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## Legal Age

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ALEXANDER A. BONI-SAENZ

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# LEGAL AGE

ALEXANDER A. BONI-SAENZ\*

**Abstract:** How old are you? This deceptively simple question has a clear answer in the law, which is a number measuring the amount of time that has elapsed since birth. However, as scientists discover various biomarkers of human aging and individuals openly embrace more fluid identities, this chronological definition will soon have to compete with biological and subjective alternatives. Legal scholars have previously examined the role of age in the legal system, but they have done so assuming a chronological definition. This is the first Article to examine critically the antecedent question of how we should define legal age after one has reached adulthood. The stakes for this definition are high. Age is ubiquitous in the legal landscape, appearing in the Constitution, antidiscrimination statutes, criminal laws, and public benefits programs. This Article normatively assesses the chronological, biological, and subjective conceptions of age, examining how well they improve the accuracy of the legal system, impact administrative costs, promote autonomy interests, and further antisubordination goals. It then charts three potential paths forward for legal age: abolishing age as a meaningful legal category for adults, particularizing the definition of legal age based on context, and reforming the chronological status quo through the calibration of existing age-based law.

## INTRODUCTION

In 2018, Emile Ratelband—a Dutch “positivity guru”—petitioned a court to change his age legally from sixty-nine to forty-nine.<sup>1</sup> Analogizing to processes that allow people to change their legal name or gender, Ratelband noted

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<sup>1</sup> Camila Domonoske, *69-Year-Old Dutch Man Seeks to Change His Legal Age to 49*, NPR (Nov. 8, 2018), <https://www.npr.org/2018/11/08/665592537/69-year-old-dutch-man-seeks-to-change-his-legal-age-to-49> [<https://perma.cc/JS8E-4QJF>] (describing Ratelband’s efforts to legally change his age).

that he did not feel his chronological age and was in excellent physical shape.<sup>2</sup> As an ethical matter, he did not wish to lie about how mature he was, and he believed that he would be better off in various domains of life if he could truthfully declare an age that matched his own self-perception and physiological state.<sup>3</sup> In addition, he was willing to take the good with the bad and forfeit his pension, given that he would become ineligible for it once his age was lowered.<sup>4</sup> The Dutch court ultimately denied Ratelband's request, but he is not alone in claiming a mismatch between his legal age and the age that he believes he is.<sup>5</sup>

Ratelband's case raises fundamental issues about how we define legal age. Traditionally, it has been seen both as unproblematic and synonymous with chronological age, or the amount of time that has elapsed since birth.<sup>6</sup> However, two trends now converge to complicate this seemingly simple picture. First, scientists working in human development and aging have slowly but surely been unlocking the mysteries of the human body.<sup>7</sup> This has resulted in the discovery of a number of "biological clocks" that measure where on the physiological trajectory an individual might be between birth and death.<sup>8</sup> In other words, while two individuals might be the same chronological age, their physiological states and proximity to mortality may be drastically different.

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<sup>2</sup> *Id.* ("We can make our own decisions if we want to change our name, or if we want to change our gender. So I want to change my age.")

<sup>3</sup> *Id.* ("When I'm 69, I am limited. If I'm 49, then I can buy a new house, drive a different car," he said . . . "I can take up more work. When I'm on Tinder and it says I'm 69, I don't get an answer. When I'm 49, with the face I have, I will be in a luxurious position.").

<sup>4</sup> *Id.* ("Ratelband told the court he would be happy to delay his pension benefits for 20 years, as a logical extension of his age change." (citing Dutch newspaper *Algemeen Dagblad*)).

<sup>5</sup> See, e.g., *In re Doe*, No. A16-1392, 2017 WL 1375331 (Minn. Ct. App. filed Apr. 17, 2017) (unpublished opinion) (involving a man who petitioned a court to change his age because he was not able to experience formative years due to illness); Emily James, 'I've Gone Back to Being a Child,' DAILY MAIL, <https://www.dailymail.co.uk/femail/article-3356084/I-ve-gone-child-Husband-father-seven-52-leaves-wife-kids-live-transgender-SIX-YEAR-OLD-girl-named-Stefonknee.html> [<https://perma.cc/4AW4-HZ8E>] (Mar. 6, 2016) (discussing the case of a fifty-two-year-old individual who was assigned male at birth and who identifies as a six-year-old transgender girl and now lives with her adoptive parents); *When the Body Got Older but the Mind Remained a Child*, REDDIT <https://www.reddit.com/r/nevergrewup/> [<https://perma.cc/BDZ8-ZSRS>] (last visited Jan. 5, 2022) (a Reddit group described as being for those "who grew up on the outside but still feel like a child").

