (2018) (connecting overpolicing to implicit biases, including adultification).

8. See Lynn Roseberry, *Multiple Discrimination*, in AGE DISCRIMINATION AND DIVERSITY: MULTIPLE DISCRIMINATION FROM AN AGE PERSPECTIVE 16, 26 (Malcolm Sargeant ed. 2011) (“‘Additive’ discrimination is understood as signifying the view that discrimination against particular targeted groups . . . is primarily an additive phenomenon that can be broken down into components corresponding to individual prohibited grounds of discrimination.”); 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”).

9. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 9 (6th ed. 2022) (defining society’s racial structure as “the totality of the social relations and practices that reinforce white privilege”).

10. See Richard A. Settersten, Jr., *The Salience of Age in the Life Course*, 40 HUM. DEV. 257, 273–77 (1997) (describing the ways in which age salience varies by domain and demographic characteristics).

11. See, e.g., NANCY J. KNAUER, *GAY AND LESBIAN ELDERS: HISTORY, LAW, AND IDENTITY POLITICS IN THE UNITED STATES* 31–32 (2011) (describing the legal challenges faced by LGBT older adults); Pnina Alon-Shenker & Therese MacDermott, *Intersecting Age and Gender in Workplace*

deepened our understanding of various forms of intersectional subordination, such as gendered racism and its impact on women of color.¹² However, the intersection of age and race has yet to receive significant theoretical attention in legal scholarship.¹³ This Essay fills that gap. In the process, it expands our understanding of the various ways that systemic racism operates in and through the law. Second, it adds to the small but rich body of scholarship on the social category of age and its relationship to the law.¹⁴ Bringing a racial lens to this literature, it furthers our understanding of how age-based rules have the potential both to facilitate and to combat racial subordination. This Essay thus initiates a conversation between the fields of law and aging and critical race theory by considering in tandem the social categories with which each is most concerned.

Part I theorizes the concept of aged racism as a form of oppression at the intersection of age and race. It draws on the insights of the intersectionality literature, in which age and race are not merely categories of identity but also represent structures of power or systems of inequality that can play a significant role in societal subordination.¹⁵ It explores how these systems

Discrimination Complaints, 41 COMP. LAB. L. & POL'Y J. 521, 524–28 (2020) (examining age and gender in antidiscrimination law); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 567–68 (1997) (exploring the intersection of race, sexuality, and class); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (analyzing the intersection of gender and race in antidiscrimination law).

12. See, e.g., MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019) (exploring gendered racism in law faculty hiring); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 818–21 (1993) (describing the racialized sexual stereotypes women of color face in sexual harassment).

13. See Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 189 (2020) (noting that the theoretical literature is “sparse” on the topic of intersectionality and old age); Sue Westwood, “*I May Be Older, but I Ain’t No ‘Elder’*”: A Critique of “Elder Law”, 21 TEMP. POL. & CIV. RTS. L. REV. 485, 495 (2012) (“One of the forms of intersectionality as-yet under-researched is how older age intersects with other forms of inequality.”). Several scholars have explored particular instances of what I term aged racism, with the bulk of this work exploring how adultification impacts legal regimes. See, e.g., Mikah K. Thompson, *Sexual Exploitation and the Adultified Black Girl*, 94 ST. JOHN’S L. REV. 971, 977 (2020) (exploring the role of adultification in mistake of age defenses in criminal law). But see Nicole Delaney & Joanna N. Lahey, *The ADEA at the Intersection of Age and Race*, 40 BERKELEY J. EMP. & LAB. L. 61, 69–72 (2019) (an exception exploring the intersection of age and race in employment discrimination law).

14. See, e.g., Alexander A. Boni-Saenz, *Legal Age*, 63 B.C. L. REV. 521 (2022); Michael C. Pollack & Lior Jacob Strahilevitz, *Property Law for the Ages*, 63 WM. & MARY L. REV. 561 (2021); Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131 (2020); Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55 (2016); Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213 (2010).

15. See Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS: J. WOMEN CULTURE & SOC. 785, 797 (2013) (emphasizing that intersectional analysis is not simply about identity but more about political and structural inequalities); Toni Calasanti & K. Jill Kiecolt, *Intersectionality and Aging Families*, in

operate differently in how and to whom they parcel out advantages and disadvantages, creating unique forms of racial subordination for multiple societal groups through their intersection.

Part II of the Essay transitions from the abstract to the specific, describing the first of three primary ways in which aged racism manifests in the law: through the racing of age categories.¹⁶ Categories such as “child” or “adolescent”—with their attendant qualities of innocence and freedom to experiment—are socially constructed as White, removing Black and Latinx children from their protection but without providing them the full benefits of adulthood.¹⁷ There may be similar racing of older age categories, though less research has been conducted on this front. This racing of age categories not only creates different lifecourse paths based on race, but also influences legal institutions and doctrines.¹⁸

Part III explores how the differential legal treatment of age and race in the law creates dynamics that allow for aged racism to manifest. Because the use of age in the law is more permissible than the use of race, there exist opportunities for legal actors to intentionally use age as a proxy for race when using the latter directly is not otherwise permissible. In addition, age-based legal rules may at best have unintended racial effects or at worst use age to mask racial exclusion.¹⁹ The possibility for these types of effects will only increase in the future, as these rules apply to a U.S. population undergoing the linked demographic trends of aging and racial diversification.²⁰

HANDBOOK OF FAMILIES AND AGING 263, 263 (Rosemary Blieszner & Victoria Hilkevitch Bedford eds., 2d ed. 2012) (“[A] system of inequality describes a relationship of privilege and oppression based on group membership—ascribed status that is usually seen to be ‘natural’—and not on achievement, individual skills, personality, and the like.”) (emphasis in original).

16. See Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806–07 (1993) (“‘[R]ace’ is a verb, that we are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”).

17. See KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* x–xi (2021) (describing how the experience of Black children does not conform with traditional narratives of carefree adolescence); Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America’s “Wars” on Drugs, Crime, and Gangs*, 46 AM. CRIM. L. REV. 1145, 1169 (2009) (noting how adultification penalizes children of color by imposing higher levels of culpability without providing analogous rights of adulthood).

18. See HENNING, *supra* note 17, at 123 (“Today, when I meet my clients at school, I can barely distinguish a school visit from a legal visit to the local youth detention center.”); Laila Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 209–22 (2020) (discussing the treatment of children in the immigration system).

19. See Alexander A. Boni-Saenz, *Age Diversity*, 94 S. CAL. L. REV. 303, 315 (2021) (“[A]ge diversity itself may have effects on other types of diversity and vice versa, and these cross-identity effects may also have normative implications.”).

20. See Press Release, U.S. Census Bureau, *Nation Continues to Age as it Becomes More Diverse* (June 30, 2022), <https://www.census.gov/newsroom/press-releases/2022/population-estimates-characteristics.html> [<https://perma.cc/F9AP-3WUE>] (describing the two trends); WILLIAM H. FREY,

Finally, Part IV tackles how aged racism manifests as a temporal form of inequality that must be understood longitudinally over the lifecourse.²¹ Many of the negative effects of race express themselves not only in particular moments, but also in ways that affect life trajectories and produce cumulative effects over time.²² As individuals subject to persistent race-based advantages and disadvantages age, the inequalities between those subject to these longitudinal effects grow.²³ Facially neutral age-based rules affecting older populations, such as the age eligibility requirements in the Social Security retirement program or age-based allocations for COVID-19 vaccine distribution, may in fact exacerbate racial inequalities.²⁴

I. AGED RACISM

This Essay explores how the social category of age intersects with race in ways that produce unique forms of racial subordination. Further, the focus is on the law as a particular system in the structure of society that can help to propagate aged racism or combat its effects.²⁵ Thus, this exercise is in large part an application of the concept of intersectionality, which originated in Black feminist thought.²⁶

Intersectionality investigates how intersecting power relations influence social relations across diverse societies as well as

DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA 21 (2015) (“The sweeping racial changes transforming much of the American landscape are segmented by an important demographic dimension: age. The infusions of new waves of Hispanics and Asians and multiracial Americans is most evident among younger age groups.”).

21. See Magda Nico & Gary Pollock, *Inequalities as Process: Doing Inequalities over the Life Course*, in THE ROUTLEDGE HANDBOOK OF CONTEMPORARY INEQUALITIES AND THE LIFE COURSE 1, 1 (Magda Nico & Gary Pollock eds. 2022) [hereinafter THE ROUTLEDGE HANDBOOK] (“Inequalities are processes, and not static measurable circumstances. They are *in the making* over the life course, interacting with each other, accumulating, attenuating, reproducing or spinning off along the way.”) (emphasis in original).

22. 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.”); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976) (“[B]ecause acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.”).

23. See, e.g., Tyson H. Brown, *Diverging Fortunes: Racial/Ethnic Inequality in Wealth Trajectories in Middle and Late Life*, 8 RACE & SOC. PROBS. 29, 39–40 (2016) (“Consistent with cumulative disadvantage perspectives on intra-cohort inequality dynamics, this study finds that racial/ethnic inequalities in wealth increase dramatically with age.”).

24. See Govind Persad, *Reforming Age Cutoffs*, 56 U. RICH. L. REV. 1007, 1018–22 (2022) (describing how age cutoffs may exacerbate preexisting disadvantage).

25. See BONILLA-SILVA, *supra* note 9, at 9 (defining society’s racial structure as “the totality of the social relations and practices that reinforce white privilege”).

26. For a history of intersectionality, see generally ANGE-MARIE HANCOCK, *INTERSECTIONALITY: AN INTELLECTUAL HISTORY* (2016). Kimberlé Crenshaw explicitly envisioned

individual experiences in everyday life. As an analytic tool, intersectionality views categories like race, class, gender, sexuality, nation, ability, ethnicity, and age – among others – as interrelated and mutually shaping one another. Intersectionality is a way of understanding and explaining complexity in the world, in people, and in human experiences.²⁷

It is important to understand social categories such as age or race not just as aspects of identity. They represent structures of power or systems of inequality that can play a significant role in societal subordination.²⁸ This subordination may function in terms of the material benefits and burdens in society, the unequal distribution of which can lead to exploitation, economic marginalization, or deprivation.²⁹ For instance, age and racial discrimination in the labor market can contribute to a lack of job opportunities, which in turn can lead to poverty and other negative outcomes.³⁰ Subordination may also operate at the level of culture, leading to social and representational patterns of cultural domination, nonrecognition, or disrespect.³¹ For example, media representations of Whiteness and youth are typically both more plentiful and positive than those of individuals who are non-White or older, which can influence the relative worth of those identities in the general public.³²

intersectionality being applied to age in the future. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 n.9 (1991) (“[T]he concept [of intersectionality] can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.”).

