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# AGE DIVERSITY

ALEXANDER A. BONI-SAENZ\*

*This Article is the first to examine age diversity in the legal literature, mapping out its descriptive, normative, and legal dimensions. Age diversity is a plural concept, as heterogeneity of age can take many forms in various human institutions. Likewise, the normative rationales for these assorted age diversities are rooted in distinct theoretical foundations, making the case for or against age diversity contextual rather than universal. A host of legal rules play a significant role in regulating age diversity, influencing the presence of different generations in the workplace, judiciary, and Congress. Better understanding the nature and consequences of age diversity allows us to recognize the unique set of costs and benefits it entails and enriches our understanding of other forms of difference. Further, examining the law with an age diversity lens highlights fruitful avenues for legal reform in fields as varied as immigration law, employment law, and the law of juries. In an era of increased intergenerational tension and a rapidly aging population, the time is ripe to evaluate age diversity and the law's role in shaping it.*

## TABLE OF CONTENTS

INTRODUCTION .....	304
I. WHAT IS AGE DIVERSITY?.....	308
A. AGE .....	308
B. DIVERSITY .....	312

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\* Associate Professor of Law, Chicago-Kent College of Law. abonisae@kentlaw.edu. For helpful questions and comments, I would like to thank Lori Andrews, Susan Appleton, Kathy Baker, Felice Batlan, Naomi Cahn, Sungjoon Cho, Adrienne Davis, Graeme Dinwoodie, Danielle D'Onfro, Dan Epps, John Inazu, Andrew Ingram, Peter Joy, Pauline Kim, Hal Krent, Michelle Layser, Ron Levin, Marty Malin, Nancy Marder, Nancy Morrow-Howell, Greg Reilly, César Rosado, Mark Rosen, Rachel Sachs, Chris Schmidt, Carolyn Shapiro, Peggie Smith, Noah Smith-Drelich, Brian Tamanaha, Karen Tokarz, Andrew Tuch, Deb Widiss, the editors at *Southern California Law Review*, and workshop participants at the American Association of Law Schools Annual Meeting, Chicago-Kent, the Chicagoland Junior Scholars Conference, and Washington University in St. Louis, where I presented earlier versions of this Article. For valuable research assistance, I would like to thank Jessica Arencibia.

II. THE CASES FOR AND AGAINST AGE DIVERSITY .....	317
A. DEMOGRAPHY .....	319
B. DISTRIBUTIVE JUSTICE.....	321
C. REPRESENTATION.....	324
D. GROUP EFFICACY.....	330
E. REDUCING AGEISM.....	336
III. AGE DIVERSITY AND THE LAW.....	339
A. LEGAL RULES.....	339
1. Age-Conscious Rules.....	339
2. Age Discrimination Rules.....	341
3. Age-Neutral Rules .....	343
B. LEGAL APPLICATIONS.....	344
1. Immigration .....	345
2. The Jury .....	348
3. The Workplace.....	353
CONCLUSION.....	355

## INTRODUCTION

During her first election campaign, Representative Alexandria Ocasio-Cortez claimed that “we need to elect a generation of new people to Congress. We have to have a diversity of age.”<sup>1</sup> As a descriptive matter, Ocasio-Cortez may have a point: in the 116th Congress, the average age in the House of Representatives was 57.6, while it was 62.9 in the Senate.<sup>2</sup> Silicon Valley seems to have the opposite problem.<sup>3</sup> In August 2019, Google settled an age discrimination lawsuit for eleven million dollars, agreeing to create age diversity committees to prevent future instances of age bias against older employees.<sup>4</sup> Such lawsuits are not uncommon,<sup>5</sup> and those

1. Philip Bump, *When It Comes to Generational Diversity in Congress, Ocasio-Cortez Has a Point*, WASH. POST (June 28, 2018), <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/L5MW-L3BY].

2. JENNIFER E. MANNING, CONG. RESEARCH SERV., R45583, MEMBERSHIP OF THE 116TH CONGRESS: A PROFILE 2 (2019).

3. See VISIER INSIGHTS REPORT: THE TRUTH ABOUT AGEISM IN THE TECH INDUSTRY 2 (2017) (“[T]here is systemic ageism in Tech hiring practices: Tech hires a higher proportion of younger workers and a smaller proportion of older workers than Non-Tech.”).

4. *Heath v. Google LLC*, No. 15-cv-01824, 2019 U.S. Dist. LEXIS 138526, at \*6 (N.D. Cal. Aug. 15, 2019) (“Defendant agrees to a gross settlement amount of \$11 million.”); *id.* at \*7 (“Defendant has also agreed to certain ‘programmatic relief’ for four years, including . . . the creation of a subcommittee within recruiting that will focus on age diversity . . .”).

5. See Carolyn Hymowitz & Robert Burnson, *It’s Tough Being Over 40 in Silicon Valley*, BLOOMBERG (Sept. 8, 2016, 10:50 AM) (noting the large number of age discrimination lawsuits against

plaintiffs may also have a point: the median age of employees at the technology companies Facebook and LinkedIn is twenty-eight and twenty-nine, respectively.<sup>6</sup> Finally, in the criminal justice system, prosecutors and criminal defense attorneys regularly use their peremptory challenges to remove younger and older individuals, respectively, from the jury box, making it less age diverse in service of predicted trial outcomes.<sup>7</sup> In the recent case *Johnson v. State*, a prosecutor even admitted that he would strike any juror under the age of twenty-five because he did not “want kids on this jury.”<sup>8</sup> The court found no error,<sup>9</sup> though one judge was “deeply disturbed” by the practice.<sup>10</sup>

These cases illustrate how heterogeneity on the dimension of age—age diversity—implicates a wide range of socio-legal contexts. Yet it has thus far received no attention in the legal literature.<sup>11</sup> Scholars studying diversity normally spotlight the critical category of race,<sup>12</sup> which is unsurprising given that racial justice movements gave birth to diversity as a normative ideal.<sup>13</sup> The time is ripe, however, to critically examine age diversity. The aging of the population has led to a broader range of ages in public and private institutions, generating tensions about the allocation of resources and power in society.<sup>14</sup> This intergenerational conflict materializes in the countless

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technology companies in California, especially as compared to race and gender discrimination lawsuits), <https://www.bloomberg.com/news/articles/2016-09-08/silicon-valley-s-job-hungry-say-we-re-not-to-old-for-this> [<https://perma.cc/7XLA-ZMVA>].

6. See Anaele Pelisson & Avery Hartmans, *The Average Age of Employees at All the Top Tech Companies*, in *One Chart*, BUS. INSIDER (Sept. 11, 2017, 6:30 AM), <https://www.businessinsider.in/The-average-age-of-employees-at-all-the-top-tech-companies-in-one-chart/articleshow/60465547.cms> [<https://perma.cc/8LS5-P68T>].

7. See Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001, 1027 (2014) (“[T]he 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.”).

8. See *Johnson v. State*, 288 So. 3d 342, 347 (Miss. Ct. App. 2019) (declaring age as a permissible race-neutral reason for peremptory strikes in the context of *Batson* challenges).

9. *Id.*

10. *Id.* at 50, 52 (Westbrooks, J., concurring) (“I write separately because I am deeply disturbed by the prosecutor’s use of peremptory challenges against potential jurors under the age of twenty-five. . . . Diversity, including age diversity, is never a bad thing because it brings different perspectives and opinions into the jury room.”).

11. See B. EVAN BLAINE & KIMBERLY J. MCCLURE BRENCHLEY, *UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY* 5 (3d ed. 2018) (“Age diversity receives relatively little research attention, but that should change with the expected growth of the senior citizen population in the next 20 years.”).

12. See ELLEN BERREY, *THE ENIGMA OF DIVERSITY* 25–30 (2015) (“When used without qualifiers, [diversity] commonly refers [sic] a heterogeneous mix of racial, ethnic, and language groups. Often, it simply implies the presence of racial minorities, often just African Americans.”).

13. See *id.* (recounting the intellectual history of diversity as a normative ideal).

14. See Michael S. North & Susan T. Fiske, *An Inconvenienced Youth? Ageism and Its Potential*

think pieces arguing that millennials are entitled or lazy,<sup>15</sup> and the response of “Okay, boomer,” which has appeared on social media and even in a recent Supreme Court oral argument.<sup>16</sup> This demographic transition also has a racial dimension, as much of the coming racial diversity in the United States derives from younger cohorts.<sup>17</sup> Thus, a comprehensive understanding of racial diversity requires examining how it intersects with age diversity.<sup>18</sup>

The goal of this Article is to introduce age diversity to the legal literature by mapping out its descriptive, normative, and legal dimensions.<sup>19</sup> What emerges is a rich and complex picture. Age diversity is itself diverse, including minimal or maximal heterogeneity of age, an age range mirroring a reference population, or an assortment of ages keyed to some variable for which age is a proxy.<sup>20</sup> The normative rationales for these assorted age diversities are rooted in distinct theoretical foundations, and they thus vary considerably based on the context in which they are examined. While demographic concerns might drive the ideal age diversity at the societal level, issues of distributive justice, representation, group efficacy, and ageism might better inform the analysis at the institutional level.<sup>21</sup> The

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*Intergenerational Roots*, 138 PSYCHOL. BULL. 982, 987–89 (2012) (discussing the psychological roots of intergenerational conflict); Simon Biggs, *Thinking About Generations: Conceptual Positions and Policy Implications*, 63 J. SOC. ISSUES 695, 704 (2007) (“[T]he transfer of generational power is a key function that policy needs to address as part of a process of social renewal.”).

15. See, e.g., Joel Stein, *Millennials: The Me Me Me Generation*, TIME (May 20, 2013), <http://content.time.com/time/subscriber/article/0,33009,2143001,00.html> [<https://perma.cc/QEN2-RR7>] (describing millennials as “lazy, entitled, selfish, and shallow”).

16. See Oral Argument at 15:45, *Babb v. Wilkie*, 140 S. Ct. 1168 (2020) (No. 18-882), <https://www.oyez.org/cases/2019/18-882> (containing the following question by Chief Justice John Roberts regarding age discrimination law: “[L]et’s say . . . the hiring person is younger, says, you know, ‘OK boomer,’ . . . is that actionable?”); Taylor Lorenz, *‘OK Boomer’ Marks the End of Friendly Generational Relations*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/style/ok-boomer.html> [<https://perma.cc/E3QU-43GQ>] (“‘Ok boomer’ has become Generation Z’s endlessly repeated retort to the problem of older people who just don’t get it, a rallying cry for millions of fed up kids.”).

17. See WILLIAM H. FREY, *DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA* 247 (2014) (“Perhaps the biggest demographic fault line in the coming decades is the cultural generation gap—the lack of intimate connections between an increasingly diverse young population and the mostly white older population.”).

18. See PATRICIA HILL COLLINS & SIRMA BILGE, *INTERSECTIONALITY* 2 (2016) (“[P]eople’s lives and the organization of power in a given society are better understood as being shaped not by a single axis of social division, be it gender or race or class, but by many axes that work together and influence each other.”).

19. See Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 189–93 (2020) (noting the importance of theory in the field of law and aging).

20. See *infra* Section I.B.

21. See *infra* Part II.

multiplicity of forms that age diversity can take as well as their associated normative justifications highlight that age diversity is a plural and contextual concept, rather than a singular or universal one.

These normative aspects of age diversity have implications for law, as several legal rules play a critical role in shaping age diversity in human institutions. Age-conscious rules explicitly incorporate age into legal directives, often in service of establishing eligibility criteria for membership in institutions.<sup>22</sup> For example, the Constitution explicitly adopts age minimums to hold a seat in Congress.<sup>23</sup> These exclude youth from serving and reduce the age diversity of our political institutions, even as they are intended to reflect the diversity of the population.<sup>24</sup> In contrast, age discrimination rules, such as the Age Discrimination in Employment Act,<sup>25</sup> bar the consideration of age in various domains.<sup>26</sup> These laws leave the age compositions of groups to other social forces, for good or ill. Finally, age-neutral rules are often geared toward some other policy objective, making age diversity a byproduct of the legal regulation.<sup>27</sup> For instance, the principle of random selection for jury members has the effect of creating a jury pool that more or less mirrors the age diversity of the citizenry, while peremptory challenges threaten that diversity.<sup>28</sup>

This Article functions not only as an introduction to age diversity, but also as a call for an increased consciousness of the age composition of our institutions.<sup>29</sup> Examining these institutions with an age diversity lens brings to light a unique set of costs and benefits that might otherwise go unappreciated in policy debates. This, in turn, can highlight opportunities for

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22. See *infra* Section III.A.1.

23. See U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years.”); *id.* art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years.”).

24. See ANNE PHILLIPS, *THE POLITICS OF PRESENCE* 6 (1995) (“Adequate representation is increasingly interpreted as implying a more adequate representation of the different social groups that make up the citizen body.”).

25. See 29 U.S.C. § 623(a) (“It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age . . .”).

26. See *infra* Section III.A.2.

27. See *infra* Section III.A.3.

28. See NANCY S. MARDER, *THE JURY PROCESS* 51 (2005) (“The main constitutional issue raised by the summoning of the venire is whether those summoned represent a ‘fair cross section’ of the community.”).

29. See James D. Schmidt, *The Ends of Innocence: Age as a Mode of Inquiry in Sociolegal Studies*, 32 *LAW & SOC. INQUIRY* 1029, 1050–55 (2007) (arguing for the inclusion of age-based analyses in legal scholarship).

legal reform in a variety of areas.<sup>30</sup> This age consciousness will also enrich diversity discussions more broadly. Just as age intersects with other forms of difference among individuals, so too is age diversity part and parcel of a larger conversation about other forms of difference, such as race, sex, or class.<sup>31</sup>

This Article proceeds in three parts. Part I discusses the conceptual categories of age and diversity and describes some of the major forms that age diversity can take. Part II maps out the normative terrain of age diversity, exploring the various theoretical rationales for and against the assorted forms that age diversity might take. Part III describes the ways in which age diversity intersects with the law. It examines the different types of legal rules that shape the age composition of society and its institutions. It then demonstrates how analyzing legal areas with age diversity in mind can provide insights into current debates in immigration law, the law of juries, and employment law.

## I. WHAT IS AGE DIVERSITY?

This Part provides the background for the Article's exploration of age diversity. Section A examines the variable of age, understanding it as an important aspect of both individual identity and social organization. Section B explores the concept of diversity, the many forms it takes, and the need to understand it in the specific context in which it arises.

### A. AGE

At the most basic level, age is simply the numerical measure of time that has elapsed since one's birth.<sup>32</sup> This gives age a unique temporal quality among the various categories of identity.<sup>33</sup> While people predictably progress through different age groups in one direction over time, other identity characteristics like race or sex do not possess the same inevitable fluidity.<sup>34</sup> Age's numerical nature also makes it particularly useful from an

30. See *infra* Section III.B.

31. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1938–39 (2000) (noting that we must acknowledge demographic and individual diversity along multiple axes).

32. See Richard A. Settersen, Jr. & Bethany Godlewski, *Concepts and Theories of Age and Aging*, in HANDBOOK OF THEORIES OF AGING 9, 10 (Vern L. Bengtson & Richard A. Settersen, Jr. eds., 3d ed. 2016) (“Chronological age is ultimately an index of *absolute* time (years since birth) that stems from a human-made calendar.” (emphasis in original) (citation omitted)).

33. See Alexander A. Boni-Saenz, *Age, Time, and Discrimination*, 53 GA. L. REV. 845, 859 (2019) (describing how age is unique in that it is “*inevitably mutable*”).

34. See *id.* at 858–59 (describing how age differs from other categories of identity). Other categories of identity also possess some fluidity, though it is far from inevitable. See, e.g., Ian F. Haney

administrative standpoint, which explains its widespread use in the law.<sup>35</sup>

The number by itself is important beyond mere administrative convenience, however, as it can convey some information about an individual's development or biology. For example, we know something about the physical and mental capacities of a three-year-old based simply on her age.<sup>36</sup> The picture becomes much murkier once one becomes an adult, as variation in the population trumps the predictive power of age.<sup>37</sup> Still, there are certain trends in how the aging process plays out at the population level. For instance, younger individuals tend to score higher on fluid intelligence, which is the ability to reason abstractly without reference to prior experience, while older individuals score higher on crystallized intelligence, which is the ability to apply previous knowledge and experiences to problem-solving.<sup>38</sup> To acknowledge these trends is not to embrace age essentialism, or the belief that age conveys something "irreducible, unchanging, and therefore constitutive of a given person or thing."<sup>39</sup> While age produces observable regularities at the population level, that does not mean that any particular characteristic is necessarily shared by individuals of the same age.<sup>40</sup>

Age is also more than just a number. It is a salient social signifier that gives membership in a particular age group and cohort.<sup>41</sup> An age group is a collection of individuals of the same age, which can be defined narrowly—such as those who are twenty-five—or more broadly, such as those in their

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López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 39 (1994) (describing race as a complex interplay between chance, context, and choice).

35. See Boni-Saenz, *supra* note 33, at 854–56 (describing the many ways in which the law employs age).

36. See, e.g., Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755, 767–68 (2017) (discussing neurological development in early childhood).

37. See Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 468 (1997) (“[B]oth cognitive and physiological changes occur in varying degrees and at individuated rates.”).