<sup>6</sup> See Richard A. Settersten, Jr. & Bethany Godlewski, *Concepts and Theories of Age and Aging*, in HANDBOOK OF THEORIES OF AGING 9, 9–10 (Vern L. Bengtson & Richard A. Settersten, Jr. eds., 3d ed. 2016) ("Chronological age is ultimately an index of *absolute* time (years since birth) that stems from a human-made calendar." (citation omitted)).

<sup>7</sup> See, e.g., Melissa Healy, *Scientists Unlock a Secret to Latinos' Longevity, with Hopes of Slowing Aging for Everyone*, L.A. TIMES (Aug. 18, 2016), <https://www.latimes.com/science/sciencenow/la-sci-sn-latinos-aging-20160817-snap-story.html> [<https://perma.cc/JW69-KLU7>] (discussing advances in aging science).

<sup>8</sup> See, e.g., Juulia Jylhävä, Nancy L. Pedersen & Sara Hägg, *Biological Age Predictors*, 21 EBIMEDICINE 29, 30–33 (2017) (discussing several such biological clocks).

Looking at these various biomarkers opens up the possibility that we may soon have a better way to quantify one's biological age, which could then be adopted into law.

Second, there is a stronger embrace of elective, fluid, and hybrid identities, with individuals adopting such labels as multiracial,<sup>9</sup> nonbinary,<sup>10</sup> pansexual,<sup>11</sup> or multireligious.<sup>12</sup> These new forms of identity rely more on the individual to ascertain or express who they are, rather than appealing to an objective measure such as chronology or biology.<sup>13</sup> These subjective understandings of identity have also penetrated the law. Self-identification is the primary way through which the government classifies individuals by race,<sup>14</sup> and states are increasingly allowing transgender individuals to select their gender designations on legal documents as well.<sup>15</sup> This opens up the prospect that age, too, should be a product of individual self-determination and expression rather than state-imposed definition.<sup>16</sup>

Although legal scholars have examined the role of age in the legal system, they have done so assuming a chronological definition.<sup>17</sup> This is the first

<sup>9</sup> See TANYA KATERÍ HERNÁNDEZ, *MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION* 1–15 (2018) (discussing how multiracialism complicates traditional antidiscrimination narratives).

<sup>10</sup> See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 933–45 (2019) (discussing nonbinary gender identity and its implications for the law).

<sup>11</sup> See Jennifer Ann Drobac, *Pansexuality and the Law*, 5 WM. & MARY J. WOMEN & LAW 297, 302–07 (1999) (arguing for the universality of pansexuality and how it might assist in discussions of law).

<sup>12</sup> See Eunil David Cho, *Constructing Multi-Religious Identity: A Narrative Self Approach*, 28 J. PASTORAL THEOLOGY 175, 176–80 (2018) (understanding multireligious identity as a product of social construction and a narrative process).

<sup>13</sup> See AMY GUTMANN, *IDENTITY IN DEMOCRACY* 24 (2003) (distinguishing between voluntary and involuntary identity groups).

<sup>14</sup> See Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1512–13 (2014) (exploring elective identity in the context of racial self-identification).

<sup>15</sup> See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 759–75 (2008) (examining the differing rules for gender designations in states and federal agencies).

<sup>16</sup> See June Carbone, *Age Matters: Class, Family Formation, and Inequality*, 48 SANTA CLARA L. REV. 901, 905 (2008) (“When researchers ask the question, however, what signifies the entry into adulthood, young Americans are inclined to reject . . . chronological age . . .”).