27. See PATRICIA HILL COLLINS & SIRMA BILGE, *INTERSECTIONALITY* 2 (2016).

28. See Cho et al., *supra* note 15, at 797 (emphasizing that intersectional analysis is not simply about identity but more about political and structural inequalities); Calasanti & Kiecolt, *supra* note 15, at 263 (“[A] system of inequality describes a *relationship of privilege and oppression* based on group membership—assigned status that is usually seen to be ‘natural’—and not on achievement, individual skills, personality, and the like.”) (emphasis in original).

29. See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* 13–14 (1997) (discussing economic injustices).

30. See 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, 848–51 (2004) (describing how discrimination based on age and race manifest differently in the employment context).

31. See FRASER, *supra* note 29, at 14 (describing recognition harms).

32. See ONNIE ROGERS, DANA MASTRO, MICHAEL B. ROBB & ALANNA PEEBLES, *THE INCLUSION IMPERATIVE: WHY MEDIA REPRESENTATION MATTERS FOR KIDS’ ETHNIC-RACIAL DEVELOPMENT* 23 (2021) (noting that White people are presented more frequently and positively and that these representation influence “how we collectively feel about, evaluate, and understand ourselves and each other.”); AARP RESEARCH, *MEDIA IMAGE LANDSCAPE: AGE REPRESENTATION IN ONLINE IMAGES* 5 (2019) (noting the disproportionately negative portrayals of old age in online images and how this reinforces stereotypes).

Aged racism is a distinct species of systemic racism characterized by its intersection with age.³³ I do not use the word “aged” here to mean having achieved an advanced age or having acquired a desirable quality over time, such as aged wine or cheese. Instead, aged refers to the fact that the forms of systemic racism at issue intersect with the social category of age, just as gendered racism is a form of systemic racism that intersects with the social category of gender.³⁴ Aged racism, like other forms of intersectional oppression, is not simply the additive effect of ageism and racism. Rather, it is the interaction of these two categories and their corresponding social structures that produces the unique forms of racial subordination that are explored in this Essay.³⁵ Systemic racism, in turn, exists in “societies where social, political, economic, cultural, and even psychological rewards are *partially* allocated along racial lines.”³⁶ This means that race is an important—though not the only—input into the distribution of welfare in the population.

This definition of aged racism is in one sense broad and in another sense narrow. It is broad because the forms of subordination encompassed by it are highly variable.³⁷ They can exist at the individual level as stereotypes, prejudice, or discriminatory behavior that are the product of the interaction of age and race. However, they may also be institutional, embedded in legal doctrines or systems of social meaning that serve to disadvantage people on the combined basis of both age and race. On the other hand, the definition is narrow because it limits for analytical purposes the social categories under consideration to age and race. This does not foreclose the possibility that other aspects of identity such as class, disability, gender, or sexuality likely also influence how age and race interact, and aged racism can intersect with these other categories of identity as well.

33. See Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS: J. WOMEN CULTURE & SOC. 1771, 1787–88 (2005) (“In the language of statistics, the analysis of intersectionality usually requires the use of ‘interaction effects’”).

34. See PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM: AN INTERDISCIPLINARY THEORY 31 (1991) (“[Sexism and racism] narrowly intertwine and combine under certain conditions into one, hybrid phenomenon”: gendered racism).

35. See Roseberry, *supra* note 8, at 26 (“‘Additive’ discrimination is understood as signifying the view that discrimination against particular targeted groups . . . is primarily an additive phenomenon that can be broken down into components corresponding to individual prohibited grounds of discrimination”); Carbado & Gulati, *supra* note 8, at 708 (noting that “systems of discrimination—e.g., racism, sexism, homophobia, and classism—are themselves intersectional.”).

36. Eduardo Bonilla-Silva, *What Makes Systemic Racism Systemic?*, 91 SOCIO. INQUIRY 513, 519 (2021). See also JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION 16–31 (2006) (describing the major dimensions of systemic racism).

37. See Sharon Koehn & Karen Kobayashi, *Age and Ethnicity*, in AGE DISCRIMINATION AND DIVERSITY, *supra* note 8, at 136 (“These intersections are at play at each of the micro, meso and macro levels—that is, relative to our identities, and to our interactions with others in different sociocultural contexts, and at the broader societal level wherein values are entrenched as policies”).

While at first glance one might assume that aged racism will only affect older adults of color because they occupy the disfavored positions in both the age and race categories, this is not necessarily the case.³⁸ This is in part because the ways in which social advantages and disadvantages are parceled out based on age is complicated and highly contextual.³⁹ It is certainly the case that the “old” face significant barriers due to structural ageism.⁴⁰ For example, the COVID-19 pandemic exposed the ageist system of long-term care, whose many regulatory failures helped produce disproportionate fatalities amongst older adults.⁴¹ However, there may also be benefits to being classified as older, such as the economic advantages of senior discounts or the heightened social status that can come with old age in one’s family or society at large.⁴² Further, it is sometimes youth who face age-based barriers in various walks of life. Depending on the job or industry, workers from younger generations may face age stereotypes or a lack of job opportunities.⁴³ Similarly, in the political world, few younger individuals

38. One strain of critical race theory methodology urges us to highlight and analyze those who fall at the intersection of two identity categories, particularly those who occupy disfavored positions within each of these categories. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 768 (1994) (noting how this method allows for those at the intersections to be recognized as “proper legal subjects”); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–25 (1987) (discussing the importance of “looking to the bottom” in examining issues of inequality); Crenshaw, *supra* note 11, at 139–40 (analyzing the interface between gender and race by highlighting Black women in antidiscrimination law). While this methodology is valuable and productive, it encounters some difficulties when applied to aged racism, as discussed in this Part. See Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1286–96 (2002) (noting that who is at the “bottom” may shift based upon your frame of reference).

39. See Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It’s Been, Where It Is Today, Where It’s Going*, 31 U. RICH. L. REV. 579, 677 (1997) (“Ageism is not equivalent, either in its genesis nor its manifestations, to racism.”).

40. See E-Shien Chang, Joan K. Monin, Daniel Zeltermann & Becca R. Levy, *Impact of Structural Ageism on Greater Violence Against Older Persons: A Cross-National Study of 56 Countries*, 11 BMJ OPEN e042580, at 4–5 (2021) (drawing a connection between structural ageism and violence against older people across various countries); E-Shien Chang et al., *Global Reach of Ageism on Older Persons’ Health: A Systematic Review*, 15 PLOS ONE e022085, at 13 (2020) (connecting ageism with negative health outcomes for older persons across several countries).

41. See Nina A. Kohn, *Nursing Homes, COVID-19, and the Consequences of Regulatory Failure*, 110 GEO. L.J. ONLINE 1, 3 (2021) (arguing that the massive nursing home deaths during the COVID-19 pandemic were the result of structural ageism).

42. See Leslie Pickering Francis & Anita Silvers, *Bringing Age Discrimination and Disability Discrimination Together: Too Few Intersections, Too Many Interstices*, 11 MARQ. ELDER’S ADVISOR 139, 157–60 (2009) (discussing the rationales for senior discounts); Geoffrey Cupit, *Justice, Age, and Veneration*, 108 ETHICS 702, 714–18 (1998) (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).

43. See Pamela Ann Gordon, *Age Diversity in the Workplace*, in DIVERSITY AND INCLUSION IN THE GLOBAL WORKPLACE: ALIGNING INITIATIVES WITH STRATEGIC BUSINESS GOALS 31, 35 (Carlos Tasso Eira de Aquino & Robert W. Robertson eds., 2018) (noting that age discrimination might affect many different ages, including the young and middle-aged); JESSICA KRIEGLER, UNFAIRLY LABELED: HOW YOUR WORKPLACE CAN BENEFIT FROM DITCHING GENERATIONAL STEREOTYPES 54–60 (2016) (describing stereotypes and discrimination encountered by millennials in the workplace); Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69, 103–04 (collecting cases and studies in which younger workers faced stereotypes and discrimination).

are in a position to wield significant power or influence over the legislative agenda.⁴⁴

This all contrasts with the allocation of social advantages and disadvantages based on race, where advantage cuts across most contexts in much the same way, providing consistent advantages to those classified as White.⁴⁵ Because of this dynamic, race has the power to transform an otherwise privileged position within an identity category into a liability in a specific context. Consider the intersection of race and gender, specifically the intersection of the disfavored position of Black in the racial category and the favored position of male in the gender category. Several scholars have described how Black men often face unique forms of gendered racism—in the context of mass incarceration as well as employment, education, and health outcomes—that are not faced in the same way by Black women.⁴⁶ In criminal sentencing, male gender combines with race and age to produce harsher punishments for young Black and Latinx males than their female counterparts.⁴⁷ Thus, intersectional subordination can manifest among those who hold a privileged position within one identity category and a disfavored position within another.⁴⁸ This is not to say that Black women do not also face unique forms of gendered racism, but instead to caution that in analyzing aged racism and other forms of intersectional oppression, one must proceed contextually.

Even though aged racism might affect people across the lifecourse, there are also reasons to believe that it might not exert its influence uniformly across it. In the United States context, race unfortunately exerts a social pull

44. See Philip Bump, *When It Comes to Generational Diversity in Congress, Ocasio-Cortez Has a Point*, WASH. POST (June 28, 2018, 1:50 PM), <https://www.washingtonpost.com/news/politics/wp/2018/06/28/when-it-comes-to-generational-diversity-in-congress-ocasio-cortez-has-a-point/> [https://perma.cc/V96H-XED7] (describing the age skew in Congress toward older people).

45. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411–12 (1994) (noting a “special problem of inequality” when social and legal practices translate “highly visible and morally irrelevant differences into systemic social disadvantage”); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–14 (1993) (describing white privilege as a form of property interest).

46. See Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 346–47 (2013) (discussing gendered racism that Black men face); Robert S. Chang & Jerrome McCristal Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485, 489 (2002) (discussing Emmett Till, whose privileged positions in the gender and sexuality categories combined with race to exacerbate racial violence against him).

47. See Darrell Steffensmeier, Noah Painter-Davis, & Jeffery Ulmer, *Intersectionality of Race, Ethnicity, Gender, and Age on Criminal Punishment*, 60 SOCIO. PERSPS. 810, 823–27 (2017) (describing these effects).

48. See Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS: J. WOMEN CULTURE & SOC. 811, 814 (2013) (describing how intersectionality seeks to map not only the bottom but also the top of relevant social categories); Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 280 (2002) (describing how systems of subordination support each other).

throughout life, with some likening it to caste systems in other countries.⁴⁹ In contrast, the salience of age fluctuates significantly across life domains and segments of the lifecourse.⁵⁰ For instance, one's age is highly salient as a minor because one is classified in the age-based category of "child," with all of its attendant social and legal meanings. The same is true for old age.⁵¹ This explains in part why legal regulations using age are more common at younger and older ages rather than in the middle, with most age-based rules addressing the transition from childhood to adulthood or the vulnerabilities associated with older ages.