38. See John L. Horn & Raymond B. Cattell, *Age Differences in Fluid and Crystallized Intelligence*, 26 ACTA PSYCHOLOGICA 107, 122–23 (1967) (finding the mean level of fluid and crystallized intelligence to be higher for younger and older adults, respectively).

39. DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* 2 (1989). While age essentialism can have many costs, it is not per se bad. See Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2205–06 (2019) (critiquing the view that essentialism is essentially bad).

40. See Norman B. Ryder, *The Cohort as a Concept in the Study of Social Change*, 30 AM. SOC. REV. 843, 847 (1965) (“The attractive simplicity of birth cohort membership as signified by age cannot conceal the ways in which this identification is cross-cut and attenuated by differentiation . . .”).

41. See 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.”).

sixties.<sup>42</sup> Age groups occupy specific positions on a standardized lifecourse, or the sequence of socially-defined events and roles in a person's life.<sup>43</sup> Each place on that lifecourse, in turn, dictates what is socially acceptable behavior and informs when one should begin schooling, have children, or retire.<sup>44</sup> The law often regulates these life stages, for instance by mandating schooling at certain ages or providing Social Security benefits at the age of retirement.<sup>45</sup>

A birth date also grants membership in a particular cohort, or a group of people born around the same time who progress through various age groups together.<sup>46</sup> Such cohorts are often categorized as generations, or groups of people who have close birth dates and have experienced similar formative socio-historical moments in a particular cultural context.<sup>47</sup> These shared experiences, in turn, shape a given generation's outlook and values.<sup>48</sup> For example, millennials' formative experiences with the Internet make them "digital natives," in contrast to prior generations who are "digital immigrants."<sup>49</sup>

Age also affects individuals and structures society through the negative force of ageism, defined as prejudice, stereotyping, or discrimination on the

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42. See Victor Marshall, *Generations, Age Groups and Cohorts*, 2 CANADIAN J. ON AGING 51, 55–56 (1984) (describing age strata or age groups).

43. See Janet Z. Giele & Glen H. Elder, Jr., *Life Course Research: Development of a Field*, in METHODS OF LIFE COURSE RESEARCH: QUALITATIVE AND QUANTITATIVE APPROACHES 5, 22 (Janet Z. Giele & Glen H. Elder, Jr. eds., 1998) (defining "life course" as a "sequence of socially defined events and roles that the individual enacts over time").

44. See HOWARD EGLIT, *ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* 7 (2004) ("Age also functions informally as a powerful normative device for influencing—and sometimes even dictating—attitudes and conduct. . . . 'Act your age' is a common admonition reflecting this phenomenon . . . ."); Bernice L. Neugarten, Joan W. Moore & John C. Lowe, *Age Norms, Age Constraints, and Adult Socialization*, in THE MEANINGS OF AGE 24, 24 (Dail A. Neugarten ed., 1996) ("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.").

45. See OHIO REV. CODE ANN. § 3321.01 (West 2018) ("A child between six and eighteen years of age is 'of compulsory school age.'"); 20 C.F.R. § 404.409 (2015) ("Full retirement age has been 65 but is being gradually raised to age 67 beginning with people born after January 1, 1938.").

46. See Marshall, *supra* note 42, at 52 (describing cohorts).

47. See KARL MANNHEIM, *THE PROBLEM OF GENERATIONS*, reprinted in *ESSAYS ON THE SOCIOLOGY OF KNOWLEDGE: COLLECTED WORKS OF KARL MANNHEIM* 276, 290 (Paul Kecskemeti ed., 1936) ("Individuals who belong to the same generation, who share the same year of birth, are endowed, to that extent, with a common location in the historical dimension of the social process.").

48. See, e.g., GLEN H. ELDER, JR., *CHILDREN OF THE GREAT DEPRESSION* 183–200 (1974) (discussing the effects of economic deprivation on the outlook of people who experienced the Great Depression).

49. See Chris Jones, *Students, the Net Generation, and Digital Natives*, in *DECONSTRUCTING DIGITAL NATIVES* 30, 30–43 (Michael Thomas ed., 2011) (discussing and critiquing the concepts of digital natives and digital immigrants).

basis of age or perceived age.<sup>50</sup> Ageist attitudes, actions, and laws limit opportunities or channel resources to certain individuals or groups on the basis of age.<sup>51</sup> However, age-based advantage or disadvantage is sensitive to context in a different way than other categories, such as race or sex.<sup>52</sup> For example, the history of race is one of slavery, Jim Crow, redlining, and mass incarceration, and this history of racial injustice informs how structural racism functions in the present.<sup>53</sup> Racial disadvantage cuts across most contexts in much the same way, providing consistent advantages to those classified as white.<sup>54</sup> The picture is more complicated with age. In some settings, it may be youth who are at the bottom of the social hierarchy.<sup>55</sup> For example, few younger individuals are in a position to wield significant power in the political world.<sup>56</sup> However, in other realms, such as entertainment and media, it may be older individuals who are most marginalized. Youth is a valued commodity in this space, and those who are older are often devalued

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

51. See ERDMAN B. PALMORE, AGEISM: NEGATIVE AND POSITIVE 119–51 (2d ed. 1999) (collecting instances of ageism in the economy, government, family, housing, and health care).

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

53. See MICHELLE ALEXANDER, THE NEW JIM CROW: INCARCERATION IN THE AGE OF COLORBLINDNESS 1 (rev. ed. 2012) (describing how the manifestation of racial disadvantage change but the end effects are the same); 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/PP5C-HFMG>] (describing the connected histories of racial disadvantage).

54. 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. 1709, 1713–14 (1993) (describing white privilege as a form of property interest). This is not to ignore the different manifestations of racism for non-Black racial minority groups, which have their own important historical legacies and present manifestations. See Maritza I. Reyes, *Opening Borders: African Americans and Latinos Through the Lens of Immigration*, 17 HARV. LATINO L. REV. 1, 54 (2014) (arguing that African Americans and Latinos need to be “proactive and conscious about recognizing their similar and different experiences with oppression”); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1252–64 (1993) (discussing the particular racial disadvantages faced by Asian-Americans).

55. See Pamela Ann Gordon, *Age Diversity in the Workplace*, in DIVERSITY AND INCLUSION IN THE GLOBAL WORKPLACE 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).

56. See Bump, *supra* note 1 (describing the age skew in Congress toward older people).

compared to younger and newer celebrities of interest.<sup>57</sup> This shifting set of power dynamics creates the need to analyze age—and age diversity—more contextually.

Thus, age structures both personal identity and social organization in powerful ways. However, age intersects with other important categories such as race, sex, and class to produce unique individuals with different interests and mindsets.<sup>58</sup> In addition, these different aspects of identity can intersect in ways that produce unique experiences and forms of disadvantage.<sup>59</sup> For example, younger Black people are more likely to face policing and incarceration than other groups due to racist and ageist stereotypes associating Blackness and youth with criminal behavior.<sup>60</sup> Similarly, older women are more likely to feel the burden of societal expectations about beauty because of sexist norms that place a woman's value in her appearance, as well as the ageist judgment that only youthfulness is attractive.<sup>61</sup> It is therefore critical to attend to these intersectional effects when considering age and the age diversity of various societal institutions.

## B. DIVERSITY

At a descriptive level, diversity simply identifies the existence of heterogeneity in a group.<sup>62</sup> In this basic sense, almost every group of people

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57. See Ann Hornaday, *Hollywood Ageism Punishes Actresses, but the Art House Offers Some Hope*, WASH. POST (Mar. 9, 2017), [https://www.washingtonpost.com/lifestyle/style/hollywood-ageism-punishes-actress-but-the-art-house-offers-some-hope/2017/03/09/ce7e0e24-040c-11e7-ad5b-d22680e18d10\\_story.html](https://www.washingtonpost.com/lifestyle/style/hollywood-ageism-punishes-actress-but-the-art-house-offers-some-hope/2017/03/09/ce7e0e24-040c-11e7-ad5b-d22680e18d10_story.html) [<https://perma.cc/TKQ6-7BPM>] (“[T]here’s no doubt that women are far more affected by the movie industry’s obsession with sex appeal and physical beauty, resulting in a giant absence in female roles once actresses reach their 50s and 60s.”).

58. See COLLINS & BILGE, *supra* note 18, at 2; Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 27 (1995) (arguing for spending our time trying to understand the relationships between different categories of identity); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 768 (1994) (noting how intersectionality allows for those at the intersections to be recognized as “proper legal subjects”).

59. See Kimberle 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 (noting the need to center the experiences of those at the intersections).

60. See L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 146 (2014) (discussing how privileged groups work with police to implement policies that subordinate young Black men and people of color).

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

62. See *Diversity*, CAMBRIDGE ENGLISH DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/diversity?q=Diversity> [<https://perma.cc/Q7Z3-MWJA>] (“[T]he fact of many different types of things or people being included in something; a range of different things or people.”).

is diverse in some way, as no two individuals are identical. Thus, the concept requires further specification by selecting the dimension on which to assess diversity.<sup>63</sup> In the United States, the characteristic of interest has typically been race, and this is unsurprising given diversity's origins.<sup>64</sup> As a social and political ideal, diversity grew out of the civil rights movement and gained traction in the late 1960s as a tool to promote racial integration after formal legal barriers to it had fallen.<sup>65</sup> As a legal rationale, it came to prominence in the seminal affirmative action case *Regents of the University of California v. Bakke*, which held that diversity was a compelling state interest that made permissible the consideration of race in public school admissions.<sup>66</sup> In the 1980s, the pursuit of diversity evolved into an institutional practice, often implemented by human resource professionals in the business world.<sup>67</sup> Today, diversity is a mantra for everyone from politicians to business executives to university presidents, and it has been applied to various other types of difference as well.<sup>68</sup>

This Article extends the diversity analysis to age.<sup>69</sup> The next Part

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63. See Ira Katznelson, *Diversity in Institutional Life: Levels and Objects*, in OUR COMPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY 182, 185 (Earl Lewis & Nancy Cantor eds., 2016) (“[D]iversity is both appropriate as a cover word but also rather too general unless calibrated and specified more exactly in its analytical and normative dimensions as a category and rationale . . .”).

64. See BERREY, *supra* note 12, at 26 (noting how diversity typically refers to racial, ethnic, or language groups). In some contexts, the focus has been less on race, and more on gender. See, e.g., Askhaya Kamalnath, *Defining ‘Diversity’ in Corporate Governance: A Global Survey*, 45 J. LEGIS. 1, 2 (2019) (“[T]he term ‘diversity’ in corporate governance is focused most specifically on only one type of ‘diversity,’ i.e. gender diversity.”).

65. See BERREY, *supra* note 12, at 30 (“[Diversity’s] earliest supporters were white college administrators and community activists trying to encourage black integration into exclusively white universities and neighborhoods.”).

66. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (“[T]he interest of diversity is compelling in the context of a university’s admissions program . . .”).

67. See BERREY, *supra* note 12, at 34–46 (describing how the corporate world found diversity a useful way to comply with vague antidiscrimination mandates).

68. See WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* 12 (2006) (“Indeed, diversity has become virtually a sacred concept in American life today. No one’s really against it; people tend to differ only in their degrees of enthusiasm for it and their ingenuity in pursuing it.”); PETER W. WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 16 (2003) (“The pursuit of *diversity* is held to be both practically good and personally redemptive; and *diversity* is depicted in popular entertainment as both fun and—there is no better word for it—virtuous.”).

69. Some might question adding another dimension to diversity analyses, seeing diversity discourse as a distraction from more pressing discussions of identity-based injustice or economic inequality. See MICHAELS, *supra* note 68, at 6 (arguing that a focus on identity issues has led to a neglect of issues of class and economic inequality); Joyce M. Bell & Douglas Hartmann, *Diversity in Everyday Discourse: The Cultural Ambiguities and Consequences of “Happy Talk,”* 72 AM. SOC. REV. 895, 906 (2007) (“[D]iversity discourse separates discussions about diversity, difference, and multiculturalism from more uncomfortable conversations about inequality, power, and privilege.”). Implicit in these

explores the implications of this extension for normative arguments about diversity, but it is worth mentioning here some of the implications it has for age diversity's more descriptive aspects as well. For example, age's numerical nature might make evaluating diversity of age easier in some ways, if one adopts certain mathematical constructs for diversity measurement.<sup>70</sup> However, age's unique temporal qualities also make age diversity a moving target, unlike other forms of diversity. Even if an institution retains an initial age-diverse membership, the age composition of that institution will naturally change over time due to the aging of its members.

In analyzing this extension of diversity to the domain of age, it is important to remember that any discussion of age diversity takes place within a larger discussion about diversity along other dimensions.<sup>71</sup> This is an inevitable byproduct of the intersection of age with other aspects of identity. This Article should thus be seen as a call for including age in such diversity discussions, rather than supplanting important conversations around other forms of diversity. There are, however, demographic links between age and other identity characteristics as well that make these discussions naturally complementary. Much of the coming racial diversity in the United States

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arguments is the belief that diversity itself lacks substance, and the benefits of shifting the discourse in its direction are thus negligible. See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 37 (2002) ("Diversity, like equality, is an idea that is at once complex and empty until it is given descriptive and normative content and context."). It is certainly the case that an exclusive focus on diversity of any type would be a mistake, and this Article does not suggest that this is a desirable approach. However, these critiques remind us that we must not let age diversity become just an empty slogan. It is important to define with precision what we mean by it, what the benefits and costs of it are, and how it applies in different contexts. This type of clarity with respect to age diversity is the primary aim of this Article.

70. See, e.g., Aisling J. Daly, Jan M. Baetens & Bernard De Baets, *Ecological Diversity: Measuring the Unmeasurable*, 6 MATHEMATICS 119, 120 (2018) (describing several criteria for evaluating mathematical measures of diversity). For age, we might take advantage of its numerical nature to employ various measures of statistical variability for measurement purposes. See SCOTT E. PAGE, DIVERSITY AND COMPLEXITY 39 (2011) (describing variance and standard deviation). If we want to better capture some meaningful social distinctions associated with age, an alternative is to measure the number and quantity of types within a group. See *id.* at 39–40 (describing entropy measures that capture distributions across types). For example, we might evaluate how well represented different generations (for example, Gen Z, Gen X) or age groups (for example, young, old) are in an institution. This substitutes accuracy for precision, as defining generations or age groups can be a fraught exercise, with these categories being contested and highly context-sensitive. See GAIL WILSON, UNDERSTANDING OLD AGE: CRITICAL AND GLOBAL PERSPECTIVES 17–19 (2000) (discussing different cultural understandings of age). We need not resolve these measurement debates to proceed with the more conceptual analysis pursued by this Article, but it is worth highlighting the multiple ways to measure diversity in general, and age diversity in particular.

71. See Schultz, *supra* note 31, at 1938–39 (noting that we must acknowledge demographic and individual diversity along multiple axes).

derives from younger cohorts, and this has implications for our politics.<sup>72</sup> As one commentator put it, the current and future political cleavages in the United States may be best described not as black versus white, but gray versus brown.<sup>73</sup> Thus, age diversity itself may have effects on other types of diversity and vice versa, and these cross-identity effects may also have normative implications.

With a basic understanding of age and its relationship to other demographic characteristics, it is worth detailing some of the types of heterogeneity that are important for the diversity analysis here. The first type is *minimal diversity*, which only requires the presence of one person who is different on the relevant dimension in a group.<sup>74</sup> For example, before the appointment of Sandra Day O'Connor in 1981, the Supreme Court was not diverse in terms of sex.<sup>75</sup> After the appointment, the Supreme Court was technically diverse as it exhibited heterogeneity of sex. But if the analysis were to stop there, diversity discussions would be relatively short and uninteresting.<sup>76</sup> This is even truer of age, as achieving minimal diversity merely requires adding to a homogeneous group one individual who was born at a different time or in a different generation, and the pool from which to draw such an individual is quite large. Further, establishing minimal diversity as the goal has troubling normative implications, as it may constitute tokenism.<sup>77</sup>

In its place, one might aim for *mirror diversity*, which entails a group

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72. See FREY, *supra* note 17, at 21 (“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.”).

73. See generally Ronald Brownstein, *The Gray and the Brown: The Generational Mismatch*, NAT’L J., July 23, 2010 (describing the political divide between an older, whiter cohort and much more diverse younger cohorts).

74. See Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1027 (2011) (“It is true that sometimes, when we talk about diversity, we are referring just to the presence of *any* level of heterogeneity in a group. Diversity in this minimal descriptive sense, though, could not possibly be regarded as evidence of operative norms of equality and nondiscrimination.”).

75. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2143 (2002) (“Reagan’s first Supreme Court appointee was Sandra Day O’Connor, the first woman to serve on the Court.”).

76. This is in part why advocates of diversity have urged a renewed focus on *inclusion*, rather than just on the numbers that would entail diversity. See HOWARD J. ROSS, *REINVENTING DIVERSITY* 38 (2011) (defining “inclusion” as “how fully involved people are in the structures of their organizations and societies”).