<sup>17</sup> See, e.g., Alexander A. Boni-Saenz, *Age Diversity*, 94 S. CAL. L. REV. 303, 309–17 (2021) (exploring diversity in chronological age in various institutions); Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES LAW 187, 189–90 (2019) (defining the field of law and aging in chronological terms); Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1167–70 (2020) (crafting a law of emerging adults in part using chronological parameters); Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1854–62 (2012) (examining marital age as a chronological threshold). There has been some recent discussion in the philosophical literature, however, about the moral dimensions of legal age. See generally Joona Räsänen, *Moral Case for Legal Age Change*, 45 J. MED. ETHICS 461 (2019) (arguing for legal age change in certain circumstances).

Article to examine the antecedent question of how we should define legal age once one has reached adulthood. The stakes for this definition are high. Perhaps more than any other identity category, age is explicitly embedded in the law in significant ways.<sup>18</sup> It appears in our founding documents, as age is a criterion in the U.S. Constitution for voting and holding elected office.<sup>19</sup> It also abounds in our statutory law. The criminal justice system uses age both to define crimes such as elder abuse and to calculate the length of criminal sentences.<sup>20</sup> Antidiscrimination laws incorporate age cutoffs to police private discriminatory behavior.<sup>21</sup> Various public benefits programs such as Social Security, disability, and retirement use age to regulate individuals' eligibility for benefits.<sup>22</sup> In the context of the COVID-19 pandemic, government bodies have also used age to prioritize who gets access to both ventilators and vaccines.<sup>23</sup>

The goal of this Article is to map out the theoretical dimensions and practical implications of the different definitions of legal age. The focus is on the definition of legal age once one reaches legal adulthood, though many of the same considerations might apply to the determination of legal age during

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<sup>18</sup> See Alexander A. Boni-Saenz, *Age, Equality, and Vulnerability*, 21 THEORETICAL INQUIRIES LAW 161, 162 (2019) (“Age is also legally significant. It is a ubiquitous legal marker that is used in ways large and small to address vulnerability in the population.”).

<sup>19</sup> U.S. CONST. art. I, § 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . . .”); *id.* § 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years . . . .”); *id.* art. II, § 1 (“[N]either shall any person be eligible to that Office [of President] who shall not have attained to the Age of thirty five Years . . . .”); *id.* amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

<sup>20</sup> See, e.g., 21 U.S.C. § 859(a) (doubling the penalty if the perpetrator is above eighteen years old and distributed a controlled substance to someone younger than twenty-one years old); N.C. GEN. STAT. § 14-32.3(a), (d)(4) (2021) (“A person is guilty of abuse if that person is a caretaker of a[n] . . . elder adult . . . and . . . (i) assaults, (ii) fails to provide medical or hygienic care, or (iii) confines or restrains the . . . elder adult in a place or under a condition that is cruel or unsafe . . . . [A]n [e]lder [a]dult . . . [is] [a] person 60 years of age or older . . . .”).

<sup>21</sup> See, e.g., 42 U.S.C. § 6102 (“[N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.”); 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 . . . .”).

<sup>22</sup> See *What Is Full Retirement Age?*, 20 C.F.R. § 404.409 (2022) (describing the age at which one can collect Social Security retirement benefits); *Medical-Vocational Guidelines*, 20 C.F.R. § 404, Subpt. P, App. 2 (2022) (describing the guidelines that incorporate age in evaluating eligibility for benefits).

<sup>23</sup> See Gina M. Piscitello et al., *Variation in Ventilator Allocation Guidelines by US State During the Coronavirus Disease 2019 Pandemic: A Systematic Review*, JAMA NETWORK OPEN, June 19, 2020, at 4, 8, JAMA NETW OPEN, 2020;3(6):e2012606 (noting how some states use age as a criterion for ventilator triage or allocation); *How CDC Is Making COVID-19 Vaccine Recommendations*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations.html> [<https://perma.cc/ZV3K-2XKS>] (Nov. 15, 2021) (recommending prioritizing vaccinating older members of the population).

childhood. The Article proceeds by assessing the chronological, biological, and subjective alternatives with respect to four normative criteria: accuracy, administrability, autonomy, and antisubordination.<sup>24</sup> The first two principles examine how age operates in the legal system. Accuracy concerns how legal terms directly or indirectly convey information that is of use to the legal system.<sup>25</sup> If a particular definition of legal age accurately captures important facts about the world, it will make the outcomes of the legal system more accurate and the system as a whole more efficient. The next criterion is administrability, which encompasses the practical costs associated with integrating a particular definition of age into the legal system.<sup>26</sup> Although it might be theoretically attractive to incorporate a certain concept into the law, if it is overly difficult for adjudicators to apply it or it leads to indeterminate results in a nontrivial number of cases, then it will nonetheless be normatively unattractive.