This body of age-based law is a major place to look for instances of aged racism in legal doctrine. The presence of an age-based rule does not necessarily constitute a manifestation of aged racism, but it is worth interrogating for its racial effects, whether positive or negative.⁵² Bright-line age-based rules that apply at younger ages can help combat racial subordination by removing discretion from potentially biased legal decision-makers, who might otherwise exercise such discretion to treat children of color differently.⁵³ At the same time, age-based rules that apply to adults, especially older adults, may exacerbate racial inequalities by surreptitiously importing race into legal decision-making,⁵⁴ by having disparate impacts by race due to demographic realities,⁵⁵ or by ignoring relevant differences by race in the populations to which they apply.⁵⁶

Age may be salient in middle life as well, suggesting a different set of legal implications. For example, those with the capacity for giving birth often view those ages in which pregnancy is possible as highly salient. This may be because of the desire for biological reproduction and an awareness of the limited years in which this is possible or because of the desire to avoid unwanted pregnancies, or both.⁵⁷ Further, studies have alternately found

49. See ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 18 (2020) ("In the American caste system, the signal of rank is what we call race, the division of humans based on their appearance. In America, race is the primary tool and the visible decoy, the front man, for caste.").

50. See Govind Persad, *Evaluating the Legality of Age-Based Criteria in Health Care: From Nondiscrimination and Discretion to Distributive Justice*, 60 B.C. L. REV. 889, 914 (2019) (claiming that there "is also more evidence that race, gender, and religion are more subjectively important identities than age").

51. See Settersten, *supra* note 10, at 273–77 (describing the ways in which age salience varies by domain and demographic characteristics).

52. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–22 (1987) (describing the need to interrogate legal rules for unconscious racism).

53. See *infra* text accompanying notes 106–107.

54. See *infra* text accompanying notes 132–141.

55. See *infra* text accompanying notes 151–165.

56. See *infra* text accompanying notes 183–90.

57. See Martina Yopo Díaz, *The Biological Clock: Age, Risk, and the Biopolitics of Reproductive Time*, 84 SEX ROLES 765, 766–67 (2020) (examining the social construction of the biological clock);

higher rates of unintended pregnancies amongst subgroups of Black, Latinx, and Asian women.⁵⁸ Legal rules that regulate pregnancy and reproductive rights also regulate a relevant life stage, and individuals may be differently situated within that life stage by race. This suggests that one might not only find aged racism or avenues to combat it in age-based law but also in other bodies of law that regulate life stages indirectly, creating racial effects.

Whether manifesting directly through age-based law or indirectly through other bodies of law, the next three Parts examine some of the major ways in which aged racism plays out in the legal context.

II. RACED AGE CATEGORIES

The first major manifestation of aged racism comes in the form of raced age categories, or age categories that take on a racial character.⁵⁹ In order to appreciate this phenomenon, it is necessary to understand how age and race are social constructions.⁶⁰ To say that these categories are socially constructed means that they are not natural or predetermined but instead are the product of an array of human processes and are subject to variation over time and place.⁶¹

While the social category of age is often popularly reduced to chronology, or the number of years that have elapsed since birth, it is in fact

F.C. Billari et al., *Social Age Deadlines for the Childbearing of Women and Men*, 26 HUM. REPROD. 616, 620–21 (2011) (finding women more constrained by social age deadlines for childbearing).

58. See Theresa Y. Kim, Rada K. Dagher & Jie Chen, *Racial/Ethnic Differences in Unintended Pregnancy: Evidence from a National Sample of U.S. Women*, 50 AM. J. PREVENTIVE MED. 427, 433–34 (2016) (finding that Black and Latinx women had higher rates of unintended pregnancy, with age being a factor contributing to the disparity); Lina Guzman, Elizabeth Wildsmith, Jennifer Manlove & Kerry Franzetta, *Unintended Births: Patterns by Race and Ethnicity and Relationship Type*, 42 PERSP. ON SEX & REPROD. HEALTH 176, 182–84 (2010) (finding higher rates of unintended pregnancies among Black married mothers, Asian married mothers, and foreign-born married Hispanic mothers as compared to White comparators).

59. See Thomas, *supra* note 16, at 1806–07 (“‘[R]ace’ is a verb, that we are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”).

60. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 106 (3d ed. 2015) (“‘[R]ace is a master category—a fundamental concept that has profoundly shaped, and continues to shape, the history, polity, economic structure, and culture of the United States.’”) (emphasis in original); Bernice L. Neugarten, Joan W. Moore, & John C. Lowe, *Age Norms, Age Constraints, and Adult Socialization*, 70 AM. J. SOCIO. 710, 710 (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.”).

61. See Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (discussing the shift in the understanding of race as biological to social); United States v. Bhagat Singh Thind, 261 U.S. 204, 208 (1923) (“[T]he words ‘white persons,’ . . . are words of common speech and not of scientific origin.”); OMI & WINANT, *supra* note 60, at 106 (“It is now widely accepted in most scholarly fields that race is a *social construction*.”) (emphasis in original); JOHN MACNICOL, *AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS* 3–4 (2006) (“A basic truism in gerontology is that age per se is meaningless: it is always mediated through social processes and cultural attitudes.”).

more complex and multidimensional.⁶² This is not to say that chronology is not an essential input into current conceptions of age, but instead to emphasize that it is socially contingent. Age's current importance is historically derived in large part from its incorporation into scientific discourse and the administrative state, which records vital statistics and integrates age into widely-used state identifications.⁶³ As recently as the mid-nineteenth century in the United States, people did not generally celebrate birthdays or even commonly know their exact birthdates.⁶⁴ In other cultural contexts, the number of years that one has been alive is less important than one's relative age position with respect to other close relatives.⁶⁵ At the individual level, even one's subjective experience of age varies by context, as one might feel relatively young or old depending on whether one is in a retirement home or at a ten-year-old's birthday party.⁶⁶

Nor is chronology the only input into the social category of age. Biology supplies many of the morphological indicators of age, including maturation of the body to an adult state, wrinkling skin, and greying hair.⁶⁷ Likewise, the cultural context supplies many of the social indicators of age.⁶⁸ These may be activities or interests that are linked with a particular generation, such as dancing on Tik Tok being associated with Generation Z.⁶⁹ Alternatively, a social indicator might be a state of being or behavior that is

62. See Richard A. Settersten, Jr. & Karl Ulrich Mayer, *The Measurement of Age, Age Structuring, and the Life Course*, 23 ANN. REV. SOCIO. 233, 238–42 (1997) (discussing the various different dimensions to age).

63. CHUDACOFF, *supra* note 1, at 51–59 (noting the integration of age into scientific analysis); Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 368 (2014) (“Recording birth provides a record of an individual’s life—a name, a family, a country, a sex; in short, recording birth provides an identity.”).

64. See CHUDACOFF, *supra* note 1, at 27 (“American society before the latter half of the nineteenth century was characterized by a lack of sharp age awareness, age norms, and age grading.”).

65. See GAIL WILSON, UNDERSTANDING OLD AGE: CRITICAL AND GLOBAL PERSPECTIVES 31 (2000) (“[C]ultural views of age, and particularly old age, vary across the world and change over time.”).

66. See Kohn, *supra* note 13, at 190 (“Moreover, age is in many ways a relative characteristic. One may feel ‘old’ in a certain context, and ‘young’ in another.”).

67. See Gaston P. Beunen, Alan D. Rogol & Robert M. Malina, *Indicators of Biological Maturation and Secular Changes in Biological Maturation*, 27 FOOD & NUTRITION BULL. S244, S244 (Supp. 2006) (“Maturation is a process that marks progress toward the adult (mature) state.”); William Montagna & Kay Carlisle, *Structural Changes in Aging Human Skin*, 73 J. INVESTIGATIVE DERMATOLOGY 47, 52 (1979) (noting skin tissue changes with age); D.J. Tobin & R. Paus, *Graying: Gerontobiology of the Hair Follicle Pigmentary Unit*, 36 EXPERIMENTAL GERONTOLOGY 29, 30–32 (2001) (describing the physiological processes behind greying hair).

68. See Victor W. Marshall, Anne-Martin Matthews & Julie Ann McMullin, *The Interpretive Perspective on Aging*, in HANDBOOK OF THEORIES OF AGING 381, 385–91 (Vern L. Bengtson & Richard A. Settersten, Jr. eds., 3d ed. 2016) (discussing the interpretive methods for assessing the interaction between conceptions of age and the relevant social context).

69. See Bradian Muliadi, *What the Rise of TikTok Says About Generation Z*, FORBES (July 7, 2020, 8:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2020/07/07/what-the-rise-of-tiktok-says-about-generation-z/?sh=143c119f6549> [<https://perma.cc/R2ET-ZYEA>] (discussing how Generation Z is fueling the rise of Tik Tok, just as millennials fueled the rise of Instagram and Facebook).

connected to a particular life stage, in the way that raising young children is often associated with early adulthood and retirement from the labor force is often associated with older ages.⁷⁰ Finally, there is some element of choice in age, as one might pursue interventions such as Botox or cosmetic surgery to change one's physical appearance or adopt behaviors or interests associated with other ages or generations.

Just as age cannot be reduced to chronology, race cannot be reduced to biology.⁷¹ Scientific advances in genetics have debunked the biological conception of races, as genetic differences do not map onto racial categories.⁷² Still, biology produces morphological characteristics, such as skin color or hair texture, which play a large part in racial classifications.⁷³ However, morphology is not the only input into racial determinations. For example, Latinx and Asian American populations are often racialized in the United States based on aspects of their ancestry, such as shared history, the geographic origins of ancestors, or language.⁷⁴

The social context highlights which of these many characteristics are constitutive of a particular race, and this context can be different based on one's geography. For example, a certain set of morphological features—primarily skin color—could lead one to be classified as Black in the United States, but instead may lead to an ambiguous or entirely different racial

70. These associations are neither universal nor race-neutral. For example, many older individuals from racial minority communities find themselves helping to raise young children through extended kinship networks. See, e.g., Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1621–22 (2001) (“Black women in particular share a rich tradition of women-centered, communal childcare. These cooperative networks have included members of the extended family (grandmothers, sisters, aunts, and cousins), as well as nonblood kin and neighbors.”) (footnote omitted).

71. See Trina Jones & Jessica L. Roberts, *Genetic Race? DNA Ancestry Tests, Racial Identity, and the Law*, 120 COLUM. L. REV. 1929, 1966 (2020) (“[A]cademic, legal, and scientific communities have consistently debunked biological notions of race and, conversely, have espoused that race is a social construct.”); Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 28–36 (2013) (tracing the intellectual history of scientific conceptions of race as biology).