77. See Linda S. Greene, *Tokens, Role Models and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN’S L.J. 81, 84 (1990–1991) (“Limited inclusion of persons visibly different from the dominant group is the essence of tokenism.”).

composition that mirrors a reference population.<sup>78</sup> This type of diversity is of particular normative interest in contexts where representation matters.<sup>79</sup> When President Bill Clinton said that he wanted his cabinet to “look like America,” it was mirror diversity—with the reference population being the United States as a whole—for which he was implicitly aiming.<sup>80</sup> In the age context, we could assemble a group that achieved mirror diversity of the United States population by inviting the following proportions of individuals to a hypothetical group of one hundred people: one of the greatest generation, six of the silent generation, twenty-two baby boomers, twenty of Generation X, twenty-two millennials, twenty of Generation Z, and nine of the as yet unnamed generation after Generation Z.<sup>81</sup>

Alternatively, one might desire *maximal diversity*, or the presence of the widest range or variability in a group on the relevant dimension.<sup>82</sup> This type of diversity might be important if heterogeneity itself is valuable in a certain context, for instance because it provides a variety of viewpoints or experiences that enrich group activities.<sup>83</sup> If you were recruiting a group of seven people and wanted it to be maximally age diverse, you could invite to the group one member of every living generation on Earth, each roughly twenty years apart. Thus, you would recruit a newborn, a twenty-year-old, a forty-year-old, a sixty-year-old, an eighty-year-old, a one-hundred-year-old, and a one-hundred-twenty-year-old. You might have to settle for a slightly younger person to represent the eldest generation, as the oldest verified living person on Earth is currently Kane Tanaka of Japan, who is only 118.<sup>84</sup> This illustrates that achieving maximal age diversity is best thought of as an

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78. See Dawinder S. Sidhu, *Racial Mirroring*, 17 U. PA. J. CONST. L. 1335, 1338 (2015) (defining “racial mirroring” as “[a]ttempts to ensure that individuals in one defined group reflect the racial composition of another group . . .”).

79. See *infra* Section II.C (discussing representation as an age diversity rationale).

80. See Mitchell Locin, *Clinton Finishes Cabinet of Diversity*, CHI. TRIB. (Dec. 25, 1992), <https://www.chicagotribune.com/news/ct-xpm-1992-12-25-9204270273-story.html> [<https://perma.cc/97W2-5MYE>] (“Clinton pledged during the campaign that his administration would ‘look like America.’”).

81. See Erin Duffin, *Population Distribution in the United States in 2019, by Generation* (July 20, 2020), <https://www.statista.com/statistics/296974/us-population-share-by-generation> [<https://perma.cc/5MC5-874H>] (describing the proportions of different generations in the population).

82. This is a simplified conceptual definition. There are vigorous mathematical debates about how best to measure maximal diversity in a set. See generally, e.g., Katherine Vera, Fabio Lopez-Pires, Benjamin Baran & Fernando Sandoya, *Multi-Objective Maximum Diversity Problem*, 2017 XLIII LATIN AM. COMP. CONF. 1 (2017).

83. See *infra* Section II.D (discussing cognitive diversity as an age diversity rationale).

84. See Oisín Sweeney, *World’s Oldest Person Celebrates Her 118th Birthday*, EUROWEEKLY (Jan. 2, 2021), <https://www.euroweeklynews.com/2021/01/02/worlds-oldest-person-celebrates-her-118th-birthday> [<https://perma.cc/GX4U-RGTG>] (reporting that Kane Tanaka was certified as the oldest living person by the Guinness Book of World Records).

aspirational goal; the point is to strive for the widest range of ages in a group, given practical constraints, as a way of accomplishing certain normative goals.

Finally, *proxy diversity* is an umbrella category of different types of diversity. It arises in situations where the relevant dimension of interest serves as a proxy for some other characteristic of interest, and some form of diversity is desirable in that underlying characteristic.<sup>85</sup> This type of diversity is valuable when measuring the underlying variable is difficult and the proxy variable has a strong relationship with the underlying variable. For example, age serves as a good proxy for a child's social and mental capacities at young ages.<sup>86</sup> Schools seek an age diversity in the classroom that falls within a narrow band, in which most students are aged within one year of each other. This approach can facilitate classroom instruction and management, and it is also less costly than testing each child annually, especially when their capacities are changing quickly. This, however, is just one example of proxy diversity. When age is a proxy for other characteristics, a different form of proxy diversity might emerge.<sup>87</sup>

These multiple forms of diversity illustrate that diversity is itself diverse. It is better understood as a plural concept rather than a unitary one, and this understanding creates a need to proceed contextually. There are many different settings in which diversity might exist, from a small group like a jury to a large institution like a corporation to society as a whole. The normative justifications for diversity will also vary according to the form that age diversity takes and the setting in which it is examined. This is the subject of the next Part.

## II. THE CASES FOR AND AGAINST AGE DIVERSITY

One scholar has noted that diversity “wears a halo and also a haze.”<sup>88</sup> Indeed, this has been one of the major critiques of diversity as a concept—that it means whatever you want it to mean.<sup>89</sup> This Part will clear the haze

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85. See Michelle M. Mello & Kathryn Zeiler, *Empirical Health Law Scholarship: The State of the Field*, 96 GEO. L.J. 649, 693 (2008) (describing proxies as “variables the researchers hope are positively correlated with the true variable of interest—because data on the variables of interest are not available or are too expensive to collect”).

86. See Huntington, *supra* note 36 (describing neurological development).

87. See *infra* Section II.A (discussing age as a proxy for human developmental stage, reproductive capacity, and labor force attachment).

88. BERREY, *supra* note 12, at 26.

89. See Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 176–77 (2005) (“The concept means different things to different people depending upon when, where, and by whom it is invoked. Thus, one can never be quite certain of why or for what purpose diversity is

with respect to age diversity by disentangling and assessing the different families of normative arguments that apply to it.<sup>90</sup> Several of the arguments presented here are recognizable from the racial or gender diversity contexts. However, they may take on a different character or have different force when applied to age diversity because of the conceptual differences between age and other categories of identity.<sup>91</sup> Other arguments will be unique to age and age diversity.

The goal of this Part is not to make the case for or against age diversity as per se good or bad. Speaking in universal terms about age diversity is not possible, as there are many different forms it might take in various contexts. Instead, the aim is to map out the families of normative arguments that pertain to age diversity, or the multiple cases for and against age diversities.<sup>92</sup> This mapping exercise will entail understanding the rationales for or against age diversity on their own terms, rather than weighing them against other policy interests. Properly situated decisionmakers will eventually need to engage in this balancing analysis, and it may very well be the case that in some instances other policy interests will trump the interest in age diversity of a certain type. In order to understand how to weigh age diversity interests against other policy interests, however, one must first understand them on their own. That understanding is the aim of this Part.

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being utilized or who is being benefited or harmed.”).

90. This Article focuses on instrumental rather than intrinsic arguments about age diversity. See Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175, 1182–87 (describing the differences between intrinsic and extrinsic sources of value and whether they are valued instrumentally or as an end). There are intrinsic arguments that one could advance about age diversity, such as that age diversity is a constitutive feature of an institution, but such arguments would require defending a particular conception of that institution. The aim here is to introduce the major arguments in the normative case more broadly, rather than to address age diversity in one particular situation.

91. For instance, the historical racial injustice that undergirds some of the normative rationales for racial diversity simply does not exist for age and age diversity. See *supra* text accompanying notes 51–54. Thus, the arguments here will tend to be more forward-looking—thinking about what benefits and costs age diversity has in the present going forward—rather than thinking of age diversity as a vehicle to redress past injustice. See Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity? Silence at Boalt Hall: The Dismantling of Affirmative Action*, 91 CALIF. L. REV. 1149, 1152 (2003) (distinguishing between backward-looking and forward-looking justifications for racial diversity); see also *supra* text accompanying notes 33–34 (discussing the differences between age and other categories).

92. One might ask why homogeneity is being used as an objective baseline against which diversity has to “prove itself.” See Evan P. Apfelbaum, Katherine W. Phillips & Jennifer A. Richeson, *Rethinking the Baseline in Diversity Research: Should We Be Explaining the Effects of Homogeneity?*, 9 PERSP. ON PSYCHOL. SCI. 235, 242 (2014) (suggesting that “it may also be informative to consider what homogeneity takes away or even what biases diversity disrupts”).

The normative arguments presented here are organized roughly based on the size of the group to which they might apply. Thus, the first Section addresses age diversity in the largest unit of analysis: society.

#### A. DEMOGRAPHY

The largest group for which age diversity might be relevant is society as a whole.<sup>93</sup> But what is the ideal age diversity for society?<sup>94</sup> As an initial matter, all societies need some basic level of age heterogeneity for biological reasons. A society composed entirely of one-year-olds would not survive, as the infants would not be able to care for themselves.<sup>95</sup> Similarly, a society composed entirely of one-hundred-year-olds would also not be self-sustaining, as the population would lack the capacity for biological reproduction.<sup>96</sup> Beyond the biological imperative, a broader age diversity in a given society is also helpful for cultural propagation. Those who are in the older reaches of the human lifespan represent a social resource of memory and cultural traditions, and they can transmit these social resources to younger generations, particularly within the familial context.<sup>97</sup>

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93. See JENNIFER HICKES LUNDQUIST, DOUGLAS L. ANDERTON & DAVID YAUKEY, *DEMOGRAPHY: THE STUDY OF THE HUMAN POPULATION* 93 (4th ed. 2015) (“The most important dimensions of [population] composition, indisputably, are age and sex.”).

94. The demographic issues associated with age diversity may be present at a local level as well. For example, rural areas in various countries have experienced problems as youth have left for urban locations in search of work, leaving a less age-diverse population behind. See LAURA DEOTTI & ELISENDA ESTRUCH, *FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, ADDRESSING RURAL YOUTH MIGRATION AT ITS ROOT CAUSES: A CONCEPTUAL FRAMEWORK* 21–23 (2016) (describing the various negative impacts of out-migration of youth from rural areas).

95. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 19 (1999) (“Without aggregate caretaking, there could be no society, so we might say that it is caretaking labor that produces and reproduces society.”).

96. See Rebecca Tan & Tania Dutta, *This 74-Year-Old Woman Just Gave Birth to Twins*, WASH. POST (Sept. 6, 2019, 10:55 AM), <https://www.washingtonpost.com/world/2019/09/06/this-year-old-woman-just-gave-birth-twins> [<https://perma.cc/ZCK8-NL8J>] (describing Mangayamma Yaramati as the oldest woman to give birth at seventy-four, though doing so with assistive reproductive technologies). Beyond this basic age diversity needed to propagate society, further age diversity is also attractive to the extent that it represents scientific advances in longevity. However, in order to prevent the normative question of societal age diversity from collapsing into the question whether extending life indefinitely is achievable or desirable, we can assume that there is some set maximum human lifespan. See Glenn Harlan Reynolds, *Live Long—and Prosper?*, 45 JURIMETRICS J. 355, 357 (2005) (“[M]aximum lifespan, the longest time that any humans live, has not advanced much if one discounts Biblical stories of people living for several centuries.”).

97. See Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 16 (2013) (“Grandparents often take on the responsibility of passing down family and cultural history to their grandchildren, which can play a large part in establishing the identity of children.”).

Age often serves as a proxy for some other characteristic of interest in assessing whether or not particular forms of societal age diversity are normatively desirable.<sup>98</sup> Thus, it is not diversity in ages per se that is important, but diversity in the underlying characteristic for which age stands in. In the above examples, age stands in for human development, reproductive capacity, and accumulated experience, for which age is an excellent proxy.<sup>99</sup> Age also indicates one's position on the lifecourse within a particular cultural context.<sup>100</sup> Thus, increased age diversity means that a society will have a range of individuals who are at different locations on the standardized lifecourse. But which array of life stages and their associated behaviors is normatively attractive? The field of demography provides some guidance on this question.

Demographers have described how the age composition of a population can present unique opportunities or challenges. For example, lower-income countries often possess an age population structure with large numbers of youth and relatively fewer older adults.<sup>101</sup> These youth are dependent on others in a variety of ways until they themselves become productive members of society, and this period of youth dependency may produce economic strains.<sup>102</sup> In contrast, upper-income countries tend to exhibit aging populations, with more similar numbers of youth and adults.<sup>103</sup> This is primarily due to declining fertility rates and the natural consequence of smaller cohorts of young people.<sup>104</sup> This poses its own problems. To the extent that older individuals exit the workforce and are supported by public or familial resources, such a situation may create similar economic strains as a society that is mostly composed of youth.<sup>105</sup>

This points to a certain form of age diversity that is particularly

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98. See *supra* text accompanying notes 84–86.

99. See FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 129–30 (2003) (arguing for the use of age as a proxy in circumstances where it has predictive power).

100. See *supra* text accompanying notes 42–44.

101. See LUNDQUIST ET AL., *supra* note 93, at 100 (showing various population pyramids).

102. See *id.* at 117 (“Youth dependency can be a drain on per-capita wealth in [less developed regions].”). Youthful life stages are also associated with increased sexual behavior and criminal activity, which can pose problems for public health and safety. See, e.g., KARL L. DEHNE & GABRIELE RIEDNER, SEXUALLY TRANSMITTED INFECTIONS AMONG ADOLESCENTS 7–10 (2005) (describing the costs associated with adolescent sexuality).

103. See LUNDQUIST ET AL., *supra* note 93, at 118–19 (“[More developed regions’] population pyramids are almost columnar in shape and are projected to be even more so in the future.”).

104. See *id.* at 114 (describing how declining fertility contributes to an aging population).

105. See GEORGE MAGNUS, THE AGE OF AGING: HOW DEMOGRAPHICS ARE CHANGING THE GLOBAL ECONOMY AND OUR WORLD, at xxiii (2009) (“Western countries . . . have completed the decline in youth dependency and now face a rapid increase in old-age dependency.”).

attractive at the societal level. Specifically, the age structure should contain a large number of individuals occupying life stages in which they are economically or socially productive. More upper-income countries have in fact already reaped a “demographic dividend” in the mid-twentieth century when a large bulge in the population structure—the baby boomer generation—reached working ages.<sup>106</sup> The presence of a large number of working-age individuals as compared to dependent youth and older adults minimizes the age-dependency ratio, or the ratio of working age individuals to non-working age individuals.<sup>107</sup> In addition to ensuring a tax base sufficient to fund governmental programs, working-age adults are also needed to provide caregiving labor for an older population.<sup>108</sup> The specific form that this ideal age diversity takes will vary based on the cultural context in question, as the range of ages that could be considered working age will vary by country.<sup>109</sup> For example, it is more common for individuals in their early teens to join the labor market in more agrarian societies, while other societies more strictly regulate working ages through child labor and mandatory retirement laws.<sup>110</sup> As will be explored in the next Part, immigration law is one of the major policy levers available to address societal age diversity.<sup>111</sup>

## B. DISTRIBUTIVE JUSTICE

Age diversity might also impact issues relevant to society as a whole

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106. See James N. Gribble & Jason Bremner, *Achieving a Demographic Dividend*, 67 POPULATION BULL. 1, 2 (2012) (“The demographic dividend refers to the accelerated economic growth that begins with changes in the age structure of a country’s population as it transitions from high to low birth and death rates.”).

107. See *Age-Dependency Ratio*, ENCYCLOPEDIA OF PUB. HEALTH 23 (Wilhelm Kirch ed., 2008) (“The age-dependency ratio is a summary measure of age composition in a population that incorporates specific assumptions about ‘productive’ and ‘unproductive’ groups. Age-dependency ratios represent the relative numbers of dependents to supporters in the population.”).

108. See generally AI-JEN POO & ARIANE CONRAD, *THE AGE OF DIGNITY: PREPARING FOR THE ELDER BOOM IN A CHANGING AMERICA* (2016) (arguing for a relaxed immigration policy to boost the number of potential eldercare workers).

109. See WILSON, *supra* note 70, at 31 (“[C]ultural views of age, and particularly old age, vary across the world and change over time.”).

110. See Cathryne L. Schmitz, Elizabeth KimJin Traver, Desi Larson & Pamela Pieris, *Introduction*, in *CHILD LABOR: A GLOBAL VIEW* 1, 5 (Cathryne L. Schmitz, Elizabeth KimJin Traver & Desi Larson eds., 2004) (“Child labor rates are higher in rural areas, where the work is predominantly agrarian; . . .”); Juliane Massarelli, *The Origins of Retirement*, 17 QUINNIAC PROB. L.J. 111, 111–12 (2003) (discussing the origins of mandatory retirement laws); Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1069–75 (1999) (discussing the history of child labor laws).

111. See *infra* Section III.B.1.

through its relationship to distributive justice, which concerns the fair allocation of benefits and burdens in society.<sup>112</sup> Because the focus is on the age diversity of societal institutions whose potential members exist at the same time, this discussion does not necessarily implicate questions of intergenerational justice, which deal with duties between generations that do not overlap in time.<sup>113</sup> Depending on the theory of distributive justice to which one subscribes, a different composition of individuals in various societal institutions will be consistent with fairer allocations of societal goods.<sup>114</sup> Each theory will likely prescribe a slightly different form of diversity as a normative ideal, but the goal of this Section is not to describe what every theory of distributive justice would require vis-à-vis age diversity. Instead, the more modest goal is to illustrate how such arguments might function and how age might complicate them, using egalitarianism as an instructive example.

Egalitarian theories posit generally that welfare should be distributed in a more or less equal fashion across members of society.<sup>115</sup> Thus, all other things being equal, an egalitarian might prefer something approximating mirror diversity in important societal institutions because it would represent outcomes roughly consistent with equality of opportunity or resources.<sup>116</sup> For example, most egalitarians would cheer the inclusion of more women and people of color in high-status professions and public institutions as compared to the past.<sup>117</sup> These increasingly diversified spaces suggest a fairer allocation of job opportunities and political power than in the past, when individuals were more routinely excluded from such groups on the

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112. See Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 346 (2018) (“The first question for any distributive analysis is what good is being distributed, and all goods can typically be conceptualized as either benefits or burdens.”).