The last two normative criteria of autonomy and antisubordination relate to how legal age operates in society more broadly. Autonomy involves the individual's ability to engage in self-authorship and self-determination.<sup>27</sup> The definition of legal age implicates autonomy interests because the state helps define the range and content of available identity options while also legitimizing individuals' identities through state recognition.<sup>28</sup> However, age is not only an axis of identity but also a legal category that impacts social equality and structures the relationships between social groups. The law helps to construct identities in ways that can facilitate stereotyping and discrimination while also affecting the distribution of benefits and burdens among age groups and other

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<sup>24</sup> See *infra* Part II.

<sup>25</sup> See Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1332 (2015) ("Much of legal system design directly addresses or indirectly implicates the accuracy of outcomes in adjudication.").

<sup>26</sup> See Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 246 (2010) (characterizing the administrability criterion as evaluating whether a given feature of the legal system "will waste judicial resources, whether it will prove impossible or burdensome to administer, [and] whether it will result in unclear or unpredictable rules").

<sup>27</sup> See GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 20 (1988) (understanding autonomy as "a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values"); JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 28 (1986) (describing autonomy as a capacity for self-government).

<sup>28</sup> See WILLIAM E. CONNOLLY, *IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 34–35 (1991) (noting how normalized identities can constrain our freedom to self-define); Martha Minow, *Identities*, 3 YALE J.L. & HUMANITIES 97, 127 (1991) (highlighting the "interconnections between choice and constraint as people negotiate their identities in relation to others and against the backdrop of social and political structures of power").

groups in society.<sup>29</sup> Thus, the definition of legal age has the potential to impact antisubordination goals as well.<sup>30</sup>

This multifactor normative analysis reveals three pathways forward for legal age.<sup>31</sup> First, we might embrace the radical path of age abolition. This could entail a wholesale embrace of the subjective definition of age—allowing individuals to select an age identity freely upon reaching adulthood.<sup>32</sup> This option would require that the legal system adapt to function without the administrative simplicity of chronological age, and thus would likely require the unraveling of many age-based legal rules and entitlements. The goal with this approach would be to reduce the salience and importance of age-based distinctions in law and society by reducing government involvement with this identity category.<sup>33</sup>

The second option is to particularize legal age. While legal age has traditionally had a near-universal chronological definition across the legal landscape, this strategy involves adopting different definitions of age based on the particulars of the legal context.<sup>34</sup> This would allow for the selective incorporation of biological or other definitions of legal age in the legal rules for which it is most appropriate. These likely include those rules that apply to older adults and primarily employ age as a measure of physical degradation or senescence.<sup>35</sup> Chronological age could be retained when it is needed for the infor-

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<sup>29</sup> See Corinne T. Field & Nicholas L. Syrett, *Introduction*, in *AGE IN AMERICA: THE COLONIAL ERA TO THE PRESENT* 1, 1 (Corinne T. Field & Nicholas L. Syrett eds., 2015) (noting that age defines “key transitions in the life course, precise moments when our rights, opportunities, and civic engagement change—when we become eligible to drive, cast a vote, or enroll in Medicare”).

<sup>30</sup> See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979) (making the analytical focal point “whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status”); Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853, 860 (2003) (“The thrust of the antisubordination principle is that a law is objectionable on equality grounds if it has the effect of creating or reinforcing second-class citizenship on the basis of race, ethnicity, gender, or similar category.”).

<sup>31</sup> See *infra* Part III.

<sup>32</sup> See Martin Lyon Levine, *Introduction: The Frame of Nature, Gerontology, and Law*, 56 S. CAL. L. REV. 261, 283 (1982) (“An image of society characterized by age-irrelevance would perceive adulthood as indivisible. Policymakers would be blind to chronological age differences.”).