72. See Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 496–97 (2005) (“Put simply, using standard definitions of modern biology races do not exist in humans.”); R. C. Lewontin, *The Apportionment of Human Diversity*, in 6 EVOLUTIONARY BIOLOGY 381, 397 (Theodosius Dobzhansky, Max K. Hecht & William C. Steere eds., 1972) (arguing that biologists should not refer to race as a biological concept).

73. See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1494 (2000) (“[S]kin color continues to play an important role in indicating an individual's race.”); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 40 (1994) (defining race as “a group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry”).

74. See Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93, 119–20 (1995) (discussing how a history of oppression and language unite Latinos and Latinas as a race); Neil Gotanda, “Other Non-Whites” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (arguing that Asian Americans are often racialized as foreign).

classification in a nearby country like Nicaragua.⁷⁵ Similarly, this context shifts based on the time period one inhabits. In the relatively recent past, one's ancestry—specifically whether one had even “one drop” of Black blood—was in large part the determinant of Black racial membership, regardless of one's skin color.⁷⁶ Just as with age, there is also an element of choice in racial classifications. Some individuals may be able to “pass” as different races, and they might in fact adopt cultural signifiers associated with a particular race—such as hairstyles, clothing, musical interests, or hobbies—to support that choice.⁷⁷

The law plays a key role in social construction, for both age and race.⁷⁸ It operates to socially construct age and the lifecourse by establishing various bright-line rules that mark the transition from childhood to adulthood as well as important social milestones such as retirement.⁷⁹ Consider how the age of sixty-five came to have the social meanings it does today. When it was chosen as the age at which one could initially collect Social Security retirement benefits, there was no particular logic behind its selection.⁸⁰ However, over time that age has come to demarcate a separate life stage called retirement, with associated expectations that a person remove themselves from the labor market.⁸¹ In other words, it evolved from a bright legal line into a social one. At other points in history, other ages

75. See Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 697–98 (1996) (describing how the author was classified as Black in the United States but as “Miskito/Spanish, Caribbean/Spanish, African/Spanish, perhaps even pure Miskito” in Nicaragua).

76. See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1171–87 (1997) (tracing the legal history of the one drop rule).

77. See Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1512–13 (2014) (discussing choice in the context of racial self-identification).

78. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 11 (10th Anniversary ed. 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.”); *id.* at 79 (“Law is both a system of behavioral control and an ideology, and legal actors are in some sense both conscious and unwitting participants in the legal construction of race.”).

79. See Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1119 (2012) (“The law relies on age benchmarks for determining when a child is mature enough to participate in the polity, exercise independent economic power, or fulfill any other right or duty.”); Neugarten et al., *supra* note 60, at 711 (“There exists what might be called a prescriptive timetable for the ordering of major life events: a time in the lifespan when men and women are expected to marry, a time to raise children, a time to retire.”).

80. See WILBUR J. COHEN, *RETIREMENT POLICIES UNDER SOCIAL SECURITY* 24 (1957) (“[T]here was no scientific, social, or gerontological basis for the selection. . . . [I]t was the general consensus that 65 was the most acceptable age.”).

81. See CHRIS PHILLIPSON, *RECONSTRUCTING OLD AGE: NEW AGENDAS IN SOCIAL THEORY AND PRACTICE* 28–41 (1998) (describing the various forces, including science and social welfare programs, that help to socially construct old age).

have been imbued with special meaning through various social and legal mechanisms.⁸²

With regard to the social construction of race, sometimes the influence of the law is explicit. Courts have historically stepped in to adjudicate the race of individuals, in the process defining the characteristics that are associated with different races.⁸³ At other times, the influence has been more subtle. For instance, the racial categories on the U.S. Census define the racial options that an individual might choose from, influencing self-identifications as those categories filter down to other forms as well.⁸⁴

While both age and race are social constructions, the processes through which they are constructed are not independent. In fact, the social construction of age and race influence each other in significant ways, making age and race mutually constitutive.⁸⁵ Further, just as the law plays a role in the construction of both age and race individually, so too is it involved in the mutual constitution of age and race, both as an input into that process and as its output.⁸⁶

This is most apparent in the racing of age categories for children. All societies have age categories, which divide life into temporal periods that have certain associated characteristics or expectations.⁸⁷ These characteristics can vary greatly across contexts. While there have always been people of very young chronological ages, the age category of childhood did not appear until the seventeenth or eighteenth century as a life

82. See Ann M. Little, "Keep Me with You, So That I Might Not Be Damned": *Age and Captivity in Colonial Borderlands Warfare*, in *AGE IN AMERICA*, *supra* note 2, at 25, 30–41 (describing how the ages of seven, twelve, and fourteen were important in colonial borderlands warfare in the eighteenth century).

83. See, e.g., Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 137–47 (1998) (discussing how courts employed physical characteristics and documented ancestry as indicators of race).

84. See Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1747 (2003) ("[T]he race categories on the census have always played a dual role: of recognizing identity and also of conferring it.").

85. See Ange-Marie Hancock, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5 PERSPS. ON POL. 63, 67 (2007) (describing the unique feature of an intersectional approach as considering the mutually constitutive relationship among social categories); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997) (describing how social categories are mutually constitutive).

86. See Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 498 (2010) ("[R]ace and law are mutually constitutive in an ongoing, dialectic process."); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 781–88 (2000) (exploring the intersection of race, gender, and class in the construction of Black masculinity).

87. See Bernice L. Neugarten, *Age Distinctions and Their Social Functions*, 57 CHI.-KENT L. REV. 809, 813 (1981) ("All societies rationalize the passage of life time, divide life time into socially relevant units, and thus transform biological time into social time.").

stage with unique qualities.⁸⁸ The age category of adolescence is of even more recent vintage, having been conceptualized in the early twentieth century.⁸⁹ As a social matter, adolescence is considered a time of emerging autonomy, where one is free to experiment and engage in activities aimed at self-discovery.⁹⁰ The biological evidence supports this view, as adolescence is a time of great neuroplasticity when the brain can change and evolve based on experience.⁹¹

These notions are reflected in many ways in the law. For example, California recently passed an “Eraser Law,” which allows the removal of Internet posts that a minor has perhaps unadvisedly made.⁹² The animating rationale is that individuals in this age range will make mistakes, and these should not reverberate throughout the lifecourse. In a similar vein, the first juvenile court, established in 1899 in Chicago, had as its aim the rehabilitation of wayward youth and focused on minimizing stigma for those who might have progressed through that system on the way to adulthood.⁹³ In general, adolescents are legally viewed as not yet adults and thus lacking all the legal entitlements of adulthood, but perhaps as having some contingent rights, unlike children.⁹⁴

This conception of adolescence, however, is not universal, and it is not universal in raced ways. Black, and to a lesser extent Latinx, children are not afforded the same freedom to experiment and make mistakes as their White counterparts. This is rooted, at least in part, in perceptions of Black and Latinx children as being older than they are, or as having attributes that

88. See Bernice L. Neugarten, *Age Groups in American Society and the Rise of the Young-Old*, 415 ANNALS AM. ACAD. POL. & SOC. SCI. 187, 190 (1974) (“[I]t was not until the seventeenth and eighteenth centuries, with industrialization, the appearance of a middle class, and formal educational institutions, that childhood became a discernible period of life with its special needs and characteristics.”).

89. See LAURENCE STEINBERG, ADOLESCENCE 209–10 (12th ed. 2020) (describing adolescence as a time of identity development); G. STANLEY HALL, ADOLESCENCE (1904) (coining the term).

90. See FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE x–xi (1982) (“Adolescence . . . is both a period in itself and a transition. It is a term of years when those not yet adult are engaged in the process of becoming adult, a rich but often stressful period of trial and error.”).

91. See Elizabeth Fordyce, *Too Young to Understand, but Old Enough to Know Better: Defining the Rights of Transition-Age Youth in the Child Welfare System*, 94 DENV. L. REV. 567, 577–79 (2017) (describing adolescent brain development).

92. 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”).

93. See NAT’L RSCH. COUNCIL & INST. MED., JUVENILE CRIME, JUVENILE JUSTICE 157 (2001) (“The focus of the court was rehabilitation rather than punishment. Records of the court were to be confidential to minimize stigma.”).

94. See Ryan, *supra* note 14, at 1146–47 (discussing the landscape of legal rights for adolescents).

are associated with adulthood, in a process termed adultification.⁹⁵ For example, Black girls are seen as needing less nurturing and protection than their White counterparts.⁹⁶ Similarly, Black and Latinx boys are seen as older than they are and more likely to be culpable of crimes.⁹⁷ This process of adultification is captured in comments made by police officers in 2012 after shooting Tamir Rice, a twelve-year old Black boy, describing him as “Black male, maybe 20.”⁹⁸

Adultification has several legal effects. First, it informs the content of the law and legal institutions through which many children of color are disproportionately directed. For instance, many states permit a reasonable mistake of age defense to the charge of statutory rape.⁹⁹ The analysis of that defense can be informed by perceptions of the age of the victim that are infected by adultification bias, excusing perpetrators of sexual assault against children of color to whom this bias might apply.¹⁰⁰ In the immigration system, minor immigrants are already treated as adults for removal purposes, with a few exceptions.¹⁰¹ The juvenile justice system has also become adultified and more similar to the adult criminal justice system, even though it was ostensibly set up to treat children differently.¹⁰²

Second, social perceptions influenced by adultification bias affect the behavior of legal actors on the ground. Law enforcement are more likely to use violence against Black and Latinx children engaging in mundane play

95. See EPSTEIN ET AL., *supra* note 6, at 4 (describing adultification as a “social or cultural stereotype based on how adults perceive children). This understanding of adultification is to be contrasted with the use of the term in sociological literature, where it refers to children taking on adult roles, often due to socioeconomic circumstances. See Linda Burton, *Childhood Adultification in Economically Disadvantaged Families: A Conceptual Model*, 56 FAM. REL. 329, 330 (2007).

96. See EPSTEIN ET AL., *supra* note 6, at 12 (demonstrating that black girls are more likely to be “adultified” and that this has implications for the juvenile justice system). See also JAMILIA J. BLAKE & REBECCA EPSTEIN, LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS 1 (2019) (corroborating the results of the 2017 study through focus groups with Black women).

97. See Goff et al., *supra* note 6, at 540 (finding that Black boys and to a lesser extent Latinx boys are seen as less childlike and more culpable than their White peers).

98. See Shaila Dawan & Richard A. Oppel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html> [<https://perma.cc/44DL-CWJ9>].

99. See, e.g., 720 ILL. COMP. STAT. 5/11-1.70(b) (“It shall be a defense . . . that the accused reasonably believed the person to be 17 years of age or over.”).

100. See Thompson, *supra* note 13, at 978–87 (discussing the problems with adultification in the context of statutory rape and mistake of age defenses as well as possible solutions).

101. See Hlass, *supra* note 18, at 209–22 (discussing the treatment of children in the immigration system); Hamilton-Jiang, *supra* note 7, at 65 (exploring the role of adultification in racializing Latinx immigrant children).