113. See Axel Gosseries & Lukas H. Meyer, *Intergenerational Justice and its Challenges*, in INTERGENERATIONAL JUSTICE 1, 1–7 (Axel Gosseries & Lukas H. Meyer eds., 2009) (describing the unique features of intergenerational justice).

114. See Anita Bernstein, *Diversity May Be Justified*, 64 HASTINGS L.J. 201, 227 (2012) (“Understood in terms of corrective and distributive justice, diversity is more of an outcome than a goal.”).

115. See IWAO HIROSE, EGALITARIANISM 1 (2015) (“Egalitarianism: a class of distributive principles, which claim that individuals should have equal quantities of well-being or morally relevant factors that affect their life.”).

116. See David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 811 (2005) (“To be sure, the absence of diversity in education, employment or public office does not always reflect an absence of opportunity. . . . However, the absence of diverse participation in many positions provides a strong indicator of an absence of fair opportunity.”).

117. See, e.g., Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1042–46 (2011) (noting some progress but still a troubling lack of racial and gender diversity in law firms).

basis of sex, race, or both.<sup>118</sup>

An age diversity that mirrors the general population would at first glance seem to represent an outcome consistent with equality as well. However, the relative lack of certain age groups in societal institutions does not necessarily indicate an unequal distribution of welfare more generally.<sup>119</sup> While the lack of age diversity in a given institution may represent a temporary inequality between two individuals at one point in time, this inequality will often even out across the lives of those two individuals.<sup>120</sup> For example, while eighteen-year-olds are prohibited from serving in the United States Senate, making it less age diverse, they will eventually have the opportunity to do so once they reach the age of thirty, the same as everyone else.<sup>121</sup> Similarly, eighty-year-olds are not well-represented in the workplace, making it less age diverse, but if they had the opportunity to work in the past, they may have had a similar distribution of job opportunities over their lifetimes when compared to younger individuals.<sup>122</sup> Thus, the universal nature of the aging process helps to ensure equality across age groups, provided that age-based entitlements and encumbrances are consistent over time.<sup>123</sup>

Sometimes, however, this requirement of consistency is not met for a specific age cohort.<sup>124</sup> If a particular generation has experienced a dearth of opportunities or a disproportionate set of burdens due to negative events occurring at an inopportune time, then the presence of members of that disadvantaged generation in societal institutions may serve distributive

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118. See JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* 232 (2014) (describing various identity characteristics as bottlenecks to equality of opportunity).

119. See Alexander A. Boni-Saenz, *Age, Equality, and Vulnerability*, 21 *THEORETICAL INQUIRIES L.* 161, 171–74 (2020) (describing how age and the temporal questions it raises complicate equality analyses).

120. See Boni-Saenz, *supra* note 33, at 872–75 (describing why the lifetimes of individuals are the relevant temporal units of analysis); see also LARRY S. TEMKIN, *INEQUALITY* 233 (1993) (“[O]n a complete lives view, an egalitarian should be concerned about A’s being worse off than B to the extent, and only to the extent, that A’s life, taken as a *complete whole*, is worse than B’s, taken as a *complete whole*.” (emphasis in original)).

121. See U.S. CONST. art I, § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years . . .”).

122. See *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Jan. 22, 2020), <https://www.bls.gov/cps/cpsaat18b.htm> [<https://perma.cc/9ZEE-92VE>] (noting the relatively few workers aged above sixty-five in various industries).

123. See Boni-Saenz, *supra* note 33, at 882 (“From an egalitarian perspective, time serves to cure the negative effects of the discrimination.”).

124. See *supra* text accompanying notes 40–48 (describing the differences between age groups and cohorts).

justice goals by remedying that preexisting inequality.<sup>125</sup> For example, some might argue that millennials have been disadvantaged by the Great Recession striking in 2008 when many of them were first entering the workforce, followed now by the economic contraction caused by the COVID-19 pandemic.<sup>126</sup> This converts an argument for age diversity more broadly into an argument for cohort diversity in a particular setting.<sup>127</sup> The empirics of such a cohort-based argument can be tricky, as they require projecting out into the future what the likely lifetime welfare of a particular generation might be, but such an argument may be more likely to succeed than one based on age group equality.

Thus, as the egalitarian example demonstrates, there may exist distributive justice arguments for certain forms of age diversity, but such arguments will need to contend with the temporal nature of age and provide a sound empirical basis for their premises. The next Section explores why the presence of individuals of different ages in societal institutions may be normatively desirable or undesirable for reasons of recognition, rather than distribution.<sup>128</sup>

### C. REPRESENTATION

Age diversity can serve to advance the representation of individuals of various ages in societal institutions. To the extent that they have force, representation arguments support an institutional age composition that mirrors a reference population, often the adult population, rather than minimizing or maximizing age diversity or seeking some other configuration of ages. These arguments have particular power in the context of public institutions or institutions that are accorded high social status, as these hold special expressive significance.<sup>129</sup>

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125. See Boni-Saenz, *supra* note 33, at 886 (describing how contextual factors can lead to lifetime inequalities despite equal treatment over the lifecourse).

126. See, e.g., Verónica C. Gonzales-Zamora, *Give Me Liberty, or Give Me Breath: A Call for Economic Justice*, J. LEGAL EDUC. (forthcoming 2021) (describing the pivotal events that have placed millennials in complicated position); Alexis C. Madrigal, *Why Housing Policy Feels Like Generational Warfare*, ATLANTIC (June 13, 2019), <https://www.theatlantic.com/technology/archive/2019/06/why-millennials-cant-afford-buy-house/591532> [<https://perma.cc/J44Z-J73S>] (noting how home ownership opportunities differ significantly by generation).

127. See Juliana Bidadanure, *Better Procedures for Fairer Outcomes: Can Youth Quotas Increase our Chances of Meeting the Demands of Intergenerational Justice?*, in YOUTH QUOTAS AND OTHER FORMS OF YOUTH PARTICIPATION IN AGEING SOCIETIES 37, 51–54 (Jörg Tremmel, Antony Mason, Petter Haakenstad Godli & Igor Dimitrijoski eds., 2015) (disentangling age- and cohort-based rationales).

128. See NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 13–14 (1997) (contrasting issues of distribution and recognition).

129. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025–28

In analyzing representation arguments, it is important to first distinguish between two forms of representation: descriptive and substantive. Descriptive representation is representation that “depends on the representative’s characteristics, on what he *is* or *is like*, on being something rather than doing something. The representative does not act for others; he ‘stands for’ them, by virtue of a correspondence or connection between them, a resemblance or reflection.”<sup>130</sup> Thus, an individual serves as a representative merely by having some relevant characteristic in common with those that she represents. In the context of this Article, that characteristic is age.

In contrast, substantive representation is “representation as an acting for others, an activity in behalf of, in the interest of, as the agent of, someone else.”<sup>131</sup> This form of representation is more concerned with the interests of those who are represented and whether the representative is acting to advance those interests, similar to the understanding adopted by agency law.<sup>132</sup> The descriptive representation that mirror age diversity provides has the potential to deliver psychological, social, and institutional benefits, though these will likely be more modest than those afforded by representation on the basis of race or sex. In addition, age-based descriptive representation may also contribute to or hinder substantive representation.

On a psychological level, descriptive representation ensures that individuals from all relevant groups have role models.<sup>133</sup> While all segments of the population benefit from role models, they will be especially important if a particular group lacks representation in a particular field.<sup>134</sup> For example,

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(1996) (discussing the expressive power of law and social norms).

130. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 61 (1967) (emphasis in original). The normative power of descriptive representation derives at least in part from the importance of the politics of recognition. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM* 25, 25 (Amy Gutmann ed., 1994) (“[O]ur identity is partly shaped by recognition or its absence, . . . and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.”).

131. See PITKIN, *supra* note 130, at 113.

132. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf . . .”).

133. See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986) (arguing for affirmative action because “the expansion of a professional class [passes] elevated aspirations to subsequent generations”). *But see* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76 (1986) (rejecting the role model rationale as sufficient to withstand an Equal Protection challenge); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1226–29 (1991) (critiquing the role model argument).

134. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1557–58 (2005) (discussing how role models from subordinated groups can reduce implicit bias).

part of what makes Alexandria Ocasio-Cortez compelling to so many Democratic voters is that she is particularly young, in addition to being a woman of color. Millennials who are near her age may see themselves in her and thus might be more likely to see a career in politics as a possibility.<sup>135</sup> The importance of the intersection of age with race and gender is significant here. Given demographic trends, role models who possess a racial minority status are more likely to come from younger cohorts.<sup>136</sup> In addition, in the institutions in which older males are overrepresented relative to the general population, shifting toward mirror diversity would open up opportunities for participation for other groups, such as women.<sup>137</sup> As a result, aiming for mirror age diversity may be an effective way to provide racial and gender role models as well.

However, there are reasons to think that the role model effect might be more muted with age than with other identity characteristics. It may be easier to imagine oneself as older or younger as compared to being a person of a different race or sex.<sup>138</sup> For younger individuals in particular, an older role model can represent one's future.<sup>139</sup> Since role models are often future-oriented—who we want to become—for many it might suffice to see someone who is older and shares some other identity characteristics. Conversely, older individuals may not see younger individuals as role models in the same way, as youth is in their past. However, they may derive a different psychological benefit from seeing younger individuals who remind them of their past selves, for instance if it is connected with the practice of reminiscence.<sup>140</sup>

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135. See Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1116 (2003) (“[D]iversity provides role models for those historically excluded. It can provide a source of hope and inspiration for those who would otherwise limit their horizons and aspirations.”).

136. See *supra* text accompanying notes 71–73.

137. See Shane Goldmacher & Jonathan Martin, *Alexandria Ocasio-Cortez Defeats Joseph Crowley in Major Democratic House Upset*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/nyregion/joseph-crowley-ocasio-cortez-democratic-primary.html> [<https://perma.cc/4FVJ-BDCY>] (noting that Ocasio-Cortez, running “as a woman, as a young person, as a working-class champion, as an unabashed liberal and as a person of color,” defeated a fifty-six-year-old white male incumbent).

138. See Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1435–40 (1996) (exploring the case for race-specific role modeling); Berenice Fisher, *Wandering in the Wilderness: The Search for Women Role Models*, 13 SIGNS 211, 212–14 (1988) (discussing the value of female role models to women).

139. See JENNIFER RADDEN, *DIVIDED MINDS AND SUCCESSIVE SELVES* 25–31 (1996) (conceptualizing the self as continuous through time).

140. See Ernst Bohlmeijer, Marte Roemer, Pim Cuijpers & Filip Smit, *The Effects of Reminiscence on Psychological Well-Being in Older Adults: A Meta-Analysis*, 11 AGING & MENTAL HEALTH 291, 297 (2007) (finding that “reminiscence interventions have moderate effects on life-satisfaction and emotional well-being of older adults”).

Relatedly, descriptive representation on the basis of age promotes the value of social equality more broadly.<sup>141</sup> This value is realized when everyone in society is seen as worthy of respect and there are no social hierarchies that serve to place one person in a dominant or subordinate position relative to another.<sup>142</sup> Age diversity, like other forms of diversity, can help to promote this ideal because the representation of people of various types in societal institutions sends the message that these institutions are open to all. In the context of age diversity, it demonstrates that one's age alone need not be a barrier to one's participation or membership.<sup>143</sup> Within those institutions, the presence of people of different ages can also create social solidarity and foster a feeling of social connectedness across generations.<sup>144</sup>

The descriptive representation that age diversity provides creates benefits to the institutions that are age diverse as well. Individuals are more likely to see an institution as legitimate if they feel as if they are present in those institutions by virtue of their descriptive representatives.<sup>145</sup> It can also foster attachments between people and those institutions, and forming these attachments at an early age is important to sustain those institutions in the future.<sup>146</sup> This type of social legitimacy and attachment is vital in the realm of politics so that all age groups feel engaged with the electoral and ruling processes rather than socially excluded.<sup>147</sup> This reasoning is likely what led

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141. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 191 (1990) ("Attending to group-specific needs and providing for group representation both promotes that social equality and provides the recognition that undermines cultural imperialism.").

142. See Samuel Scheffler, *The Practice of Equality*, in *SOCIAL EQUALITY: ON WHAT IT MEANS TO BE EQUALS* 21, 21–22 (Carina Fourie, Fabian Schuppert & Ivo Wallimann-Helmer eds., 2015) (understanding social equality as relational in nature).

143. See FISHKIN, *supra* note 118, at 13 (describing bottlenecks as "a narrow place in the opportunity structure through which one must pass in order to successfully pursue a wide range of valued goals").

144. See Danielle Allen, *Toward a Connected Society*, in *OUR COMPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY*, *supra* note 63, at 71, 87–88 (arguing for a socially connected and egalitarian society in which institutions actively foster bridging ties across demographic difference).

145. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 35 (1994) (describing the importance of this type of virtual representation).

146. See Bidadanure, *supra* note 127, at 50 (describing how youth quotas could promote "feelings of inclusion and help in reengaging young people in their political communities").

147. See Martha L. Minow, *From Class Actions to Miss Saigon: The Concept of Representation in the Law*, 39 CLEV. ST. L. REV. 269, 291 (1991) (noting how representation can promote "apparent legitimacy"). It will also be important to a lesser extent in private institutions. For instance, it may be valuable for groups such as attorneys to be representative of the public at large to engender trust in them across demographic groups. See J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black*

the Democratic Party to institute age quotas for delegates to the 1972 Democratic Convention.<sup>148</sup> The 1968 Democratic Convention was widely seen as a debacle, as various groups, including youth, protested outside. The lesson learned was that it was better to have those individuals represented inside the building.<sup>149</sup>

In addition to these direct effects of age-based descriptive representation, this form of representation may also help facilitate substantive representation if certain conditions are met.<sup>150</sup> There must first be some relationship between age and the political interests that one might possess. As a matter of public opinion, there are certainly generational differences in political ideology.<sup>151</sup> In addition, societal resources and legal entitlements are often allocated at least in part according to age, creating different age-based political interests in them.<sup>152</sup>

The second condition is the existence of some barrier that prevents people of one age from effectively representing the interests of individuals of other ages.<sup>153</sup> There are two plausible barriers to this cross-age representation. The first is a breakdown in communication between members of generations such that the interests of one generation are not adequately understood or considered by the other.<sup>154</sup> Youth activists believed this to be the case in the 1960s, when activist Jack Weinberg of the Free Speech Movement coined the phrase “Don’t trust anybody over thirty.”<sup>155</sup> We may

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*Lawyer Sit at Our Table*,” 71 *FORDHAM L. REV.* 1257, 1268 (2003) (describing the importance of legitimacy across demographic groups in the legal profession).

148. See Robert E. Goodin, *Convention Quotas and Communal Representation*, 7 *BRIT. J. POL. SCI.* 255, 255 (1977) (describing the various quotas put in place for the 1972 Democratic Convention).

149. See *id.*

150. See Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* 61 *J. POL.* 628, 641–48 (1999) (describing the two contexts in which descriptive representation enhances substantive representation as being in contexts of uncrystallized interests and contexts of distrust).

151. See Lydia Saad, *Socialism as Popular as Capitalism Among Young Adults in U.S.*, *GALLUP* (Nov. 25, 2019), <https://news.gallup.com/poll/268766/socialism-popular-capitalism-among-young-adults.aspx> [<https://perma.cc/TY59-DLG3>] (contrasting the positive views toward socialism held by younger generations as compared with older ones).

152. See *supra* text accompanying note 44.

153. See Mansbridge, *supra* note 150, at 641 (“In conditions of impaired communication, including impairment caused by inattention and distrust, the shared experience imperfectly captured by descriptive representation facilitates vertical communication between representatives and constituents.”).

154. See ANGIE WILLIAMS & JON F. NUSSBAUM, *INTERGENERATIONAL COMMUNICATION ACROSS THE LIFE SPAN* 26–45 (2001) (discussing the contexts and barriers across generations).

155. See SETH ROSENFELD, *SUBVERSIVES: THE FBI’S WAR ON STUDENT RADICALS, AND REAGAN’S RISE TO POWER* 214 (2012) (attributing the quote to Jack Weinberg in response to a reporter who insinuated that the Free Speech movement was backed by communists).

be entering another period of intergenerational conflict and misunderstanding between those baby boomer activists of the 1960s, now grown up and in positions of political power, and the younger generations of millennials and Generation Z.<sup>156</sup> In such circumstances, including descriptive representatives from younger cohorts might reduce the harm to the deliberative process created by the lack of age diversity in various representative bodies.<sup>157</sup>

A second possible barrier arises when there is an age-based difference in political interests grounded in the time horizons for certain political issues.<sup>158</sup> Consider climate change, which requires actions that often involve short-term costs but long-term benefits. For example, a carbon tax would increase the costs of carbon-based activities in the present while averting costs associated with climate change that will occur in the future.<sup>159</sup> Older individuals have little individual incentive to tackle such issues because they will see only the costs and none of the benefits, though those with loved ones in younger generations may still feel some personal stake. In contrast, younger individuals will experience the future costs of inaction directly and thus might be more willing to accept costs in the present. This argument assumes a troubling lack of altruism, but if the factual predicates contain some truth, then younger representatives will be more likely to represent the interests of those who will experience the consequences of these types of decisions. Even if this is not the case, their presence will lend legitimacy to any decisions that have these long-term impacts.<sup>160</sup>

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156. See JENNIE BRISTOW, *BABY BOOMERS AND GENERATIONAL CONFLICT* 183–84 (2015) (“[W]hereas social or cultural critiques over the twentieth century tended to focus on divisions of class, race, or gender, and saw problems or solutions in terms of political differences between left and right, the recent period tends to focus on the problems allegedly caused by the domination of one generation over another.”).