<sup>33</sup> See Michel Foucault, *The Ethics of the Concern of the Self as a Practice of Freedom*, in 1 THE ESSENTIAL WORKS OF MICHEL FOUCAULT, 1954–1984: ETHICS: SUBJECTIVITY AND TRUTH 281, 281–301 (Paul Rabinow ed., Robert Hurley & others trans., 1994) (arguing for resistance to identity, particularly that imposed by disciplinary bodies).

<sup>34</sup> See Clarke, *supra* note 10, at 933–36 (arguing for definitions that are tailored to a particular legal context in the area of sex and gender); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1601 (1990) (discussing the opposition of “the universal and the particular”).

<sup>35</sup> See Masood A. Shammass, *Telomeres, Lifestyle, Cancer, and Aging*, 14 CURRENT OP. CLINICAL NUTRITION & METABOLIC CARE 28, 30 (2011) (“Telomere length, shorter than the average telomere length for a specific age group, has been associated with increased incidence of age-related diseases and/or decreased lifespan in humans.” (citations omitted)).



mation it conveys about time, or when it serves as a good proxy for a variety of social and biological variables of interest.<sup>36</sup>

Finally, we might calibrate the current system of chronological age, avoiding the alternative definitions altogether. This is the most incrementalist approach, incorporating a variety of tweaks to the existing legal system.<sup>37</sup> It recognizes the administrative benefits of chronological age, as it only requires the reliable recordation of birth and the existence of a standardized timekeeping system.<sup>38</sup> Nevertheless, it suggests possible avenues for reform, including keying the various maturity rules to different ages based on scientific understandings of human development and scrutinizing more heavily those rules for older adults in which chronological age is a particularly poor proxy.<sup>39</sup>

This Article proceeds in three parts. Part I defines the three conceptual models of age employed in this Article: chronological, biological, and subjective.<sup>40</sup> This provides the basis for Part II, which normatively assesses the different models using the criteria of accuracy, administrability, autonomy, and antisubordination.<sup>41</sup> Part III then considers the options for the future of legal age, including abolition, particularization, and calibration of the status quo.<sup>42</sup>

### I. THREE MODELS OF LEGAL AGE

The law currently defines age in almost purely chronological terms.<sup>43</sup> This definition is implemented through laws that require the registration of the birth of a child with the state.<sup>44</sup> Although the federal government is the entity that gathers vital statistics data and promulgates model laws regarding vital

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<sup>36</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (“[A] State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State’s legitimate interests.”).

<sup>37</sup> See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1008 (1995) (noting the tension between incremental reform and revolution); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 583, 617 (1983) (noting the tension between “utopian fantasies” and “marginal adjustments”).

<sup>38</sup> See Judah Levine, *Measuring Time and Comparing Clocks*, in 3 HANDBOOK OF MEASUREMENT IN SCIENCE AND ENGINEERING 2109, 2109–10 (Myer Kutz ed. 2016) (describing the connection between cosmology and the measurement of time and the construction of clocks).

<sup>39</sup> See Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 90–91 (2016) (arguing for the disaggregation of the legal age of the majority).

<sup>40</sup> See *infra* notes 43–122 and accompanying text.

<sup>41</sup> See *infra* notes 123–247 and accompanying text.

<sup>42</sup> See *infra* notes 248–293 and accompanying text.

<sup>43</sup> See, e.g., *United States v. Marshall*, 736 F.3d 492, 498 (6th Cir. 2013) (“Under the Supreme Court’s jurisprudence concerning juveniles and the Eighth Amendment, the only type of ‘age’ that matters is chronological age.”).