102. See Arnett, *supra* note 7, at 422–23 (describing the different waves of adultification in juvenile justice); Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 961–67 (2006) (describing the adultification of the juvenile justice process).

activities characteristic of all adolescents, such as playing with toy guns, cellphones, or going to parties with friends.¹⁰³ Those with decision-making power in the juvenile justice system are also more likely to refer non-White children for more formal procedures or carceral outcomes.¹⁰⁴ Further, these legal effects do not exist in a vacuum. The more that certain children of color are treated as adults by the law or legal actors, the more it will validate social understandings of them as adults and deserving of that treatment.¹⁰⁵

However, it is also possible that age-based law can be employed to combat the negative effects of adultification. For example, there is a movement amongst the states to create a minimum age for juvenile court jurisdiction, with twenty-eight states currently doing so.¹⁰⁶ Such bright-line rules reduce the discretion currently delegated to potentially biased legal actors. It is precisely this type of discretion that might be influenced by adultification bias and can lead to disparate outcomes for racial minorities. That being said, simply having a bright-line rule will not combat aged racism of this type. Some states have set the minimum age for juvenile court jurisdiction as low as seven, which will likely do little to address adultification bias.¹⁰⁷

As a mechanism of social construction, adultification illuminates the multivalent nature of age categories and the insidious effects of their combination with race. There are many benefits to being in a younger age category, due to the enhanced ability to make mistakes and engage in self-discovery. However, there are also downsides, such as limits on individual agency and placement in a dependent relationship with parents or the state. As noted in the introductory example of this Essay, these negative aspects of childhood were highlighted when they were used to impose an extended length of servitude on Black enslaved people due to their “childlike nature”

103. See HENNING, *supra* note 17, at 25–44 (discussing characteristic activities of children and how they led to violence by police against Black adolescents engaging in them).

104. See Laura S. Abrams, Matthew L. Mizel & Elizabeth S. Barnert, *The Criminalization of Young Children and Overrepresentation of Black Youth in the Juvenile Justice System*, 13 RACE & SOC. PROBS. 73, 73 (2021) (“We find that at each stage of the juvenile justice system the overrepresentation of Black youth increases relative to White youth.”); Donna Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 405–06 (1996) (noting that nonwhite youths are more likely to be recommended for more formal procedures or carceral outcomes).

105. See Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through “Colorblind” Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQUIRY 406, 409 (2015) (“[C]onceptions of race shape and impact criminal justice apparatuses and, conversely, criminal justice apparatuses reinforce existing categories, experiences, and social constructions of race.”).

106. See Nat’l Juv. Just. Network, *Raising the Minimum Age for Prosecuting Children*, <https://www.njjn.org/our-work/raising-the-minimum-age-for-prosecuting-children> [<https://perma.cc/66CD-DN5Y>] (last visited Apr. 12, 2023) (reporting on minimum ages that range from 7 (Florida) to 13 (New Hampshire and Maryland)).

107. See *id.*

as compared to White paupers.¹⁰⁸ Other groups, such as women, have historically been characterized as childlike to justify unequal legal treatment as well.¹⁰⁹

Conversely, the category of adult normally brings with it many advantages as compared to the category of child or adolescent, as several rights and freedoms attach to adulthood through bright-line legal rules that mark that transition. However, it is not these aspects but instead the negative qualities of adulthood such as culpability that are highlighted in the process of adultification.¹¹⁰ This suggests that the racing of age categories has the effect of drawing out the negative aspects of those age categories and applying them to those who are in disfavored positions within the racial hierarchy.

Similar processes may occur at the other end of the age spectrum as well. Old age, like youth or adulthood, is associated with varying qualities, both positive and negative.¹¹¹ Thus, classification as older may bring with it advantages, like perceived wisdom or experience, or disadvantages, such as a perceived lack of ability and attractiveness.¹¹² Consider this personal narrative from an older woman of color in the academy:

Although the topic is never discussed, a new challenge that has emerged for me at this stage of my career is ageism. . . . I am experienced, knowledgeable, and wise, yet my age, combined with other dimensions of my identity, is used to discount me and make my contributions invisible. Instead of viewing me and women like me as repositories of skill, knowledge, and institutional memory, others often perceive us as having a lesser ability to make continuing contributions to our departments, universities, and the profession.¹¹³

This individual did not experience the advantages of old age in her profession. Instead, she merely experienced a new form of subordination, which could be interpreted in many ways. It could be understood as simple

108. See *supra* text accompanying notes 4–5.

109. See CORINNE T. FIELD, *THE STRUGGLE FOR EQUAL ADULTHOOD: GENDER, RACE, AND THE FIGHT FOR CITIZENSHIP IN ANTEBELLUM AMERICA* 16–21 (2014) (noting the historical interplay between age and gender in denying women equal rights).

110. See Dennis, *supra* note 17, at 1169 (noting how adultification penalizes children of color by imposing higher levels of culpability without providing analogous rights of adulthood).

111. See ERDMAN B. PALMORE, *AGEISM: NEGATIVE AND POSITIVE* 6 (2d ed. 1999) (noting that ageist stereotypes can be both negative and positive in nature).

112. See Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13 *EUR. J. WOMEN'S STUD.* 193, 199 (2006) (“[I]n some cultural traditions the elderly are considered to be wise while in others the elderly can be constructed as in ‘second childhood.’”).

113. Donna Castañeda, Yvette G. Flores & Yolanda Flores Niemann, *Senior Chicana Feminist Scholars: Some Notes on Survival in Hostile Contexts*, in *PRESUMED INCOMPETENT II: RACE, CLASS, POWER, AND RESISTANCE OF WOMEN IN ACADEMIA* 83, 89 (Yolanda Flores Niemann, Gabriella Gutiérrez y Muhs & Carmen G. González eds. 2020).

ageism, in which she was subjected to new age-based stereotypes that she had not experienced before. But she suggests that there is some interaction between her age and other identity characteristics that is producing this new challenge. Perhaps then it was instead aged racism, where the negative aspects of older age categories were drawn out and highlighted because of her lower status in the racial and sexual hierarchy.¹¹⁴

Aged racism at the older end of the lifespan has implications for legal decisions that involve some degree of age perception for older adults. For example, there appear to be racial disparities in the granting of compassionate release to prisoners on the basis of age or infirmity, with prisoners of color faring worse.¹¹⁵ Is this because medical evaluations that are involved in these processes are racially biased?¹¹⁶ Is it because older people of color are not perceived as older compared to White people because they are less likely to exhibit some of the phenotypical characteristics that are associated with older age?¹¹⁷ Or are older people of color perceived as older, but still do not receive the positive associations with older age, such reduced recidivism and criminality?¹¹⁸ Further research on such topics is needed.

In sum, age and race are mutually constitutive, and these processes of mutual constitution are important for understanding how aged racism operates both socially and legally. More research is needed to understand whether and to what extent age categories, particularly older age categories,

114. This type of development may be a particularly unpleasant surprise if one expects to experience the benefits of old age as a buffer against past mistreatment based on race, sex, or their combination, but instead experiences an amplification of past mistreatment.

115. See U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2021 12 tbl.6 (May 2022) (showing higher rates of denial for Blacks and Hispanics as compared to Whites for those who made motions for compassionate release).

116. See Renagh O'Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 655 n.189 (2022) (suggesting that racial disparities may be attributed to medical evaluations that are biased by race).

117. The colloquial phrases of "Black don't crack," "Brown don't frown," and "Asian don't raisin" represent this view. But there is some evidence to support the notion that racial minorities are less likely to exhibit or be perceived to exhibit morphological characteristics associated with aging. See Neelam A. Vashi, Mayra Buainain de Castro Maymone & Roopal V. Kundu, *Aging Difference in Ethnic Skin*, 9 J. CLIN. AESTHETIC DERMATOLOGY 31, 36 (2016) ("Individuals with darker skin are overall thought to have firmer and smoother skin than individuals with lighter skin of the same age; however, aging does occur in regards to mottled pigmentation, wrinkles, and skin laxity."); A.V. Rawlings, *Ethnic Skin Types: Are There Differences in Skin Structure and Function?*, 28 INT'L J. COSMETIC SCI. 79, 90 (2006) ("[A]ll skin types experience photoaging changes but the more darkly pigmented subjects show the dermatological signs of aging at a more advanced age compared with more lightly pigmented subjects.").

118. See Michael O'Hear, *Early Release for Prisoners Convicted of Violent Crimes: Can Anyone Escape the Incapacitation-Retribution Catch-22?*, 52 CONN. L. REV. 653, 664–66 (2020) (collecting studies on the negative relationship between old age and recidivism); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 5 (2001) ("It is well known that crime declines with age in the aggregate population.").

are raced, and how this phenomenon impacts the formation and application of legal doctrines.

III. LEGAL DIVERGENCE AND PROXIES

The second way that aged racism manifests is through the differential treatment of age and race in the law. Because the Supreme Court long ago held that age-based classifications are only subject to rational basis review, the resulting landscape of age-based law is quite large.¹¹⁹ It is found in the Constitution, in the form of age requirements to vote and hold elected office,¹²⁰ as well as in constitutional jurisprudence, with the Supreme Court using age as a basis for prohibiting executions when interpreting the Eighth Amendment.¹²¹ Age populates countless statutes across various legal areas, defining when people acquire various legal entitlements, such as the ability to consent to sex,¹²² enter into contracts,¹²³ stay on their parents' health insurance,¹²⁴ get tax exemptions,¹²⁵ and be protected against age discrimination in employment.¹²⁶

In contrast, the explicit use of race in the law is much less frequent, given the limitations set forth in the Equal Protection Clause of the Constitution, which prohibits the government from drawing racial distinctions unless doing so is narrowly tailored to a compelling government interest.¹²⁷ This does not mean, however, that race has not significantly influenced the development of the law over time.¹²⁸ Racial stereotypes explicitly drove the

119 See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312–14 (1976); Alexander A. Boni-Saenz, *Age, Equality, and Vulnerability*, 21 THEORETICAL INQUIRIES L. 161, 162 (2020) (“Age is also legally significant. It is a ubiquitous legal marker that is used in ways large and small to address vulnerability in the population.”).

120 U.S. CONST. art II, § 1 (limiting Presidential eligibility to those over thirty-five); *id.* at amend. XXVI, § 1 (establishing the right to vote at age eighteen).

121 *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

122 See, e.g., ARIZ. REV. STAT. ANN. § 13-1405(A) (2015) (establishing eighteen as the age of consent); 720 ILL. COMP. STAT. ANN. 5/11-1.50(b) (West 2011) (establishing seventeen as the age of consent).

123 See 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 9:3 (4th ed. 2009) (discussing the contractual age of majority in various jurisdictions).