157. See Bidanure, *supra* note 127, at 50 (“Another potential impact of youth quotas could be an enhanced vertical communication between young people and [representatives].”).

158. See Anja Karnein & Dominic Roser, *Saving the Planet by Empowering the Young?*, in *YOUTH QUOTAS AND OTHER FORMS OF YOUTH PARTICIPATION IN AGEING SOCIETIES*, *supra* note 127, at 77, 89–90 (considering but questioning whether empowering youth would lead to better environmental outcomes). Greta Thunberg, the eighteen-year-old Swedish climate change activist, illustrates this concept well in one of her speeches, in which she proclaims: “We are not the ones who are responsible for this, but we are the ones who have to live with these consequences, and that is so incredibly unfair.” Robinson Meyer, *Why Greta Makes Adults Uncomfortable*, ATLANTIC (Sept. 23, 2019), <https://www.theatlantic.com/science/archive/2019/09/why-greta-wins/598612/> [<https://perma.cc/878G-7KGB>].

159. See generally Roy Boyd, Kerry Krutilla & W. Kip Viscusi, *Energy Taxation as a Policy Instrument to Reduce CO<sub>2</sub> Emissions: A Net Benefit Analysis*, 29 J. ENVTL. ECON. & MGMT. 1 (1995) (discussing the economic implications of carbon taxes).

160. See Ivo Wallimann-Helmer, *Can Youth Quotas Help Avoid Future Disasters?*, in *YOUTH QUOTAS AND OTHER FORMS OF YOUTH PARTICIPATION IN AGEING SOCIETIES*, *supra* note 127, at 57, 70–73 (doubting whether youth representatives would enhance long-term planning but acknowledging that

Even with these positive effects on substantive representation, it is possible that descriptive representation may also actively harm substantive representation in the political sphere. Some research has shown that people who share demographic characteristics with their representatives may scrutinize them less, assuming that they are acting in their interests even when they might not be.<sup>161</sup> Conversely, people who do not share demographic characteristics with their representatives can become politically demotivated, believing their interests and concerns will not matter to a demographically-different representative.<sup>162</sup> This illustrates how it might be dangerous to embrace too strong a link between age and political interests—a form of age essentialism—as it may have detrimental psychological effects.

While representation rationales apply primarily, though not exclusively, to public institutions, the next set of considerations apply to any group, as they deal with how age diversity may affect group outcomes more broadly, for good or ill.

#### D. GROUP EFFICACY

Groups often come together to solve problems, and this Section considers how age diversity might help or hinder in accomplishing this objective.<sup>163</sup> Age diversity will help if it increases the cognitive diversity in the group and stimulates group processes that elicit that cognitive diversity in group decision-making.<sup>164</sup> In contrast to representation claims, these

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their presence would increase the legitimacy of long-term policy decisions).

161. See CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 73 (1993) (quoting one Black Representative as saying: “One of the advantages, and disadvantages, of representing blacks is their shameless loyalty to their incumbents. You can almost get away with raping babies and be forgiven. You don’t have *any* vigilance about your performance.” (emphasis in original)).

162. See Claudine Gay, *The Effect of Black Congressional Representation on Political Participation*, 95 AM. POL. SCI. REV. 589, 598–99 (2001) (finding that white constituents are less politically engaged in districts with Black representatives).

163. See Julie Christian, Lyman W. Porter & Graham Moffitt, *Workplace Diversity and Group Relations: An Overview*, 9 GROUP PROCESSES & INTERGROUP REL. 459, 460 (2006) (“[W]e can conclude that diversity—mixed composition workgroups—can improve group performance by providing groups with a wider range of perspectives and a broader skills base, but simultaneously it can be detrimental to group cohesion and performance because the diversity in personal backgrounds has the potential to exert a negative influence.”).

164. See SCOTT E. PAGE, *THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY* 13 (2017) (“[A] team’s performance depends on the diversity as well as the ability of its members. . . . The best team will not consist of the ‘best’ individuals. It consists of diverse thinkers.”); Anthony Carnevale & Nicole Smith, *The Economic Value of Diversity*, in *OUR COMPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY*, *supra* note 63, at

arguments favor maximal age diversity in a given group rather than aiming for diversity corresponding to a reference population.<sup>165</sup> However, maximal age diversity might also hinder group efficacy if age differences among group members lead to social conflict.<sup>166</sup> This Section will explore each of these sets of arguments in general, examine how they might apply to age diversity in particular, and review the mixed empirical evidence on them.

The basic cognitive diversity argument for age diversity is familiar from other diversity contexts, and it has two basic components.<sup>167</sup> First, including diverse perspectives—that is, cognitive diversity—in groups will enhance group outcomes. Second, identity diversity, including age diversity, will contribute to the cognitive diversity in a group. Cognitive diversity exists when individuals in a group have diverse cognitive repertoires, or sets of “information, knowledge, heuristics or tools, representations, and mental models and frameworks.”<sup>168</sup> Diverse perspectives within groups allow teams to cover more cognitive ground overall by having access to the widest variety of information, knowledge, and frameworks.<sup>169</sup> Empirical studies about the effectiveness of cognitively diverse teams support this proposition.<sup>170</sup> These

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106, 120 (“Diverse perspectives can spring from many sources, including education, work and life experience, and personal identity.”). This raises the difficult question of which forms of identity diversity to prioritize as a general matter, which I bracket for the discussion here.

165. See text accompanying notes 81–83 (describing maximal diversity).

166. See PETER H. SCHUCK, *DIVERSITY IN AMERICA* 40 (2003) (“The dismal trail of hostility, fear, violence, and social upheaval aroused by ethnic, religious, racial, and other diversities is a very long one. The trail leads today from Sri Lanka, Rwanda, the Balkans, the Mideast, and many other dangerous neighborhoods back to the earliest human communities.”); Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 *SCANDINAVIAN POL. STUD.* 137, 138–39 (2007) (worrying that racial and ethnic diversity might lead to decreased social solidarity). Age diversity is not part of this checkered history, perhaps because age-based conflicts would require people to turn on their own families. However, age differences may still harm group cohesion in smaller groups. See David Leonhardt, *Old vs. Young*, *N.Y. TIMES* (June 22, 2012), <http://www.nytimes.com/2012/06/24/opinion/sunday/the-generation-gap-is-back.html> [<https://perma.cc/MN9C-4K6U>] (noting intergenerational tension with respect to political beliefs, economic opportunities, and social practices).

167. See RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 94 (2013) (“Devotees of diversity argue that teaching, learning, and decision making will typically be richer, more informed, and better received if a wide array of people affiliated with salient social groupings participate together in carrying out the missions of the nation’s schools, workplaces, and governments.”).

168. PAGE, *supra* note 164, at 52 (emphasis removed).

169. See Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 *PROC. NAT’L ACAD. SCI.* 16385, 16386–87 (2004) (providing a mathematical model and computational test of this proposition).

170. See PAGE, *supra* note 164, at 171–82 (collecting empirical studies); Seyhan Güver & Renate Mutschig, *Effects of Diversity in Teams and Workgroups: A Qualitative Systematic Review*, 7 *INT’L J. BUS., HUMAN. & TECH.* 6, 15 (2017) (conducting a systematic analysis of studies from 1959–2016 and finding that diversity has a positive impact on creativity and innovation); Karen A. Jehn, Gregory B. Northcraft & Margaret A. Neale, *Why Differences Make a Difference: A Field Study of Diversity, Conflict,*

diverse cognitive repertoires are particularly useful for groups tackling complex cognitive problems, which are increasingly important in our knowledge economy.<sup>171</sup>

Identity diversity contributes to cognitive diversity because identity characteristics affect one's experiences, and these experiences, in turn, cause individuals to develop different cognitive tools.<sup>172</sup> Social psychologists have demonstrated cross-cultural differences in cognitive mapping, as individuals from different cultures notice different features of situations and understand them differently.<sup>173</sup> This is not to say that identity diversity will always contribute cognitive diversity to a group, nor that the cognitive diversity will in all instances be helpful. Identity-based diversity is most likely to be beneficial when tackling cognitive problems in which there is a significant human element, such as those that appear in the fields of education, finance, entertainment, or health.<sup>174</sup> It is less likely that one's identity characteristics will add to one's cognitive toolset in a way that will enhance a team's ability to handle scientific or technical problems, although there are examples of this as well.<sup>175</sup> Thus, a marketing firm trying to find ways of making certain products appealing will be more likely to benefit from the identity-based cognitive diversity than theoretical physicists trying to understand the nature of a quark.

Age diversity will contribute to cognitive diversity in a group to the

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*and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741, 758 (1999) (finding the most effective teams have high information diversity).

171. See David H. Autor, Frank Levy & Richard J. Murnane, *The Skill Content of Recent Technological Change: An Empirical Exploration*, 118 Q.J. ECON. 1279, 1322 (2003) (describing how computer technology is replacing humans for routine tasks but not for tasks requiring creativity, problem-solving, and communication).

172. See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 307 (2007) ("Though identity matters, we cannot equate individual tools or collections of tools with specific identities. We can expect, however, that identity differences lead to experiential differences that in turn create tool differences.").

173. See generally RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 47–78 (2003) (describing differences in cognition across cultures).

174. See PAGE, *supra* note 164, at 151 ("As a rule, we should expect identity-driven differences to matter in any domain that serves people: education, finance, entertainment, or health."); Chad Sparber, *Racial Diversity and Aggregate Productivity in U.S. Industries: 1980–2000*, 75 S. ECON. J. 829, 848–50 (2009) (demonstrating productivity gains from racial diversity in sectors employing creative decisionmakers, while other sectors may demonstrate productivity losses).

175. See, e.g., Emily Martin, *The Egg and the Sperm: How Science Has Constructed a Romance Based on Stereotypical Male-Female Roles*, 16 SIGNS 485, 486–92 (1991) (describing how stereotypical thinking about sex roles created an inaccurate scientific account of the interaction between egg and sperm).

extent that age contributes to one's cognitive toolset, and that cognitive diversity will be helpful to the extent that it bears on the problems that a particular group is trying to solve.<sup>176</sup> Individuals of different ages are exposed to different historical moments at formative times, internalize different cultural trends, and are more likely to exhibit fluid or crystallized intelligence.<sup>177</sup> Thus, age does appear to influence the cognitive toolsets that an individual might bring to group problem-solving. For example, different generations have distinctive histories interfacing with technology that might provide insights for a company that is creating new technologies that will be easy for customers to adopt and use.<sup>178</sup> Again, this is not to suggest that all people of a certain age think in the same way or have the same cognitive toolset. But age is still influential, even if the ways in which it exerts its influence are in large part social and historical rather than essential.

While identity diversity, including age diversity, likely brings some form of cognitive diversity to the table, the presence of socially salient differences also triggers certain group processes that activate the cognitive diversity in a group.<sup>179</sup> Salient differences in a group prime individuals to believe that difference of opinion might be present and to seek it out.<sup>180</sup> For

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176. See PAGE, *supra* note 172, at 306 (“Attributes such as race shape our experiences. They limit, steer, and even guide our choices. Thus, identity attributes cause us to construct different sets of cognitive tools. Sometimes these are not chosen so much as forced on us.”).

177. See *supra* text accompanying notes 41–48; see also Saad, *supra* note 151 (discussing the differing political views of younger and older generations).

178. See Emily A. Vogels, *Millennials Stand Out for Their Technology Use, but Older Generations Also Embrace Digital Life*, PEW RES. CTR.: FACT TANK (Sept. 9, 2019), <https://www.pewresearch.org/fact-tank/2019/09/09/us-generations-technology-use> [<https://perma.cc/GL68-NS4M>] (demonstrating the differing embraces of digital life by different generations); Marie Hayes, Katherine van Stolk-Cooke & Fred Muench, *Understanding Facebook Use and the Psychological Affects [sic] of Use Across Generations*, 49 COMPUTERS HUM. BEHAV. 507, 510 (2015) (explaining the different emotional attachments generations have to social media).

179. See Katherine W. Phillips, Sun Young Kim-Jun & So-Hyeon Shim, *The Value of Diversity in Organizations: A Social Psychological Perspective*, in SOCIAL PSYCHOLOGY AND ORGANIZATIONS 253, 261–65 (David De Cremer, Rolf van Dick & J. Keith Murnighan eds., 2011) (discussing the role of affect and cognition in diverse groups).

180. See Katherine W. Phillips, *What Is the Real Value of Diversity in Organizations? Questioning Our Assumptions*, in THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY 223, 230 (“A second benefit of identity diversity is simply that seeing differences on the surface makes people assume that there are more cognitive differences there in the group, prompting them to seek this information out.”). This difference need not be identity-based, as studies have tested both racial differences and differences in education. See, e.g., Katherine W. Phillips, Gregory B. Northcraft & Margaret A. Neale, *Surface-Level Diversity and Decision-Making in Groups: When Does Deep-Level Similarity Help?*, 9 GROUP PROCESSES & INTERGROUP REL. 467, 472–73 (2006) (using those who appear Caucasian and a group member who does not); Katherine W. Phillips & Denise Lewin Loyd, *When Surface and Deep-Level Diversity Collide: The Effects on Dissenting Group Members*, 99 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 143, 147 (2006) (using medical and MBA

example, in a study comparing homogeneous and racially diverse juries, the white members of the racially diverse juries were more likely to highlight novel facts and accurately characterize the facts of the case during deliberations than white members on the homogeneous juries.<sup>181</sup> The presence of socially salient identity diversity thus may trigger mental orientations that prevent the main pathology of homogeneity in groups, which is groupthink, or the tendency for groups to reach a premature consensus through the failure to consider alternative viewpoints or options.<sup>182</sup> To the extent that age is salient, it should as well, though more empirical research on age specifically is needed to see if this is in fact the case.

Age diversity may also activate group processes that harm group outcomes. When in the presence of heterogeneity on salient characteristics, including age, individuals often begin to sort themselves conceptually into subgroups on the basis of those characteristics.<sup>183</sup> This has the effect of creating ingroups and outgroups through the process of social categorization.<sup>184</sup> After such groups are formed, there is a tendency to valorize one's own ingroup at the expense of the outgroup, which will be subject to negative stereotyping.<sup>185</sup> Thus, in the age context, individuals may

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students).

181. See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606–08 (2006).

182. See IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 9 (2d ed. 1982) (defining groupthink as “a mode of thinking that people engage in when they are deeply involved in a cohesive ingroup, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action”); Charlan Jeanne Nemeth, *Minority Dissent as a Stimulant to Group Performance*, in *GROUP PROCESSES AND PRODUCTIVITY* 95, 100–02 (Stephen Worchel, Wendy Wood & Jeffrey A. Simpson eds., 1992) (arguing that the presence of minority opinions leads to increased divergent thinking and perspective taking); see also Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 160–64 (2019) (discussing these arguments in the context of gender diversity in corporate boards).

183. See DONN BYRNE, *THE ATTRACTION PARADIGM* 3 (1971) (describing this similarity-attraction dynamic).

184. See Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 815–16 (2011) (“[P]eople are drawn to similar others. Mixed gender and racial groups may divide, and diversity may elicit group conflict that interferes with efficacy. Diversity in race, ethnicity, and, to a lesser extent, sex, tends to bring about group conflict, hinder communication, and interfere with cooperation, thereby lowering performance.”) (footnote omitted); John C. Turner, *Social Categorization and the Self-Concept: A Social Cognitive Theory of Group Behavior*, in 2 *ADVANCES IN GROUP PROCESSES: THEORY AND RESEARCH* 77, 78–80 (1985) (suggesting that individuals classify themselves and others on the basis of various dimensions).

185. See Marilynn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 554, 558–60 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed.

attribute some quality to people of the same age, such as seeing old people as senile, or young people as irresponsible. This, in turn, may lead to tokenizing members of certain age groups, which will suppress the sharing of different perspectives and harm group outcomes.<sup>186</sup>

This conceptual sorting is often accompanied by actual sorting and associated negative behaviors. Individuals who share a similarity of age may be particularly motivated to interact with others who are the same age, as they may believe they have similar values, interests, or experiences.<sup>187</sup> This can lead to decreased or erroneous communication between people of different ages in the broader group.<sup>188</sup> If there is an asymmetric allocation of power between age groups within a certain setting, such group formation can also lead to feelings of detachment or exclusion for members of an age group not in power.<sup>189</sup> All of these processes can harm group cohesiveness, leading to social conflict or avoidance, which in turn can harm group outcomes.

It is an empirical question whether the cognitive benefits of age diversity outweigh the costs of social conflict. The limited but growing empirical research on age or generational diversity typically focuses on teams in the workplace context.<sup>190</sup> The results are decidedly ambiguous, with studies finding positive, negative, and no relationships between age diversity and team performance or innovation.<sup>191</sup> Some studies have found age

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1998) (describing these stereotyping processes).

186. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 206–42 (1977) (describing the negative effects of token status, including stereotyping and the creation of interpersonal boundaries); Joana L. Young & Erika Hayes James, *Token Majority: The Work Attitudes of Male Flight Attendants*, 45 *SEX ROLES* 299, 314 (2001) (associating token status with lower satisfaction and organizational attachment).

187. See Barbara S. Lawrence, *New Wrinkles in the Theory of Age: Demography, Norms, and Performance Ratings*, 31 *ACAD. MGMT. J.* 309, 310–13 (1988) (describing how demographic age influences age norms and produces age effects).

188. See Todd R. Zenger & Barbara S. Lawrence, *Organizational Demography: The Differential Effects of Age and Tenure Distributions on Technical Communication*, 32 *ACAD. MGMT. J.* 353, 368 (1989) (finding that age and tenure similarity appeared to influence the frequency of communication among coworkers).

189. See Matt Bloom, *The Performance Effects of Pay Dispersion on Individuals and Organizations*, 42 *ACAD. MGMT. J.* 25, 33 (1999) (finding hierarchical pay dispersion associated with poor performance).

190. See Florian Kunze & Stephan A. Boehm, *Research on Age Diversity in the Workforce: Current Trends and Future Research Directions*, in *THE SAGE HANDBOOK OF AGING, WORK AND SOCIETY* 41, 45–50 (John Field, Ronald J. Burke & Cary L. Cooper eds., 2013) (collecting empirical studies of age diversity).

191. Compare Suzanne T. Bell, Anton J. Villado, Marc A. Lukasik, Larisa Belau & Andrea L. Briggs, *Getting Specific About Demographic Diversity Variable and Team Performance Relationships: A Meta-Analysis*, 37 *J. MGMT.* 709, 728–42 (2011) (finding age diversity unrelated to team performance), with Aparna Joshi & Hyuntak Roh, *The Role of Context in Work Team Diversity Research: A Meta-*

diversity to be associated with higher turnover and absenteeism,<sup>192</sup> while others have found age diversity to be associated with lower levels of emotional conflict.<sup>193</sup> Further, it is not clear to what extent these results are generalizable beyond the work contexts in which they were identified.

These mixed results suggest one of three possibilities.<sup>194</sup> First, the benefits and costs of age diversity for team performance cancel each other out. Second, neither the benefits nor the costs of age diversity are particularly significant, so there is no overall effect. Third, there are mediator variables that have yet to be discovered that are important for the actualization of the benefits or costs of age diversity. Further research is needed to understand the relationship between age diversity, any potential mediator variables, and various performance indicators of interest in the workplace and other settings. Such research will put those in charge of managing teams in a better position to reap any benefits of age diversity while avoiding its costs.

In addition to these potential effects of age diversity on group efficacy, age diversity may also impact individuals directly. The next Section considers how age diversity might influence individual ageist beliefs or attitudes.

#### E. REDUCING AGEISM

One of the consequences of having age diversity in a particular group or institution is that it fosters contact between people of different ages or generations. This contact, in turn, can help to eliminate stereotypes and ageist attitudes under the right circumstances.<sup>195</sup> In contrast to the arguments already surveyed, this argument does not necessarily prescribe a particular

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*Analytic Review*, 52 ACAD. MGMT. J. 599, 614–15 (2009) (finding age diversity had the most negative association with team performance), and Martin Kilduff, Reinhard Angelmar & Ajay Mehra, *Top Management-Team Diversity and Firm Performance: Examining the Role of Cognitions*, 11 ORG. SCI. 21, 32 (2000) (finding age diversity to be the only demographic diversity measure positively associated with team performance).

192. See, e.g., Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 427–28 (1996) (describing several studies finding correlations between age diversity and absenteeism or turnover).

193. See Lisa Hope Pelled, Kathleen M. Eisenhardt & Katherine R. Xin, *Exploring the Black Box: An Analysis of Work Group Diversity, Conflict, and Performance*, 44 ADMIN. SCI. Q. 1, 16 (1999) (finding age diversity to have a significant negative relationship with emotional conflict).

194. See Matthias Schneid, Rodrigo Isidor, Holger Steinmetz & Rüdiger Kabst, *Age Diversity and Team Outcomes: A Quantitative Review*, 31 J. MANAGERIAL PSYCHOL. 2, 6 (2016) (describing the three possibilities in light of heterogeneous results from the authors' review).

195. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 261–81 (1954) (exploring the concept of prejudice and its relationship to intergroup contact).

form that age diversity should take. These benefits would exist in institutions that have a range of age diversities, though at least minimal diversity would be required to facilitate cross-age interactions.

The proposition that contact across various forms of difference helps to decrease prejudice as a general matter has robust empirical support.<sup>196</sup> However, the relationship between contact and decreased prejudice is mediated by three variables. The first is knowledge. Increased contact with an outgroup leads to greater knowledge of that outgroup, which can have a debiasing effect.<sup>197</sup> The second mediator is anxiety; as individuals encounter outgroup members, they become more familiar and such encounters become less anxiety-inducing.<sup>198</sup> The third mediator is empathy. Contact, especially close friendships with outgroup members, can encourage one to take the perspective of members of the outgroup, decreasing prejudice.<sup>199</sup> These mediators can also work in concert with each other.<sup>200</sup>

With respect to ageism, most empirical studies focus on the psychological effects on younger individuals of interaction with older ones.<sup>201</sup> There have been relatively consistent findings that intergroup contact either enhances positive attitudes, decreases ageist stereotypes, or both.<sup>202</sup> This finding, however, is not universal. When the age-based

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196. See THOMAS F. PETTIGREW & LINDA R. TROPP, WHEN GROUPS MEET: THE DYNAMICS OF INTERGROUP CONTACT 13 (2011) (“[The] basic premise of contact theory is well-supported by an ever-growing research base.”); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006) (collecting studies).

197. See Walter G. Stephan & Cookie White Stephan, *The Role of Ignorance in Intergroup Relations*, in GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 229, 244 (Norman Miller & Marilynn B. Brewer eds., 1984) (arguing that ignorance contributes to intergroup prejudice).

198. See Jim Blascovich, Wendy Berry Mendes, Sarah B. Hunter, Brian Lickel & Neneh Kowai-Bell, *Perceiver Threat in Social Interactions with Stigmatized Others*, 80 J. PERSONALITY & SOC. PSYCHOL. 253, 265–66 (2001) (finding that white study participants who had prior interracial contact showed lower levels of anxiety).

199. See C. Daniel Batson, Marina P. Polycarpou, Eddie Harmon-Jones, Heidi J. Imhoff, Erin C. Mitchener, Lori L. Bednar, Tricia R. Klein & Lori Highberger, *Empathy and Attitudes: Can Feeling for a Member of a Stigmatized Group Improve Feelings Toward the Group?*, 72 J. PERSONALITY & SOC. PSYCHOL. 105, 116–17 (1997) (finding that inducing empathy for various stigmatized groups can decrease prejudice toward those groups).

200. See PETTIGREW & TROPP, *supra* note 196, at 84–86 (showing the interactions between these mediators).

201. This is the typical pattern in stereotype research, as it tends to focus on the effects of intergroup contact on the “majority.” *But see* David S. Meshel & Richard P. McGlynn, *Intergenerational Contact, Attitudes, and Stereotypes of Adolescents and Older People*, 30 EDUC. GERONTOLOGY 457, 475–76 (2004) (finding intergenerational contact produced more positive attitudes toward the young among older participants).

202. See Tania Tam, Miles Hewstone, Jake Harwood, Alberto Voci & Jared Kenworthy, *Intergroup Contact and Grandparent-Grandchild Communication: The Effects of Self-Disclosure on Implicit and*

intergroup contact contains an element of threat or uncertainty, the contact can actually help foster stereotypes and negative conceptions of aging. For instance, one study brought four- and five-year-olds to a nursing home to interact with older individuals living there who were heavily impaired. These visits did not counter stereotypes about the elderly, and the children left with more negative attitudes toward the elderly and toward their own aging.<sup>203</sup>

These findings suggest that intergenerational contact does not automatically lead to decreased ageism.<sup>204</sup> The factors that have been shown to facilitate the positive effects of intergroup contact are a sense of equal status among participants, an orientation toward a common goal, a cooperative atmosphere, and institutional support for the intergroup contact.<sup>205</sup> Other studies have found that the frequency of contact is important, as extended contacts allow deeper relationships to develop.<sup>206</sup> More empirical research is needed in this area, especially on the effects of intergroup contact on ageism against the young.<sup>207</sup> However, it does appear that to the extent that age diversity encourages cross-age contact, and to the extent that such contact occurs in the right set of conditions, it can lead to decreased age-based prejudice.

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As these various normative rationales demonstrate, age diversity's

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*Explicit Biases Against Older People*, 9 GROUP PROCESSES & INTERGROUP REL. 413, 420 (2006); Natalie M. Hale, *Effects of Age and Interpersonal Contact on Stereotyping of the Elderly*, 17 CURRENT PSYCHOL. 28, 36 (1998) (finding that adolescents experiencing positive contact with the elderly possessed fewer age-based stereotypes); Avshalom Caspi, *Contact Hypothesis and Inter-Age Attitudes: A Field Study of Cross-Age Contact*, 47 SOC. PSYCHOL. Q. 74, 78 (1984) (“[C]hildren with cross-age contact in school can discriminate age-group categories better and evaluate the elderly more favorably than their counterparts in the age-segregated school.”).

203. Carol Seefeldt, *The Effects of Preschoolers' Visits to a Nursing Home*, 27 GERONTOLOGIST 228, 231 (1987); see also Linda J. Allan & James A. Johnson, *Undergraduate Attitudes Toward the Elderly: The Role of Knowledge, Contact and Aging Anxiety*, 35 EDUC. GERONTOLOGY 1, 11–12 (2009) (finding that anxiety about aging mediates between experience with the elderly and negative attitudes toward the elderly).

204. See Julie Christian, Rhiannon Turner, Natasha Holt, Michael Larkin & Joseph Howard Cotler, *Does Intergenerational Contact Reduce Ageism? When and How Contact Interventions Actually Work?*, 3 J. ARTS & HUMAN. 1, 8–10 (2014) (collecting studies and noting that more long-term contact is associated with more positive attitudes toward the elderly).

205. See PETTIGREW & TROPP, *supra* note 196, at 61–76 (evaluating the evidence for these conditions); ALLPORT, *supra* note 195, at 264–67 (originally outlining these conditions).

206. See Ashley Lytle & Sheri R. Levy, *Reducing Ageism: Education About Aging and Extended Contact with Older Adults*, 59 GERONTOLOGIST 580, 586–87 (2019) (finding that increased aging-related knowledge and extended intergenerational contact were associated with less ageist attitudes).

207. See North & Fiske, *supra* note 14, at 991–92 (articulating a need for more research on ageist attitudes toward the young).

effects are varied, and some of these effects will be more salient in some contexts as opposed to others. However, more empirical research is needed to establish the strength of these effects so that legal decisionmakers may better know how to weigh age diversity against other policy interests. If age diversity of a certain type is worth pursuing in the final analysis, the law is one vehicle through which to do it. The next Part examines how various types of legal rules influence the form that age diversity takes and how adopting an age diversity lens may suggest potential avenues for legal reform.

### III. AGE DIVERSITY AND THE LAW

While the first Part described age diversity as a concept and the second Part described the normative cases for and against various forms of age diversity, this Part addresses how age diversity intersects with the law. Legal rules play an important role in shaping the age diversity of various institutions or society as a whole. The age diversity of political and legal institutions, in turn, may also influence the content of legal rules.<sup>208</sup> This Part will demonstrate how adopting an age diversity lens can highlight underappreciated aspects of policy debates, inform our normative judgments about various legal rules, and suggest fresh avenues for legal reform. Section A describes the different types of rules that serve to regulate age diversity. Section B then applies the age diversity lens to three contexts: immigration, juries, and the workplace.

#### A. LEGAL RULES

The form that age diversity takes is a complex product of individual decision-making, social norms, and legal rules. These legal rules regulate age diversity both directly and indirectly and take three primary forms, discussed in each of the subsections below: age-conscious rules, age discrimination rules, and age-neutral rules.

##### 1. Age-Conscious Rules

Age-conscious rules explicitly integrate age into legal directives.<sup>209</sup> Most of these rules take advantage of the determinate and administrable

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208. While there is likely some relationship between the age compositions of political institutions and the policies they produce, the content of law and policy is the result of a complex array of forces and historically contingent processes. See Robert B. Hudson, *Theories of the Politics and Policies of Aging*, in *HANDBOOK OF THEORIES OF AGING*, *supra* note 32, at 484–96 (exploring six theories that explain the landscape of aging policy in the United States).

209. See Boni-Saenz, *supra* note 33, at 854–56 (describing the ubiquity of age-based law).

nature of age by incorporating it into bright-line rules as a triggering fact.<sup>210</sup> Not all such age-conscious rules are relevant for the analysis of age diversity, however, as many simply establish legal entitlements, such as setting the age at which one may receive Social Security.<sup>211</sup> Those that are relevant to age diversity are the ones that affect the age composition of groups. For example, maturity rules demarcate the separation between childhood and adulthood, and they establish age minima for participation in various societal institutions.<sup>212</sup> While these rules exclude minors and thus reduce age diversity generally, they often do so for good reason, as many minors lack the capacity to be full participants in the institutions for which age diversity might be a concern.<sup>213</sup>

Even for those who have reached legal maturity, age-conscious rules regulate group membership, especially in public institutions. For instance, the Constitution actively limits the age diversity of Congress by prohibiting the entry of those under the age of twenty-five into the House of Representatives and under the age of thirty into the Senate, even though people of those ages are otherwise considered full citizens for the purposes of voting and military service.<sup>214</sup> On the other end of the age spectrum, most states actively regulate the age diversity of the judiciary by mandating the retirement of judges after a certain age, either through their Constitutions or statutory law.<sup>215</sup> These bright-line rules were adopted to select for qualities

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

211. See 20 C.F.R. § 404.409 (2015) (setting the retirement age).

212. See Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1118–45 (2012) (discussing rationales for maturity rules). To the extent that we should have varying rules for when people enter the age of the majority, so too might we have varying populations of interest for discussions of age diversity, depending on the context. See Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 90–91 (2016) (arguing for a more contextual understanding of maturity rules, with various exceptions to a unified legal age of majority).

213. See Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1209–13 (2015) (discussing the relationship between mental capacity and legal capacity).

214. U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years. . . .”); *id.* art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years.”).

215. See National Center for State Courts, *Mandatory Judicial Retirement* (Sept. 30, 2020), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/mandatory-judicial-retirement> [<https://perma.cc/E5DD-RPV9>] (reporting that thirty-two states and the District of Columbia impose mandatory retirement). The ages at which retirement is required vary significantly by state. See, e.g., FLA. CONST. art. 5, § 8 (“No justice or judge shall serve after attaining the age of seventy-five years except upon temporary assignment.”); 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 (2019) (“The Justices of the Supreme Court and judges of all subordinate courts shall be

thought to be desirable in Congress or the judiciary rather than to influence the age diversity of those institutions, but they clearly have that latter effect as well. And they achieve this effect quite efficiently, even if using age as a triggering fact risks enshrining in the law a certain age essentialism about qualifications for serving in particular positions.<sup>216</sup>

While less common, age-conscious rules can also take a more standard-like form while having age diversity as their aim as well.<sup>217</sup> For example, Alabama considers age diversity as a relevant criterion, often alongside other forms of diversity, for the selection of members to various state boards or task forces.<sup>218</sup> Age-based standards may help mitigate some of the costs of age diversity by obfuscating the relative importance of age to selection, reducing concerns about age essentialism. In addition, to the extent that standards consider various factors in a totality of the circumstances analysis, they will prevent age from crowding out other important selection criteria.<sup>219</sup> However, because standards provide significant discretion for the legal decisionmaker implementing them, it is not always clear what form of age diversity might materialize in any given case.<sup>220</sup>

## 2. Age Discrimination Rules

The law may be age-conscious in a different way. Rather than incorporating age into the law explicitly, it may actively prohibit the consideration of age by public or private actors. This is the domain of

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required to retire at the end of the calendar year in which they attain 90 years of age.”).

216. See Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 972 (1995) (“Because of their simplifying effects, rules produce enormous gains where decisions would otherwise be extremely expensive.”); see also Peter Baehr & Daniel Gordon, *Paradoxes of Diversity*, in THE SAGE HANDBOOK OF POLITICAL SOCIOLOGY 977, 980 (William Outhwaite & Stephen P. Turner eds., 2018) (“The first paradox of diversity is that an idea that is emblematic of openness reinforces closed systems of classification. While some advocates of diversity celebrate the fluidity of the individual’s identity, once diversity becomes an institutional goal, a static mode of benchmarking comes to the fore.”).

217. See Sullivan, *supra* note 210, at 58 (“A legal directive is ‘standard’-like when it tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation.”).

218. See ALA. CODE § 34-3-41 (1975) (requiring that the Board of Commissioners for the state judicial circuits be selected taking into account age as well as other forms of diversity); ALA. CODE § 17-4-34 (1975) (requiring age diversity in the selection of members for the State Voter Registration Advisory Board); ALA. CODE § 16-40-9 (1975) (“Eight members appointed by the Governor representing the eight regional school board districts and reflecting the racial, ethnic, gender, and age diversity of the state.”).

219. See Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 510 (2002) (explaining the crowding out phenomenon in the context of motivation).

220. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 609 (1992) (“Rules may be preferred to standards in order to limit discretion, thereby minimizing abuses of power.”).

antidiscrimination law, and it has two main sources. The first is the Equal Protection Clause of the Constitution, which prevents the government from creating certain legal classifications.<sup>221</sup> As this applies to age, the Supreme Court held in *Massachusetts Board of Retirement v. Murgia* that age-based classifications are only subject to rational basis review, making most age-based law permissible.<sup>222</sup> This means that there is wide latitude to pursue age diversity through governmental rules, provided such pursuit can be construed as rational and not arbitrary.

The second source of age-based antidiscrimination law is statutory.<sup>223</sup> This law primarily applies to private actors, and it may limit the consideration of age in a variety of domains. For example, at the federal level, the Age Discrimination in Employment Act prohibits many employment decisions based solely on age for those over the age of forty.<sup>224</sup> Age-based antidiscrimination law also applies to other domains, sometimes explicitly and at other times because courts read age into a relevant antidiscrimination statute.<sup>225</sup> Provided that these statutes are effective,<sup>226</sup> they leave the age diversity of institutions to other social forces.

It is not always clear what the effect of these antidiscrimination rules or their absence might be. Housing presents an interesting example. The federal Fair Housing Act does not prohibit discrimination on the basis of age.<sup>227</sup> It does, however, contain a prohibition on discrimination on the basis of familial status.<sup>228</sup> Such a provision has age diversity implications because it would prohibit discrimination against family forms that are themselves age diverse, such as an adult with a minor child. Yet this familial status antidiscrimination provision contains exceptions for “housing for older

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221. See U.S. CONST. amend. XIV, § 1.

222. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

223. See, e.g., 29 U.S.C. § 623(a) (“It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age . . .”).

224. See *id.*

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

226. See *infra* Section III.B.3 (discussing how there are several doctrinal avenues for getting around the prohibitions on age discrimination in employment).

227. See 42 U.S.C. § 3604(b) (including a variety of identity categories but omitting age). Some states, however, do have explicit age-based antidiscrimination protections in the realm of housing. See CONN. GEN. STAT. ANN. § 46a-64c (West 2017) (prohibiting the refusal to sell or rent because of age); VT. STAT. ANN. tit. 9, § 4503 (West 2016) (same).

228. See 42 U.S.C. § 3604(b) (including familial status as a protected category).

persons,” meaning that said parent with child could be excluded.<sup>229</sup> Whether a housing development qualifies as housing for older persons turns on whether the development lacks age diversity. It must either be solely occupied by persons older than sixty-two, or be eighty percent occupied by persons older than fifty-five, and it must have concrete policies expressing the intent for this to remain the case.<sup>230</sup>

Without the exception above, discrimination law would prohibit the creation of intentional senior housing.<sup>231</sup> However, this would not necessarily lead to intergenerational communities, for two reasons. First, age-homogeneous communities can arise naturally, for instance in areas that experience a large out-migration of youth or in which a population has aged in place.<sup>232</sup> Second, a blanket antidiscrimination rule would also prohibit using age to create intentional intergenerational communities, where residents might be selected in part because of how they might enhance the age mix of a development.<sup>233</sup> This illustrates that while the presence of age discrimination rules may prevent intentional age segregation, they do not ensure any particular form of age diversity. Nor does the absence of such rules lead to a determinate outcome in every case.

### 3. Age-Neutral Rules

Finally, the law might neither integrate age nor prohibit its consideration, but regulate age diversity indirectly.<sup>234</sup> Sometimes an age-neutral rule will affect age diversity because it regulates some correlate of age. For example, many unions bargain for seniority rules in collective bargaining agreements, which give preferences to employees of longer tenure, often in the context of layoffs.<sup>235</sup> These rules can be justified on

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229. See *id.* § 3607(b) (“Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.”).

230. See *id.* § 3607(b)(2)(B)–(C) (defining housing for older persons).

231. See Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 156–58 (2004) (discussing how these exemptions facilitate housing options for seniors).

232. See Jon Pynoos, Christy Nishita, Caroline Cicero & Rachel Caraviello, *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77, 102–03 (2008) (describing how naturally occurring retirement communities arise).

233. See Patricia E. Salkin, *A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors*, 16 GEO. J. ON POVERTY L. & POL’Y 285, 309 (2009) (discussing the affordability benefits of intergenerational housing).

234. See Allen, *supra* note 144, at 84–85 (noting that an organization’s rules will affect whether diversity is present).

235. See Gary Chartier, *Toward a New Employer-Worker Compact*, 9 EMP. RTS. & EMP. POL’Y J. 51, 99 (2005) (“[Seniority rules] determine which workers will be affected by layoffs: senior workers are

numerous grounds, such as rewarding cumulative effort and loyalty, or protecting workers who have the greatest skills based on experience.<sup>236</sup> But because tenure is correlated with age, they also have a significant effect on age diversity, as layoffs will target the employees with the least tenure, who are more likely to be younger overall. This will lead, all other things being equal, to an age distribution in the workforce that skews older.

At other times, age-neutral rules neither concern age nor one of its correlates but may still have a large impact on age diversity. For instance, consider how jury selection worked in the past. Before the 1960s, many jurisdictions selected jury members by using the recommendations of a citizen of good reputation in the community—a “key man.”<sup>237</sup> Because the recommendations derived from the social networks of this key man, juries were not representative of the demographic diversity of the community, including age.<sup>238</sup> In contrast, while the modern process still has its flaws, it starts with the principle of random selection.<sup>239</sup> This is more likely to produce a jury pool that is representative of the adult population as a whole.<sup>240</sup>

As can be seen from these examples, age-neutral rules are often geared toward some other policy objective or do not otherwise take age into account. This makes any resulting age diversity a byproduct of the primary aim of the legal regulation. Thus, this category of rules is the most diverse of the three types, taking a variety of forms and leading toward different forms of age diversity depending on the context in which they are employed.

## B. LEGAL APPLICATIONS

This Section applies an age diversity lens to three illustrative examples.

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characteristically the last to be laid off and the first to be rehired.”); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1000 (1984) (noting that labor unions often bargain for the inclusion of seniority rules).

236. See Ronen Perry & Tal Z. Zarsky, *Queues in Law*, 99 IOWA L. REV. 1595, 1619, 1625 (2014) (offering various rationales for seniority rules).

237. See Robert P. Burns, *The History and Theory of the American Jury*, 83 CALIF. L. REV. 1477, 1489 (1995) (describing the key man system).

238. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 211 (1995) (noting that the key man system “has been used explicitly to weed out young adults”); Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247, 250 (1973) (“The ‘Main Street town booster,’ a middle-aged male in the middle income bracket, remained the prototype of our federal juror.”).

239. See Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 936 (2016) (“In an effort to avoid historically rooted discriminatory practices, courts have limited the data collected about jurors and randomized the selection process.”).

240. See *infra* Section III.B.2 (discussing the age diversity issues in the modern jury).

The first case of immigration demonstrates that age diversity can be a societal rather than just an institutional issue. The second case of the jury involves a fundamental public institution and examines how age-neutral rules can produce non-ideal forms of age diversity. However, the weak regulation of age-based classifications in Equal Protection jurisprudence as compared to race actually frees the government to use age-conscious rules to implement reforms that might improve the representative nature of the jury. The third example of the workplace demonstrates how in some contexts the case for age diversity may be relatively weak. However, a close examination of antidiscrimination doctrines in this area reveals avenues through which employers might still pursue age diversity goals, though perhaps in ways that violate antidiscrimination norms.

### 1. Immigration

The aging of the population has caused some consternation among commentators, who have called it everything from an “age wave”<sup>241</sup> to an “aging tsunami”<sup>242</sup> to a “time bomb.”<sup>243</sup> This alarmist rhetoric may overstate the problem, but there is indeed an issue, which is that an older population often entails a less favorable age dependency ratio, which can cause social and economic stresses.<sup>244</sup> Thus, a particular form of proxy age diversity is desirable—one in which a larger share of the population lies within the range of ages associated with productive activities such as labor market participation and informal caregiving.<sup>245</sup> Countries have experimented with a variety of policies to achieve a more desirable societal age diversity or to mitigate the negative consequences of a less than ideal one. These include measures to incentivize childbirth amongst the native population, provide support to families with children, and facilitate extended labor market participation for older adults, many of which have been met with mixed success.<sup>246</sup>

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241. See KEN DYCHTWARD, *AGE WAVE: HOW THE MOST IMPORTANT TREND OF OUR TIME WILL CHANGE YOUR FUTURE* 6–23 (1990).

242. See Amanda S. Barusch, *The Aging Tsunami: Time for a New Metaphor?*, 56 *J. GERONTOLOGICAL SOC. WORK* 181, 181 (2013) (“There’s nothing human about a tsunami. It’s a nasty metaphor for older adults.”).

243. See MARK ADLER, *TIME BOMB: HOW THE AGING POPULATION WILL TRANSFORM OUR WORLD AND WHY WE MUST ACT BEFORE IT’S TOO LATE* 24–35 (2019).

244. See *supra* text accompanying notes 103–07.

245. See Howard F. Chang, *The Economics of Immigration Reform*, 52 *U.C. DAVIS L. REV.* 111, 135 (2018) (“Recall that youth at the time of entry is an important factor determining the total fiscal impact of an immigrant.”).

246. See JONATHAN GRANT, STIJN HOORENS, SUJA SIVADASAN, MIRJAM VAN HET LOO, JULIE DAVANZO, LAUREN HALE, SHAWNA GIBSON & WILLIAM BUTZ, *LOW FERTILITY AND POPULATION*

Immigration law is one of the few additional policy levers available to address the age composition of society.<sup>247</sup> Indeed, adjusting immigration law is likely a necessary, but not sufficient, solution to the demographic challenges ahead.<sup>248</sup> Yet immigration has long been associated with discussions about racial diversity rather than age diversity, and this tendency toward racialized immigration rhetoric has only increased in recent years.<sup>249</sup> This crowding out of age diversity in immigration debates is unfortunate, as a highly restrictive immigration policy will not aid countries in reaching a normatively desirable societal age diversity. Japan provides an ominous warning for the United States in this regard.<sup>250</sup> While it is experiencing the decline in fertility associated with most industrialized countries, Japan has also adopted a highly restrictive immigration regime.<sup>251</sup> This has led to several problems, including depopulated towns, worker shortages, and lackluster economic growth.<sup>252</sup>

Thus, as an initial matter, welcoming more immigrants would seem to be a valuable policy goal from an age diversity perspective.<sup>253</sup> However, it

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AGEING: CAUSES, CONSEQUENCES, AND POLICY OPTIONS 18–40 (2004) (discussing the various policy approaches).

247. See Stephen Lee, *Productivity and Affinity in the Age of Dignity*, 114 MICH. L. REV. 1137, 1147 (2016) (describing how increasing family-based immigration can help with worker shortages in eldercare); Juha M. Alho, *Migration, Fertility, and Aging in Stable Populations*, 45 DEMOGRAPHY 641, 649 (2008) (finding that immigration can reduce the aging of the population under certain circumstances).

248. See Marta Tienda, *Economic Implications of Demographic Change: Diversity Dividend or Deficit?*, 51 BUS. ECON. 11, 14–15 (2016) (arguing for educational initiatives for the smaller cohorts of youth); David A. Wise, *Facilitating Longer Working Lives: International Evidence on Why and How*, 47 DEMOGRAPHY S131, S135 (2010) (arguing for the need to extend the working lives of older adults).

249. See Marta Tienda, *Demography and the Social Contract*, 39 DEMOGRAPHY 587, 589–92 (2002) (discussing the racial and ethnic dimensions to immigration). This connection has been emphasized by President Trump’s racialized immigration stance. See Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 246 (2017) (“For his many supporters, President Trump paints a picture of a nation besieged by a flood of criminal and terrorist immigrants . . .”). This rhetoric has manifested in a restrictive set of immigration policies. See SARAH PIERCE, MIGRATION POLICY INST., IMMIGRATION-RELATED POLICY CHANGES IN THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION 16–25, 28–39 (2019) (detailing restrictive policies for humanitarian, family, and employment-based immigration).

250. See Alexander J. Q. Parsons & Stuart Gilmour, *An Evaluation of Fertility and Migration-Based Policy Responses to Japan’s Ageing Population*, 13 PLOS ONE 1, 8 (2018) (concluding that it is too late for fertility and migration policies to reduce Japan’s old age dependency ratio at this point).

251. See Francisco Toro, *Japan Is a Trumpian Paradise of Low Immigration Rates. It’s Also a Dying Country.*, WASH. POST (Aug. 29, 2019, 3:52 PM), <https://www.washingtonpost.com/opinions/2019/08/29/japan-is-trumpian-paradise-low-immigration-rates-its-also-dying-country> [https://perma.cc/L8YS-RJ7X] (“Japan proves that the choice between homogeneity and diversity is real. It’s just that homogeneity leads to decline, while diversity offers at least a chance of ongoing vitality and prosperity.”).

252. See *id.*

253. See John Field, *Migration and Workforce Aging*, in THE SAGE HANDBOOK OF AGING, WORK, AND SOCIETY, *supra* note 190, at 75, 79 (“For countries with an aging population, migration offers an

is not only the number but also the age profile of entering migrants that might matter for the purposes of influencing the age composition of society. For instance, family-based migrants can be of any age, but preference is given to those who are immediate relatives—defined as minor children, spouses, and parents of a citizen of the United States—over other relations, such as siblings and adult children.<sup>254</sup> A large proportion of those who immigrate under the family-based immigration regime are minor children, which is a salutary outcome from an age diversity perspective.<sup>255</sup> However, this is not an inevitable outcome, and the age profile of family-based migrants appears to be shifting older. This is due in part to the migration of parents of U.S. citizens as well as siblings who have aged waiting for entry due to the backlog in distribution of visas for those in less-favored immigration categories.<sup>256</sup> This mix of age-neutral rules based on family relationship and age-conscious rules distinguishing between minor and adult children thus interact with a particular social context to produce a certain age profile of incoming immigrants.

While the composition of family-based migrants is largely a byproduct of rules that have other policy aims, it is also possible to engineer more explicitly the age profile of incoming immigrants by relying more on age-conscious rules. For example, some countries explicitly integrate age as a selection criterion for potential labor migrants through the use of a points system, which assigns each potential migrant points for qualities that are

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obvious potential source of replacements.”).

254. See 8 U.S.C. § 1151(b)(2)(A)(i) (noting that there is no numerical limitation for “children, spouses, and parents of a citizen of the United States”); WILLIAM A. KANDEL, CONG. RESEARCH SERV., U.S. FAMILY-BASED IMMIGRATION POLICY 3 n.19 (2018) (clarifying how U.S. immigration law distinguishes between minor children (under twenty-one years of age), unmarried children over the age of twenty-one, and married sons and daughters). At the same time, several other categories, including adult children and siblings of citizens, and spouses and unmarried children of legal permanent residents, are subject to different sets of immigration caps. See 8 U.S.C. § 1153.

255. See ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL MIGRATION OUTLOOK 2017, at 124 (2017) (“[C]hildren made up large shares of the family migration inflows to the United States and Germany (at least 40% and 34%, respectively).”).

256. See Marta Tienda, *Multiplying Diversity: Family Unification and the Regional Origins of Late-Age US Immigrants*, 51 INT’L MIGRATION REV. 727, 753 (2015) (“Parents of US citizens, who are not subject to annual country caps or worldwide ceilings, are the major source of late-age migration, but the numerically limited admission classes consisting of adult sons, daughters and siblings of US citizens increasingly contribute to late-age migration owing to long visa queues for oversubscribed countries.”); Stacie Carr & Marta Tienda, *Family Sponsorship and Late-Age Immigration in Aging America: Revised and Expanded Estimates of Chained Migration*, 32 POPULATION RES. POL’Y REV. 825, 827 (2013) (“[T]he immigrant cohort share ages 50 and over at admission to the United States increased from about 11 percent for persons legally admitted between 1981 and 1985 to nearly 17 percent for those admitted between 2006 and 2009.”).

meant to be predictive of immigrant success and align with societal values.<sup>257</sup> To be allowed to immigrate, an applicant must score a certain predetermined number of points or must fall at the top of the point distribution of all applicants.<sup>258</sup> Frequent criteria include education, work experience, language proficiency, offers of employment, close family ties, and prior work or education in the receiving country.<sup>259</sup> Age is also often a criterion, though it receives different weight in different systems.<sup>260</sup> Such an approach has been suggested in the United States as well. In 2013, the Senate passed a bill that included a points system as a supplement to the current regime, and President Trump also proposed his own points system, albeit coupled with a more restrictive immigration regime overall.<sup>261</sup>

The demographics of the nation and the immigration system that informs it are complex, with many moving parts that might contribute to desired outcomes. In addition, the age mix of the population is one among many concerns that inform immigration policy, and it is not suggested here that age diversity objectives should always supersede other important policy aims. Instead, the lesson is that it is important to be conscious of the age composition of society given its multiple consequences, and any analysis of immigration law would be incomplete without some scrutiny of its age diversity effects.

## 2. The Jury

In contrast to the vastness of the American population, the jury

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257. See generally Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99 (2001) (assessing Canada's points system's predictive capacity).