<sup>44</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 102400 (West 2021) (“Each live birth shall be registered with the local registrar of births and deaths for the district in which the birth occurred within 10 days following the date of the event.”).

records, it is the states that regulate birth registration and maintain vital records.<sup>45</sup> On the ground, birth registration is typically routinized through hospital procedures or medical professionals who are present at birth.<sup>46</sup> This results in a state-issued birth certificate that serves as proof of birth, parentage, and other characteristics; “in short, [it] provides an identity.”<sup>47</sup>

With only a few exceptions, this chronological definition is universal across the legal landscape.<sup>48</sup> There is perhaps no other category of identity that is as explicitly enshrined in the law as is age.<sup>49</sup> It is found in the U.S. Constitution, in the form of age requirements to vote and hold elective office, with the former being the subject of the second-most recent amendment to the Constitution, which lowered the voting age to eighteen.<sup>50</sup> It is also found in constitutional jurisprudence, as the Supreme Court has used age as the basis for prohibiting executions when interpreting the Eighth Amendment.<sup>51</sup>

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<sup>45</sup> See 410 ILL. COMP. STAT. ANN. 535/2 (West 2021) (authorizing the creation of an Office of Vital Records within the Department of Public Health, charged with “install[ing], maintain[ing], and operat[ing] [a] system of vital records throughout [the] state”); *About the National Vital Statistics System*, CDC, [https://www.cdc.gov/nchs/nvss/about\\_nvss.htm](https://www.cdc.gov/nchs/nvss/about_nvss.htm) [<https://perma.cc/EQE2-KM28>] (Jan. 4, 2016) (describing the National Vital Statistics System and its relationship to state entities).

<sup>46</sup> See Jonathan Todres, *Birth Registration: An Essential First Step Toward Ensuring the Rights of All Children*, 10 HUM. RTS. BRIEF 32, 32 (2003) (“A child’s birth record typically includes the name of the child, the names of his or her parents, the name of the attending healthcare professional or birth attendant, and the date and place of birth.”). Although not legally required, hospitals also typically offer to register the child with the federal government so that it might issue a Social Security number and card, which serves as federal documentation of birth. *Id.*; see also SOC. SEC. ADMIN., SOCIAL SECURITY NUMBERS FOR CHILDREN 1 (2017), <https://www.ssa.gov/pubs/EN-05-10023.pdf> [<https://perma.cc/ZW3A-B4D8>] (noting that the process of obtaining a Social Security number is voluntary but wise).

<sup>47</sup> See Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 368 (2014) (“Recording birth provides a record of an individual’s life—a name, a family, a country, a sex; in short, recording birth provides an identity.”). Nevertheless, it is not always conclusive evidence. See, e.g., *Caraballo v. Sec’y of Health & Hum. Servs.*, 670 F. Supp. 1106, 1107 (D.P.R. 1987) (noting that the birth certificate provides prima facie rather than conclusive evidence of age).

<sup>48</sup> These exceptions are few and far between. See, e.g., *Bryant v. State*, 824 A.2d 60, 66 (Md. 2003) (defining “youthful age” in the criminal sentencing context using various factors relating to maturity rather than chronology); *State v. Atkins*, 505 S.E.2d 97, 113 (N.C. 1998) (coming to a similar conclusion in the sentencing context, noting that age is a “flexible and relative concept” (quoting *State v. Johnson*, 346 S.E.2d 596, 624 (N.C. 1986))).

<sup>49</sup> See Boni-Saenz, *supra* note 18, at 162 (“Age is also legally significant. It is a ubiquitous legal marker that is used in ways large and small to address vulnerability in the population.”); Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 12 (2014) (“Policymakers and advocates frequently advocate age-based policies because age is seen as a proxy for a host of other harder-to-assess characteristics, because age-based classification systems are easy and relatively inexpensive to administer and apply, and because the use of such classifications is typically assumed to be beneficial—or at least benign—with regards to older adults.”).

<sup>50</sup> See *supra* note 19 and accompanying text (collecting the constitutional provisions).

<sup>51</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

Age populates countless statutes across various legal areas, defining when people acquire various legal entitlements, such as the ability to obtain a driver's license,<sup>52</sup> consent to sex,<sup>53</sup> drink alcohol,<sup>54</sup> enter into contracts,<sup>55</sup> stay on their parents' health insurance,<sup>56</sup> get tax exemptions,<sup>57</sup> be protected against age discrimination,<sup>58</sup> or get Social Security retirement or disability benefits.<sup>59</sup>