124 See 42 U.S.C. § 300gg-14(a) (allowing children to stay on their parents' health insurance until age twenty-six).

125 See 26 U.S.C. § 63(f)(1) (“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 . . .”).

126 See 29 U.S.C. § 623 (prohibiting age-based employment discrimination).

127 See U.S. CONST. amend. XIV, § 1; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (requiring racial classifications be reviewed under strict scrutiny).

128 See Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 94 (2020) (describing the enduring impact and normalization of slavery cases); Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 972–73 (2010) (describing the fascination of the court with race and getting past race in Equal Protection jurisprudence).

outcomes of important early Supreme Court cases, cementing European settlers' claims to Native American lands and justifying the institution of slavery.¹²⁹ More recently, Jim Crow laws, redlining, and mass incarceration demonstrate how race shapes the law in subordinating ways.¹³⁰ It has similarly shaped the immigration regime, which has historically made racial classifications that escape the scrutiny attached to the Equal Protection Clause.¹³¹

The differential legal treatment of these two categories creates an opportunity for legal actors to use age as a proxy for race, especially when using the latter directly is not otherwise permissible.¹³² With respect to individuals, this substitution of age for race is always a possibility as everyone possesses both an age and a race. Consider the context of jury selection. Peremptory challenges permit attorneys to strike individuals from the jury pool without having to provide cause.¹³³ At least nominally, race is not a permissible reason for striking jurors after *Batson v. Kentucky*.¹³⁴ However, one of the ways for attorneys to evade *Batson* restrictions is, when challenged, to cite other non-race-related reasons for striking a juror that happen to correlate with race.¹³⁵

129. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (relying on racist stereotypes of Black people to justify unequal treatment under the law); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823) (employing racialized stereotypes of Native Americans to justify the denial of property rights); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1067 (2022) (discussing the suppressed histories of race and violence that inform property law).

130. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 12–13 (2012) (describing the systems of law and custom that operate to subordinate); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/M6DS-ZWDW>] (describing the connected histories of racial disadvantage).

131. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12–28 (1998) (tracing the history of exclusion of racial minorities in immigration law).

132. It is important to note that this is not the usual set of circumstances in which using a proxy might be desirable. Proxies are typically used when a target underlying variable is difficult to measure, when there is some relationship between the proxy and that underlying variable, and when the proxy is easily measurable. See Michelle M. Mello & Kathryn Zeiler, *Empirical Health Law Scholarship: The State of the Field*, 96 GEO. L.J. 649, 693 (2008) (describing these characteristics of proxies). These conditions do not hold in this case. While age is highly administrable, race is not difficult to ascertain in many cases, and the relationship between age and race may not be particularly strong across all contexts. Instead, the proxy—in this case, age—is being employed because the law has made it more difficult to use race directly.

133. See NANCY S. MARDER, *THE JURY PROCESS* 84 (2005) (describing peremptory challenges).

134. See *Batson v. Kentucky*, 476 U.S. 79, 88 (1986) (holding that race-based peremptory challenges violates the Equal Protection Clause). See also *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (noting that a *Batson* challenge can be made on the basis of ethnicity).

135. See Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1589–95 (2012) (describing this strategy amongst attorneys).

Age provides prosecutors with a legitimate basis for such strikes, as *Batson* has not been extended to age.¹³⁶ In *United States v. Bryce*, the prosecutor struck all jurors below the age of forty-one, which happened also to remove a nineteen-year old woman who was the only Black person in the pool.¹³⁷ In *United States v. Helmstetter*, the prosecutor successfully struck a twenty-year-old woman with a Hispanic surname on the basis of age and because she had a pierced lip.¹³⁸ In *Sanchez v. Roden*, the prosecutor successfully struck a nineteen-year-old Black man on the basis of age while retaining a twenty-one-year-old White man because he was “running out of challenges.”¹³⁹ In *United States v. Clemons*, prosecutors successfully struck the only two Black members of the jury panel because they were “nonmarried and young.”¹⁴⁰

These examples do not prove that age is consistently being used as a pretext for race. It is quite possible that what is happening in these cases is simply legally permissible age discrimination in jury selection. There is some evidence that prosecutors do purposefully exclude youth from juries with the aim of obtaining more punitive outcomes, while defense attorneys do the opposite.¹⁴¹ At the same time, the circumstances of some of the cases might reasonably lead one to believe that racial motivations were in play as well. The point is that age could easily be so used as a proxy for race, just as other non-racial factors that might be correlated with race are. Age, however, may be a more convenient basis to offer for such strikes, since it is a readily ascertainable characteristic of potential jury members.

While the use of age as a proxy for race at the individual level is always a possibility, at the group level there needs to exist a meaningful relationship between age and race for age to serve as a reliable proxy. Whether this is the case or not will depend on the composition of the group under consideration, which will vary significantly by context. At the population

136. See *Hidalgo v. Fagen, Inc.*, 206 F.3d 1013, 1019 (10th Cir. 2000) (holding that youth is an “acceptable race-neutral justification for exercising a peremptory strike.”); *Weber v. Strippit, Inc.*, 186 F.3d 907, 911 (8th Cir. 1999) (“[A]n age-based motivation for exercising peremptory challenges does not violate equal protection.”). Hybrid age/race groups also do not qualify as cognizable groups for *Batson* purposes. See *United States v. White*, 899 F.2d 52 (D.C. Cir. 1990) (“The class of young, black males is not a ‘cognizable racial group.’”).

137. *United States v. Bryce*, 208 F.3d 346, 350 n.3 (2d Cir. 1999).

138. *United States v. Helmstetter*, 479 F.3d 750, 752 (10th Cir. 2007).

139. See *Sanchez v. Roden*, 808 F.3d 85, 87–89 (1st Cir. 2015).

140. See *United States v. Clemons*, 843 F.2d 741, 743–44 (3d Cir. 1988).

141. See Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Role of Age in Jury Selection and Trial Outcomes*, 57 J. L. & ECON. 1001, 1027 (2014) (The “age of the jury has a causal effect on trial outcomes and . . . prosecution and defense attorneys take age into account when using their peremptory challenges to shape the seated jury”); David C. Baldus, George Woodworth, David Zuckerman & Neil Alan Weiner, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 60 (2001) (finding that prosecutors tended to disfavor younger jury members while defense attorneys tended to disfavor older ones, with both race and gender effects).

level, two recent demographic trends somewhat strengthen the relationship between age and race, increasing the probability that groups drawn from that broader population will exhibit similar age-race dynamics.

The first demographic trend of interest is population aging. Whereas in 1990, 12.6% of the population was aged over sixty-five, in 2019, 16% of the country was over that age.¹⁴² This trend will continue into the future, such that by the year 2050, the proportion of the population over sixty-five is projected to be 20.9%.¹⁴³ This aging trend is the product primarily of declining fertility rates, which are characteristic of most industrialized countries.¹⁴⁴ The second demographic trend is racial diversification. Whereas in 1990 approximately 20.9% of the population was non-White, in 2020 that percentage rose to 38.4%.¹⁴⁵ By the year 2060, the population of the United States will be majority minority, with 44.3% of people projected to be non-Hispanic White, 27.5% Hispanic, 15% Black, and 9.1% Asian.¹⁴⁶

These two demographic trends are linked.¹⁴⁷ The oldest populations in the United States are disproportionately White compared to the population as a whole, being 76% White in 2019.¹⁴⁸ A corollary of this is that the main way in which the United States is diversifying is through its younger cohorts. In 2020, only 47.3% of those under eighteen were classified as White.¹⁴⁹ The Latinx population in particular is disproportionately young even as compared to other racial minority groups.¹⁵⁰

142. See U.S. DEP'T HEALTH & HUM SERVS., ADMIN. ON AGING, 2020 PROFILE OF OLDER AMERICANS 4 (May 2021) (noting the 2019 percentage); LIZA HETZEL & ANNETTA SMITH, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE 65 AND OVER POPULATION: 2000 4 (Oct. 2001) (noting the 1990 percentage).

143. See JENNIFER M. ORTMAN, VICTORIA A. VELKOFF & HOWARD HOGAN, U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 6 tbl. 2 (May 2014).

144. See JENNIFER HICKES LUNDQUIST, DOUGLAS L. ANDERTON & DAVID YAUKEY, DEMOGRAPHY: THE STUDY OF THE HUMAN POPULATION 114 (4th ed. 2015) (describing this mechanism).

145. See Nicholas Jones, Rachel Marks, Roberto Ramirez & Mararys Ríos-Vargas, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html> [<https://perma.cc/YJ3Q-5T2R>] (noting the percentage of those identifying as White alone at 61.6%); ESRI, TRENDS IN THE U.S. MULTIRACIAL POPULATION FROM 1990–2000 8 fig.1 (Nov. 2005) (noting the 1990 percentage).

146. See JONATHAN VESPA, LAUREN MEDINA & DAVID M. ARMSTRONG, U.S. CENSUS BUREAU, DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060 7 tbl.3 (Feb. 2020).

147. This situation, of course, is contingent, as other demographic trends may arise that serve to de-link age and race at the population level in the future.

148. See U.S. DEP'T HEALTH & HUM SERVS., *supra* note 142, at 7.

149. See WILLIAM H. FREY, BROOKINGS, NEW 2020 CENSUS RESULTS SHOW INCREASED DIVERSITY COUNTERING DECADE-LONG DECLINES IN AMERICAN'S WHITE AND YOUTH POPULATIONS (Aug. 13, 2021).

150. See Mark Hugo Lopez, Jens Manuel Krogstad & Antonio Flores, *Key Facts About Latinos, One of the Nations' Fastest-Growing Populations*, PEW RSCH. CTR. (Sept. 13, 2018),

There are two implications of these linked demographic trends for the discussion here. First, they increase the probability that age can serve as an imperfect proxy for race in certain contexts. Thus, age may be a vehicle through which legal actors can advance racially discriminatory projects while evading legal prohibitions on such activities. For example, the federal Fair Housing Act does not prohibit discrimination on the basis of age, but it does contain a prohibition on discrimination on the basis of familial status.¹⁵¹ However, there is an exception for “housing for older persons,”¹⁵² which has made age-restricted communities permissible.¹⁵³

When one examines the racial makeup of the resulting communities, they are overwhelmingly White. The proportion of White residents is higher than one would expect even given the Whiteness of the older population, with the largest such community being 98% White.¹⁵⁴ Further, racial income differences alone cannot explain these practically monoracial demographics.¹⁵⁵ The exclusion of younger individuals and families also does not explain the homogeneous makeup of these communities entirely, but it is certainly a piece of the picture, particularly when those excluded are more likely to be racial minorities.¹⁵⁶

Second, the use of age as a proxy for race may not be an intentional attempt to evade antidiscrimination norms, but incorporating age into the law in various ways may still produce effects that promote racial subordination. This suggests that we should evaluate age-based legal regimes with a critical eye, as there may be downstream racial effects due to the composition of the population to which such legal rules apply. For

<https://www.pewresearch.org/fact-tank/2018/09/13/key-facts-about-young-latinos/#:~:text=The%20number%20of%20young%20Latinos,major%20racial%20or%20ethnic%20group.> [https://perma.cc/P4HX-5MCX] (“Youth is a defining characteristic of the U.S. Latino population.”).