258. See RUTH ELLEN WASEM & CHAD C. HADDAL, CONG. RESEARCH SERV., POINT SYSTEMS FOR IMMIGRANT SELECTION: OPTIONS AND ISSUES 3 (2007) (noting that "the factors/criteria, the scoring/scaling dimensions; and the possible use of tiers" are the design choices for a points system).

259. See Yale-Loehr & Hoashi-Erhardt, *supra* note 257, at 102, 105–07 (discussing various categories in which points might be awarded).

260. See Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 FORDHAM URB. L.J. 183, 209 (2010) (describing how a points system can integrate age alongside other factors); see also Yale-Loehr & Hoashi-Erhardt, *supra* note 257, at 111–12 (discussing the Canadian points system); *id.* at 122–23 (discussing the Australian points system). But see Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 303–04 (2013) (critiquing points systems).

261. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. §§ 2301, 2302 (2013); see also Julia Gelatt, *The RAISE Act: Dramatic Change to Family Immigration, Less So for the Employment-Based System*, MIGRATION POLICY INSTITUTE (Aug. 2017), <https://migrationpolicy.org/news/raise-act-dramatic-change-family-immigration-less-so-employment-based-system> [<https://perma.cc/U4CR-6LQC>] (describing the move toward a point system for labor migration while cutting family migration).

represents a small group of individuals dedicated to the common task of arriving at a verdict in a legal proceeding. In this setting, the case for age diversity—though of a different type—appears quite strong. Because the jury is a high-profile public legal institution, the argument for representation is at its strongest. The Supreme Court has embraced this particular understanding of representation, at least at a general level, by endorsing the fair cross section requirement for juries as an element of Sixth Amendment jurisprudence.<sup>262</sup> Jury cases are also paradigmatic problem-solving groups, and the issues involved often have a strong human element. This is the situation in which age or other forms of identity diversity are more likely to add value to deliberations.<sup>263</sup> Finally, the experience of participating on a team with members of other ages may serve to reduce ageist stereotypes in jury members, especially since threat and competition are minimized in this context. There is also some evidence that more age diverse juries leave jurors more satisfied with their own participation and the verdict itself.<sup>264</sup>

The downsides of age diversity are also less applicable to juries. There are minimal qualifications required for jury service such that age will not crowd out other characteristics that might be desirable, and it will not prevent challenges for cause.<sup>265</sup> The social conflict that might be engendered by age diversity in the group is mitigated by the fact that the group is non-hierarchical in nature and is aimed at a common goal.<sup>266</sup> Thus, the application of the arguments for and against age diversity suggest that the jury box should reflect the age distribution of the relevant community, which will also have the effect of having at least minimal age heterogeneity, given the small size of the jury.

How well does the age composition of juries map on to these ideals? Unfortunately, courts in many states do not collect data on the age of jurors or potential jurors, so it is hard to know the precise age composition of

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262. See *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (“[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.”); see also *Duren v. Missouri*, 439 U.S. 357, 370 (1979) (“We stress, however, that the constitutional guarantee to a jury drawn from a fair cross section of the community requires that States exercise proper caution in exempting broad categories of persons from jury service.”).

263. See Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 419 (2010) (“Diversity of experiences increases the accuracy of jury fact finding by increasing the range of experiences that jurors will be able to use to evaluate the plausibility of the evidence.”).

264. See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 692 (2002) (“[A]s the jury became more age diverse, the jurors became more satisfied with their experience as jurors, and they estimated that other jurors would be more satisfied with the verdict.”).

265. See *Hopt v. Utah*, 120 U.S. 430, 433 (1887) (discussing the grounds for a for-cause challenge).

266. See *supra* text accompanying notes 198–200.

juries.<sup>267</sup> We know that the jury selection process starts with the principle of random selection, but there are several reasons why we might doubt that juries are in practice appropriately diverse with respect to age. First, the process for generating the jury pool has structural age biases. For example, not all states allow the privilege of jury service at age eighteen.<sup>268</sup> Even in those that do, the lists from which potential jurors are drawn may be incomplete or inadequate, often in ways that disfavor the young.<sup>269</sup> Cutting in the other direction is the fact that over half of the states have jury service exemptions for those aged sixty-five or seventy and over, likely decreasing participation by that age group.<sup>270</sup>

Second, the main legal safeguards that exist to ensure adequate diversity on the jury simply do not exist for age. In order to invoke the fair cross section requirement to challenge the composition of a jury, one must assert that there is a cohesive group that has been systematically excluded from the pool.<sup>271</sup> When confronted with this question, courts have been unwilling to see age groups—either younger or older—as representing cohesive groups for the purposes of the Sixth Amendment.<sup>272</sup> Further along in the jury

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267. See Pamela Entzel, Burton D. Dunlop & Max B. Rothman, *Elders and Jury Service: A Case of Age Discrimination?*, in *ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTH, PERCEPTION, AND REALITY IN THE 21ST CENTURY* 163, 164 (Max B. Rothman, Burton D. Dunlop & Pamela Entzel eds., 2000) (“Courts in many states do not collect or record age-specific information on summoned jurors who decline service, report for service, or ultimately progress to panels.”).

268. See *Todres*, *supra* note 212, at 1137 (noting that forty-six states allow jury service at age eighteen, while in Alabama and Nebraska the age is nineteen, and in Mississippi and Missouri the age is twenty-one). For an argument that excluding those over the age of eighteen from jury service is unconstitutional, see Amar, *supra* note 238, at 206 (arguing that jury service is a legal entitlement akin to voting).

269. See Shari Seidman Diamond & Andrea Ryken, *The Modern American Jury: A One Hundred Year Journey*, 96 *JUDICATURE* 315, 317 (2013) (“Voter lists do not supply a random sample of citizens. Indeed, minorities, the young, and the highly mobile tend to be underrepresented.”). A majority of states use voter registration lists or licensed driver’s lists to obtain names, while a small minority of states mandate supplementation of these lists with other sources. See GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT* 13–14 (2007) (finding that thirty-five and thirty-eight states mandate the use of licensed drivers and voter registration lists, respectively, but that only eight and three mandate the use of state/local tax or unemployment compensation records, respectively). Even then, supplementation may not be a perfect fix. See John P. Bueker, *Jury Source Lists: Does Supplementation Really Work?*, 82 *CORNELL L. REV.* 390, 415–20 (1997) (gathering data from federal district courts demonstrating that supplementation did not necessarily increase racial diversity).

270. See *MIZE ET AL.*, *supra* note 269, at 15 (noting that twenty-seven states have age-based exemptions).

271. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224 (1946) (rejecting the systematic and automatic exclusion of certain groups as an unacceptable way of convening a jury).

272. See, e.g., *Silagy v. Peters*, 905 F.2d 986, 1011 (7th Cir. 1990) (“[P]ersons over the age of seventy do not constitute a ‘distinctive group’ for purposes of the sixth amendment.”); *Ford v. Seabold*,

selection process are peremptory challenges, whereby attorneys can remove individuals from the jury without providing a reason.<sup>273</sup> After *Batson v. Kentucky*,<sup>274</sup> race is technically no longer a permissible ground for such challenges, though there are serious doubts about whether *Batson* has been effective in eliminating peremptory strikes based on race.<sup>275</sup> Nonetheless, *Batson* has been extended to gender<sup>276</sup> and ethnicity<sup>277</sup> as well. In contrast, courts consistently permit peremptory challenges on the basis of age, even when that is the articulated reason for the strike,<sup>278</sup> and both prosecutors and defense attorneys do appear to strike potential jurors on that basis.<sup>279</sup> This is particularly concerning given the empirical evidence that the age composition of the jury affects trial outcomes in the criminal context.<sup>280</sup>

It is unclear what effects these deviations from random selection have on the jury pool or final juries. It is possible that the net effect is neutral and what is left are juries that are relatively representative of the population. However, it is also quite possible, if not likely, that it leaves our jury system

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841 F.2d 677, 682 (6th Cir. 1988) (“We agree with the First Circuit that it is impossible to clearly delineate the age boundaries of ‘young adults’ and that such a group, therefore, cannot by definition be distinctive.”); *Barber v. Ponte*, 772 F.2d 982, 1000 (1st Cir. 1985) (“[W]e should avoid the overwhelming problems and sterile solutions that will result from attempting to subdivide a continuum of ages into ‘distinctive groups.’”).

273. See *MARDER*, *supra* note 28, at 84 (“Peremptory challenges are the challenges that lawyers exercise to remove prospective jurors from the panel without, at least traditionally, having to explain why.”).

274. See *Batson v. Kentucky*, 476 U.S. 79, 88 (1986) (holding that race-based peremptory challenges violates the Equal Protection Clause).

275. See Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1589–95 (2012) (describing the many defects of *Batson* challenges).

276. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) (extending *Batson* challenges to gender).

277. See *Hernandez v. New York*, 500 U.S. 352, 358 (1991) (noting that a *Batson* challenge can be made on the basis of ethnicity).

278. See *Hidalgo v. Fagen, Inc.*, 206 F.3d 1013, 1019 (10th Cir. 2000) (“Fagen’s counsel struck Ms. Gonzales because of her youth. We have held this to be 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.”).

279. See David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *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 attorneys, with both race and gender effects).

280. See Anwar, et al., *supra* note 7, at 1004 (“[W]hen the average age of the jury pool is older than 50 . . . defendants are convicted 79 percent of the time. In contrast, when the average age of the jury pool is younger than 50, conviction rates are only 68 percent. These differences are statistically significant.”). *But see* Jee-Yeon K. Lehmann & Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences* 22 (June 27, 2013) (unpublished manuscript), [https://uh.edu/~jlehman2/papers/lehmann\\_smith\\_jurycomposition.pdf](https://uh.edu/~jlehman2/papers/lehmann_smith_jurycomposition.pdf) [<https://perma.cc/KA5N-7V86>] (arguing that age effects may not exist when income is taken into account).

with both young and old underrepresented. Knowing for certain requires further empirical research on the age composition of juries, but this need not stop us from considering possible legal reforms that might address the sources of the bias.

One potential tool for ensuring adequate age diversity on juries is to employ stratified jury selection at the beginning of the jury selection process, by which courts summon differential numbers of individuals based on their demographic characteristics in order to ensure the representativeness of the jury pool.<sup>281</sup> Such approaches have encountered obstacles in court. In *United States v. Ovalle*, the Sixth Circuit struck down a jury plan that subtracted at random individuals of overrepresented racial groups in order to achieve a mix that was more representative of the community at large.<sup>282</sup> The court held that such an approach violated the Jury Selection and Service Act, which prohibits exclusion from service on account of race.<sup>283</sup> In addition, the court held that the plan violated Equal Protection under the Fifth Amendment because the plan was not narrowly tailored even if it demonstrated a compelling state interest.<sup>284</sup>

Age-based stratified jury selection, however, does not possess these legal defects. While the Jury Selection and Service Act prohibits exclusion on the basis of race, color, religion, sex, national origin, and economic status, age is notably absent.<sup>285</sup> In addition, since age classifications receive less scrutiny under Equal Protection analysis than racial classifications, stratified jury selection would almost certainly satisfy rational basis review.<sup>286</sup> Finally, the interest in age diversity also adds to the many reasons for eliminating peremptory challenges.<sup>287</sup> Evidence from other jurisdictions suggests that

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281. See Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 274 (1996) (describing how sampling techniques can yield a more representative venire).

282. See *United States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998) (“Section VIII. B. of the Jury Selection Plan called for a ‘subtraction’ method of balancing the jury wheel to ensure proportional representation of different cognizable groups in the community, . . .”).

283. *Id.* at 1100.

284. See *id.* at 1105–07.

285. 28 U.S.C. § 1862 (“No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.”).

286. See *supra* text accompanying notes 211–12.

287. See *Miller-El v. Dretke*, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring) (discussing various arguments against peremptory challenges); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1051–86 (1995) (articulating various arguments against peremptory challenges). An alternative would be to extend *Batson* challenges to age. There are several persuasive reasons to regard *Batson* challenges as a failure, however, such that

doing so would not have a significant adverse impact on the jury system, even if it might be unfamiliar to the American tradition.<sup>288</sup>

### 3. The Workplace

Age diversity has already arrived in the workplace. The aging of the workforce has led to four generations now working side by side in many places of employment.<sup>289</sup> But is this a desirable state of affairs? As noted earlier, the empirical research on the effects of age diversity has produced mixed results.<sup>290</sup> Until we better understand the relationship between age diversity and workplace outcomes, the group efficacy benefits of age diversity cannot be the normative basis on which to pursue it in that context.

Unfortunately, the other benefits and costs of age diversity are similarly muddled. The representation rationale does not apply with as much force to private workplaces as it does to high-profile public institutions, though some high-status professions may generate positive representational effects. The debiasing effects of contact between generations in the workplace might produce benefits, but that is contingent on the nature of the workplace, as hierarchical, anxiety-inducing, or threatening workplaces are unlikely to engender these effects.<sup>291</sup> Thus, the normative case for either promoting or discouraging age diversity in employment is at best unclear. At the very least, the results will vary significantly by workplace.

The current legal regime theoretically removes age from consideration in employment decisions, seemingly leaving the age composition of workplace personnel to other forces. The Age Discrimination in Employment Act (“ADEA”) prohibits the use of age in most employment decisions for employees over forty.<sup>292</sup> However, the case law interpreting the ADEA has opened several avenues through which employers might be able

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extending this flawed machinery to age may not address age diversity concerns. *See Marder, supra* note 275, at 1589–95 (summarizing *Batson*’s flaws).

288. *See* Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 *CHI.-KENT L. REV.* 537, 555 (2011) (“The elimination of peremptories in the English jury system suggests that jury selection can be conducted without them.”).

289. *See* Rhetta L. Standifer & Scott W. Lester, *To See Ourselves as Others See Us: How Perceptions of Generational Diversity Affect the Workplace*, in *WORK PRESSURES: NEW AGENDAS IN COMMUNICATION* 65, 65 (Dawna I. Ballard & Matthew S. McGlone eds., 2017) (“Given that there are now four generations simultaneously in the U.S. workforce, people often find themselves in situations with coworkers, supervisors, and customers of various ages who have contrasting (and sometimes conflicting) viewpoints.”).

290. *See supra* text accompanying notes 184–88.

291. *See supra* text accompanying notes 198–200.

292. *See supra* text accompanying note 214.

to employ age to diversify their workforces. First, the Supreme Court has held that it is permissible to privilege older members of the protected class in employment decisions, even if doing so disadvantages younger individuals who are also members of the protected class.<sup>293</sup> This holding would permit employers to pursue age-based affirmative action programs, provided that they result in the favorable treatment of older employees. This may be a viable strategy for technology firms to pursue, given that their workforce skews younger,<sup>294</sup> but it may not be as valuable in other industries where the lack of older employees is not a problem.

Second, it may also be possible to promote age diversity through the intentional selection of policies that favor younger employees, though doing so may require bad faith compliance with the law on behalf of employers. The Supreme Court has held that one may use correlates of age, such as pension status, in employment decisions, provided that they are not mere proxies for age and have a reasonable basis.<sup>295</sup> Some recent federal appellate courts have also construed the ADEA to prohibit disparate impact theories of liability brought by applicants for a position, as opposed to employees.<sup>296</sup> Thus, it may be permissible for employers to list in an ad that they seek applicants who have no more than a certain number of years of experience.<sup>297</sup> This could permit firms to hire younger employees to replace those who might have left due to retirement, increasing the age diversity of the firm as a whole.

Thus, it appears that courts have simultaneously opened the door to

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293. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (“We see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one.”); Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. RICH. L. REV. 757, 758–63 (1997) (explaining the policy underpinnings of the ADEA embodied in the Wirtz Report).

294. See *supra* text accompanying notes 4–6.

295. See 29 U.S.C. § 623(f) (“It shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age, . . .”); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (“We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age.”).

296. See *Kleber v. CareFusion Corp.*, 914 F.3d 480, 485 (7th Cir. 2019) (en banc) (“In the end, the plain language of § 4(a)(2) leaves room for only one interpretation: Congress authorized only employees to bring disparate impact claims.”); *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 970 (11th Cir. 2016) (en banc) (“We have employed the traditional tools of statutory interpretation here, and we conclude that the only reasonable meaning of the statute is that a job applicant cannot sue under section 4(a)(2).”).

297. See *Kleber*, 914 F.3d at 481–82 (describing how an employer asked for applicants with no more than seven years of experience).

certain types of age diversity initiatives as well as to age discrimination. Whether one supports these doctrinal developments or not depends in part on the respective weights one gives to the age diversity interest or antidiscrimination norms. Because the case for age diversity appears to be relatively weak in the workplace context overall, it is not a strong foundation on which to argue for the removal of antidiscrimination protections. Instead, a strategy of diversity management at the human resources level may be the best way to implement whatever benefits age diversity might provide in the workplace, while lessening its costs.<sup>298</sup>

### CONCLUSION

Age is a dimension on which we might assess diversity in groups, and there are several normative rationales for why we might seek out age diversity in different forms. This Article is a first step in promoting age consciousness in the legal sphere by examining the forms that age diversity might take, the strength of age diversity as a policy interest, and the possible methods through which to achieve different age compositions in groups or in society as a whole.

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298. Stephan Alexander Boehm, Helke Schroder & Florian Kunze, *Comparative Age Management: Theoretical Perspectives and Practical Implications*, in THE SAGE HANDBOOK OF AGING, WORK AND SOCIETY, *supra* note 190, at 226–27 (describing human resources strategies for “age management”).