151. See 42 U.S.C. § 3604(b) (including a variety of identity categories such as familial status but omitting age).

152. See *id.* § 3607(b)(1) (“Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.”). A housing development qualifies as housing for older persons if it is either provided under a state or federal program specifically designed for older persons, solely occupied by persons older than sixty-two, or intended and operated for occupancy by persons over fifty-five with at least eighty percent of occupants being over fifty-five. See *id.* § 3607(b)(2)(A)–(C) (defining housing for older persons).

153. Mark D. Bauer, “*Peter Pan*” As Public Policy: Should Fifty-Five-Plus Age-Restricted Communities Continue to Be Exempt from Civil Rights Laws and Substantive Federal Regulation?, 21 ELDER L.J. 33, 34 (2013) (“Age-restricted communities for elders, most typically for those over age fifty-five . . . are an anomaly under the U.S. Constitution, civil rights laws, and even historic property law.”).

154. See Pollack & Strahilevitz, *supra* note 14, at 633–34. The percentages of White residents in the five largest age-restricted communities are 98.0% (The Villages, FL); 94.9% (Sun City, AZ); 97.5% (Sun City West, AZ); 98.3% (Green Valley, AZ); and 76.3% (Laguna Woods, CA). *Id.* Laguna Woods’ minority population is primarily Asian (19.7%). *Id.*

155. See *id.* at 634.

156. See *id.* at 635 (explaining other methods of exclusion).

instance, age discrimination statutes have effectively prohibited mandatory retirement, which only remains for some public officials because it is mandated in state Constitutions or statutes.¹⁵⁷ While this is to be lauded as a way to combat stereotypes based on age that may lead to adverse employment outcomes for older adults, including those of color, it may also inhibit the diversification of certain workplaces.

Consider the law professoriate, which has traditionally been very White and male.¹⁵⁸ If law professor positions are in limited supply, then the occupation of those jobs by older generations, which are typically Whiter, may hinder the ability of those from more diverse younger cohorts from joining the academy.¹⁵⁹ In this way, diversifying the professoriate in terms of age—meaning younger ages—may complement efforts to promote both racial and gender diversity. However, there are a variety of reasons why simply adding age diversity by no means guarantees other forms of diversity and may in fact reinforce racial and sexual subordination in other ways.¹⁶⁰ For example, mandatory retirement can have targeted detrimental effects on female and minority law professors, who may join the profession later in their lives for a variety of reasons.¹⁶¹

Another example of how there may be downstream racial effects of age-based law comes from the realm of reproductive rights. Many states have enacted parental involvement laws, which require notification, consent, or both from minors' parents when minors seek an abortion.¹⁶² These laws are no longer relevant in many states since the Supreme Court overturned precedents guaranteeing a right to abortion and states have sought to restrict

157. See, e.g., N.J. STAT. ANN. § 43:6A-7 (West 2008) ("Any member of the retirement system who has reached the age of 70 years shall be retired forthwith."); VT. STAT. ANN. tit. 4, § 609(a) (2019) ("The Justices of the Supreme Court and judges of all subordinate courts shall be required to retire at the end of the calendar year in which they attain 90 years of age.").

158. See Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943, 961 (2015) ("If one simply considers the numbers, significant gender and racial disparities remain in legal academia, with only 4,091 women legal academics (37%) and only 1,632 people of color (15%) out of 10,965 total.").

159. See Herma Hill Kay, *UC's Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 342–45 (2003) (describing the de-diversifying effects of the "65 Club" at UC-Hastings, when the law school hired law professors forced to retire from other prestigious schools).

160. See Boni-Saenz, *supra* note 19, at 315 ("[A]ge diversity itself may have effects on other types of diversity and vice versa, and these cross-identity effects may also have normative implications.").

161. See DEO, *supra* note 12, at 13 (describing how many women of color in legal academic did not arrive there through a longstanding strategic plan but instead through more circuitous routes); Pamela Braboy Jackson & Alexandra Berkowitz, *The Structure of the Life Course: Gender and Racioethnic Variation in the Occurrence and Sequencing of Role Transitions*, 9 ADVANCES LIFE COURSE RSCH. 55, 85 (2005) (finding that Black people and White women adhere less to a standardized lifecourse).

162. See Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J. L. & GENDER 175, 179 (2011) (describing the legal landscape of parental involvement laws before the Supreme Court overturned *Roe v. Wade*, 410 U.S. 113 (1973)).

abortion directly.¹⁶³ However, they help illustrate how age-based law can have racial impacts. As noted earlier, there are racial disparities in the frequency of unintended pregnancy, meaning that restrictions on abortion rights will have differential impacts on racial minorities, particularly Black people.¹⁶⁴ In this example, age is not necessarily being used in these laws as a proxy for race, but instead for certain ideological commitments regarding abortion.¹⁶⁵ However, the intentions regarding the use of age do not diminish the racial effects of such laws, given the population to which they are applied.

Thus, the divergence in the treatment of age and race in the law creates the possibility of racial subordination left unaddressed by the current legal regime. The use of age as a proxy for race is always an inherent possibility, in that everyone has both an age and a race, and legal actors may point to age as a way of surreptitiously discriminating on the basis of race. At the population level, there may be additional opportunities to use age and race as proxies due to the demographic trends of aging and racial diversification. Further, there may be unintended racial effects that derive from age-based law because of the racial composition of the populations to which such laws apply.

IV. RACISM AND THE LIFECOURSE

The third major way in which aged racism manifests is through the dimension of time.¹⁶⁶ While age as a social category is more than just the passage of time, neither age nor the aging process can be divorced from their temporal dimensions.¹⁶⁷ A useful tool for thinking through this temporal aspect of aged racism is the lifecourse perspective, which is a theoretical lens originating in gerontology. It emphasizes the importance of understanding individuals as situated in time.¹⁶⁸ In other words, everyone

163. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) ("We hold that *Roe* and *Casey* must be overruled.") (citing *Roe*, 410 U.S. 113 and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

164. See Khiara M. Bridges, *Deploying Death*, 68 UCLA L. REV. 1510, 1528–32 (2022) (describing how Black people in particular will be adversely affected by lack of access to abortion).

165. See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 161–62 (2010) (describing antiabortion legal strategy as pursuing incremental changes such as parental involvement laws instead of outright bans on abortion).

166. See Dale Dannefer, Chengming Han & Jiao Yu, *Inequality Across Time: Social Change, Biography, and the Life Course*, in THE ROUTLEDGE HANDBOOK, *supra* note 21, at 5–6 (arguing that inequality increases over the lifecourse, making it a normal feature of aging).

167. See Alexander A. Boni-Saenz, *Age, Time, and Discrimination*, 53 GA. L. REV. 845, 870–71 (2019) (describing how age's relationship with time forces that certain temporal questions be asked).

168. See Glen H. Elder Jr., Monica Kirkpatrick Johnson & Robert Crosnoe, *The Emergence and Development of Life Course Theory*, in HANDBOOK OF THE LIFE COURSE 3, 9–10 (Jeylan T. Mortimer & Michael J. Shanahan eds. 2003) (tracing the history of life course theory and noting how it is linked to time).

has a history, and the way to understand an individual's position in the present is through the experiences that that person has had up to that point. Similarly, understanding aged racism requires delving into the longitudinal effects of race over the lifecourse.¹⁶⁹

There are two important lifecourse perspective concepts that are relevant to the analysis here: trajectory and accumulation.¹⁷⁰ A trajectory is the range of paths that might emerge from a person's experiences, which can be defined by one's own choices, the networks—such as family—in which one is embedded, and structural forces in society.¹⁷¹ Consider the situation of a child who grows up in a situation of poverty, without access to nutritious food or quality educational opportunities. In addition to being an unjust situation for that child in that particular phase of life, it also represents an injustice projecting forward through time, as that early-life situation will negatively influence the range of outcomes that will be available to that child in the future. This is not to say that the child's life is predetermined, but instead that opportunities that might accrue to the child will be more limited and certain benchmarks might be more difficult to achieve.

Similarly, the concept of accumulation adds a temporal element to any advantages or disadvantages that an individual might experience throughout the lifecourse. These advantages or disadvantages conferred on individuals might not only create inequalities between them in the moment, but if they are persistent they can also accumulate over time.¹⁷² For example, an individual born into a wealthy family will receive the benefits of that wealth during life as well as a potential increase in wealth upon the death of close relatives through inheritance.¹⁷³ This set of unearned advantages will accumulate through the lifecourse, creating the illusion over time that they

169. See Gilbert C. Gee, Anna Hing, Selina Mohammed, Derrick C. Tabor & David R. Williams, *Racism and the Life Course: Taking Time Seriously*, 109 ETIOLOGY SCI. S1 543, 544 (2019) (discussing age as time and exposure in the context of racism).

170. See Susan McDaniel & Paul Bernard, *Life Course as Policy Lens: Challenges and Opportunities*, 37 CAN. PUB. POL'Y S1, S6 (Supp. 2011) ("It is crucial from a life-course perspective to follow cohorts that represent the accretion of historical experiences in the trajectories of individuals, or biographical time.").

171. See Vern L. Bengtson, Glen H. Elder, Jr. & Norella M. Putney, *The Life Course Perspective on Ageing: Linked Lives, Timing, and History*, in ADULT LIVES: A LIFE COURSE PERSPECTIVE 9, 11 (Jeanne Katz, Sheila Peace & Sue Sourr eds. 2012) (discussing the importance of sociohistorical context and transitions in lifecourse theory).

172. While evidence mounts for the cumulative disadvantage hypothesis, there are competing hypotheses that inequalities stay stable or even decrease over the lifecourse. See Tyson H. Brown, *Racial Stratification, Immigration, and Health Inequality: A Life Course-Intersectional Approach*, 96 SOC. FORCES 1507, 1512–13 (2018) (discussing the cumulative disadvantage, persistent inequality, and age-as-leveler hypotheses and their empirical support).

173. See Anne L. Alstott, *A New Deal for Old Age*, 97 B.U. L. REV. 1933, 1936 (2017) ("[L]ow earners also suffer cumulative disadvantage, which leaves them with a shorter life span, worse health, higher rates of disability, and worse job options."); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 466 (2010) ("[A]t least in the short term, inheritance tends to replicate the current, relatively unequal distribution of wealth.").

are just or earned when in fact they may instead be the product of unjust social forces or an accident of birth.¹⁷⁴

Disadvantages can also accumulate. For instance, if an individual breathes in polluted air, that will harm their health in the present, but breathing polluted air for decades could create more serious health problems by the time they reach older ages. As with accumulated advantages, these accumulated disadvantages may create the illusion that the position of the individual in the present is deserved rather than influenced by a set of initial positions and continuing social forces.¹⁷⁵ The net effect of such accumulations of advantages and disadvantages is that inequalities will widen as individuals increase in age, with older individuals potentially exhibiting the worst comparative outcomes.¹⁷⁶

Race enters into the equation because it is a primary mechanism through which society confers advantages and disadvantages throughout the lifecourse.¹⁷⁷ In terms of resources, intergenerational wealth inequalities coupled with income inequalities during life mean that older people of color often lack accumulated human capital and financial resources compared to White peers.¹⁷⁸ This, in turn, creates problems when such resources are needed to help cushion against the vulnerabilities associated with older age, be they declines in functioning, lack of access to the labor market, or isolation and lack of social supports.

In the health domain, researchers are beginning to understand how accumulation effects can harm racial minorities' health outcomes. The compounding effects of more limited economic resources, stress, and racial discrimination lead to "weathering" that can negatively impact the mortality and morbidity of racial minorities along several dimensions.¹⁷⁹ There is

174. See Melvin J. Lerner & Leo Montada, *An Overview: Advances in Belief in a Just World Theory and Methods*, in *RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD* 1, 1 (Leo Montada & Melvin J. Lerner eds. 1998) (describing the psychological tendency for individuals to believe that others get what they deserve in the long run, or in a "just world").

175. See *id.*

176. See Toni Calasanti & Sadie Giles, *The Challenge of Intersectionality*, 41 *GENERATIONS* J. 69, 73 (2018) ("[P]eople do not age out of inequalities that exist earlier in life. Instead these disparities can be compounded in old age.").

177. See DAYNA BOWEN MATTHEW, *JUST HEALTH: TREATING STRUCTURAL RACISM TO HEAL AMERICA* 33–56 (2022) (describing the many ways in which race serves as a social comorbidity).

178. See DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* 17–18 (2021) (discussing racial disparities in wealth accumulation); Brown, *supra* note 23, at 39–40 (2016) (finding that "racial/ethnic inequalities in wealth increase dramatically with age"); Stephen Crystal & Dennis Shea, *Cumulative Advantage, Cumulative Disadvantage, and Inequality Among Elderly People*, 30 *GERONTOLOGIST* 437, 442 (1990) (finding that income inequalities in retirement are likely the product of inequalities earlier in the lifecourse).

179. See Allana T. Forde, Danielle M. Crookes, Shakira F. Suglia & Ryan T. Demmer, *The Weathering Hypothesis as an Explanation for Racial Disparities in Health: A Systematic Review*, 33 *ANNALS EPIDEMIOLOGY* 1, 16 (2019) (finding evidence for the weathering hypothesis across studies);

emerging evidence from epigenetics that such socially-induced biological accumulation effects might transfer to the next generation, suggesting that we should expand the temporal scope of our analyses even further, beyond a single life and lifecourse to multiple generations.¹⁸⁰

It is important to note, however, that even if different racial minority groups might experience these trajectory and accumulation effects, they will not experience them in the same way or have the same outcomes. For example, in the United States, Asian and Latinx people have longer life expectancies than White, Black, and Native American populations, though this may be in part due to the immigration of healthier individuals to the United States and emigration of less healthy individuals back to countries of origin as they age.¹⁸¹ Specific health-related events may also interact with these racial accumulation effects in unique ways. For instance, when adjusted for age, American Indian or Alaska Native, Black, and Hispanic populations in the United States had higher rates of both infection and death due to COVID-19 compared to White populations.¹⁸²

Considering these temporal issues raises questions about the normative attractiveness of facially neutral age-based legal rules as applied to older adult populations.¹⁸³ At first glance, these legal rules seem egalitarian in nature, as everyone will be subject to them at the same time. However, people may be quite differently situated in older age due to racism over the lifecourse, and some might not reach the triggering ages for legal entitlements at all.¹⁸⁴ Consider the age-based cutoff for collecting Social

David F. Warner & Tyson H. Brown, *Understanding How Race/Ethnicity and Gender Define Age-Trajectories of Disability: An Intersectionality Approach*, 72 SOC. SCI. & MED. 1236, 1245–46 (2011) (finding that all race/gender groups fared worse than White men in terms of disablement trajectories, with Black women faring the worst).

180. See Lucy A. Jewel, *The Biology of Inequality*, 95 DENV. L. REV. 609, 616–27 (2018) (explaining the epigenetic mechanisms of social inequality).

181. See Laura Dwyer-Lindgren et al., *Life Expectancy by County, Race, and Ethnicity in the USA, 2000–19: A Systematic Analysis of Health Disparities*, 400 LANCET 25, 28–30 (2022) (discussing differential life expectancy by race); Christina A. Clarke et al., *Racial and Social Class Gradients in Life Expectancy in Contemporary California*, 70 SOC. SCI. & MED. 1373, 1377–78 (2010) (discussing theories for more positive life expectancy outcomes among Hispanic and Asian/Pacific Islander populations in the United States).

182. See Latoya Hill & Samantha Artiga, KFF, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and Changes over Time*, KFF (Aug. 22, 2023), <https://www.kff.org/coronavirus-covid-19/issue-brief/covid-19-cases-and-deaths-by-race-ethnicity-current-data-and-changes-over-time/> [<https://perma.cc/73ZZ-M8GN>] (“Black, Hispanic, and AIAN people have experienced higher rates of COVID-19 infection and death compared to White people when accounting for age differences across racial and ethnic groups.”).

183. Elisabetta Ruspini, *Inequality as Process*, in THE ROUTLEDGE HANDBOOK *supra* note 21, at 27, 34 (“Anyone hoping to design appropriate and effective policies to promote equity should have a clear understanding of past and present inequality dynamics and on how old and new, local and global, micro- and macro-determinants of inequality connect and interact.”).

184. See Boni-Saenz, *supra* note 167, at 885–87 (noting that the egalitarian nature of age-based rules comes into question when groups are differently situated).

Security retirement benefits, which was initially set at sixty-five but has risen such that it is set at sixty-seven for those born after 1960.¹⁸⁵ One critique of a set or rising retirement age is that it has a disproportionately negative impact on certain racial minorities, who have higher mortality rates.¹⁸⁶ In other words, although they pay into the system as do their White peers, some racial minorities are less likely to collect benefits due to lower average life expectancies.¹⁸⁷

There is a similar problematic dynamic around the allocation of vaccines during the COVID-19 pandemic. The Centers for Disease Control promulgated recommendations that Phase 1 vaccine eligibility should be based on age, with those aged seventy-five and older receiving priority after health care personnel and residents of long-term care facilities.¹⁸⁸ While those who were older were certainly at risk for negative health outcomes due to COVID-19, these guidelines failed to capture the health vulnerabilities of racial minority populations of all ages who fell below that cutoff, which are often a product of cumulative disadvantage accrued over the lifecourse.¹⁸⁹ This is what led some doctors and advocates to argue for lower age cutoffs for racial minorities as a medical and ethical imperative, even though such approaches would be constitutionally suspect.¹⁹⁰

185. See What is Full Retirement Age?, 20 C.F.R. § 404.409 (2015) (describing the age at which one can collect Social Security retirement benefits).

186. 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.”).

187. See, e.g., Kyle Moore, Thera Ghilarducci & Anthony Webb, *The Inequitable Effects of Raising the Retirement Age on Blacks and Low-Wage Workers*, 46 REV. BLACK POL. ECON. 22, 30–35 (2019) (noting the differential longevity of White people and Black people and the implications for raising the retirement age); Anna Zajacova, Jennifer Karas Montez & Pamela Herd, *Socioeconomic Disparities in Health Among Older Adults and the Implications for the Retirement Age Debate: A Brief Report*, 69 J. GERONTOLOGY, SERIES B: PSYCH. SCIS. & SOC. SCIS. 973, 976–77 (2014) (noting the differential health status of individuals at different ages based on various demographics). Some of these racial effects may be mitigated by the existence of derivative benefits for certain relatives. See 42 U.S.C. § 402 (2020) (discussing the various categories of individuals entitled to Social Security retirement benefits).

188. See Kathleen Dooling et al., *The Advisory Committee on Immunization Practices’ Updated Interim Recommendation for Allocation of COVID-19 Vaccine—United States, December 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1657, 1658 (2020).

189. See William Mude, Victor M. Oguoma, Tafadzwa Nyanhanda, Lillian Mwanri & Carolyne Njue, *Racial Disparities in COVID-19 Pandemic Cases, Hospitalisations, and Deaths: A Systematic Review and Meta-Analysis*, 11 J. GLOB. HEALTH 1, 7 (2021) (finding disproportionate impact of COVID-19 on racial minorities across studies and countries).

190. See Harald Schmidt, Lawrence O. Gostin & Michelle A. Williams, Opinion, *Is it Lawful and Ethical to Prioritize Racial Minorities for COVID-19 Vaccines?*, 324 J. AM. MED. ASSOC. 2023, 2023 (2020) (arguing that the ethical case for vaccine priority for racial minorities rests on epidemiological, economic, and social justice grounds.”); Oni Blackstock & Uché Blackstock, Opinion, *Black Americans Should Face Lower Age Cutoffs to Qualify for a Vaccine*, WASH. POST (Feb. 19, 2021, 5:51 PM),

In short, when designing legal rules using age, it is necessary to examine the heterogeneity of the populations to which they apply to see if their application promotes equity or reinforces racial subordination. This third manifestation of aged racism suggests that we should be skeptical of age-based legal entitlements provided at older ages, at least in a society that has persistent social and racial inequalities that exert a pull throughout the lifecourse. Instead, we might focus on need-based or universalist approaches to some of the social policy issues that arise due to aging.¹⁹¹

CONCLUSION

The fields of law and aging and critical race theory have each provided invaluable insights into the operation of age and race and their relevance for law. However, they have also been theoretically siloed, limiting in some ways their capacity for recognizing forms of racial subordination as connected and part of the larger phenomenon of aged racism. This Essay has initiated a conversation between the two fields by creating an initial map of how age, race, and the law intersect. The hope is that this will lead to productive future exchanges that will help to understand and combat racial subordination in all of its forms.

https://www.washingtonpost.com/opinions/black-americans-should-face-lower-age-cutoffs-to-qualify-for-a-vaccine/2021/02/19/3029d5de-72ec-11eb-b8a9-b9467510f0fe_story.html [<https://perma.cc/KS6T-CNSE>] (arguing for lower age cutoffs for racial minorities).

191. See Boni-Saenz, *supra* note 167, at 901–02 (suggesting these two approaches as alternatives to age-based legal distinctions).