As a matter of form, perhaps the most frequent use of age in legal directives is its inclusion in bright-line rules as a triggering fact.<sup>60</sup> For example, elder abuse and statutory rape laws define their crimes by reference to the age of the victim,<sup>61</sup> and curfews often set certain ages at which individuals can legally stay outside at night.<sup>62</sup> At the same time, chronological age can also serve as a guideline or factor in various legal directives, rather than being part of a bright-line rule. For instance, in family law, age is a factor in calculating alimony awards at divorce and in determining appropriate parents for adoption.<sup>63</sup> More recent-

<sup>52</sup> See *Graduated Licensing Laws by State*, INS. INST. FOR HIGHWAY SAFETY & HIGHWAY LOSS DATA INST., <https://www.iihs.org/topics/teenagers/graduated-licensing-laws-table> [<https://perma.cc/5FUW-KAWD>] (Jan. 2022) (collecting different states' requirements).

<sup>53</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-1405(A) (2021) (establishing eighteen as the age of consent); 720 ILL. COMP. STAT. 5/11-1.50(b) (2021) (establishing seventeen as the age of consent); NEV. REV. STAT. § 200.364(10) (2021) (establishing eighteen as the age of consent).

<sup>54</sup> See 23 U.S.C. § 158(a)(1)(A) (restricting federal funds to states that have a drinking age below twenty-one).

<sup>55</sup> See 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 9:3 (West 4th ed. 2009) (discussing the contractual age of majority in various jurisdictions).

<sup>56</sup> See 42 U.S.C. § 300gg-14(a).

<sup>57</sup> See 26 U.S.C. § 63(f)(1) ("The taxpayer shall be entitled to an additional amount of \$600—(A) for himself if he has attained age 65 before the close of his taxable year . . .").

<sup>58</sup> See 42 U.S.C. § 6102 (prohibiting age discrimination in "any program or activity receiving Federal financial assistance"); 29 U.S.C. § 623 (prohibiting age-based employment discrimination).

<sup>59</sup> What Is Full Retirement Age?, 20 C.F.R. § 404.409 (2022).

<sup>60</sup> 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").

<sup>61</sup> See, e.g., N.C. GEN. STAT. § 14-32.3(a), (d)(4) (2021) ("A person is guilty of abuse if that person is a caretaker of a[n] . . . elder adult . . . and . . . (i) assaults, (ii) fails to provide medical or hygienic care, or (iii) confines or restrains the . . . elder adult in a place or under a condition that is cruel or unsafe . . . [An] [e]lder adult [is] [a] person 60 years of age or older . . ."); N.H. REV. STAT. ANN. § 632-A:3(II) (2021) (defining felonious sexual assault as "sexual penetration with a person who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 4 years or more"); see also 21 U.S.C. § 859(a) (doubling the penalty if the perpetrator is above eighteen and distributed a controlled substance to someone younger than twenty-one).

<sup>62</sup> See, e.g., CHI., IL., MUN. CODE § 8-16-020(b)(1) (2021) (creating an offense if a minor stays "in any public place . . . within the city during curfew hours").

<sup>63</sup> See *Bailey v. Bailey*, 617 So. 2d 815, 817 (Fla. Dist. Ct. App. 1993) (Altenbernd, J., concurring) (noting how "age weighs more heavily in favor of permanent alimony when the spouse requesting permanent alimony is approaching fifty"); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 486 (1996) (describing how "the wife's age, her health, and marital duration—were significantly correlated with the decision to award alimony for an unlimited time period"); see also *In re ASF*, 876 N.W.2d 253,

ly, age has been used a criterion during the COVID-19 pandemic for the allocation of both ventilators and vaccines.<sup>64</sup>

How we define legal age has an impact on a wide variety of legal areas and legal rules. Thus, the stakes for its definition are high. This Article, however, does not endeavor to tackle the use of age across the legal landscape. Instead, the more modest goal is to focus in on the definition of legal age once one reaches adulthood as a way of illustrating the tradeoffs involved in any definition of legal age. Thus, it brackets the question of how one should define legal age during childhood. It also assumes for the purposes of the analysis the existence of a set of bright-line rules using chronological age that define the transition to legal adulthood.<sup>65</sup> Despite this focus, many of the same considerations about the formulation of legal age during the adult phase of life might also provide insights into legal age during childhood.

This Part will examine three particular conceptions of age—chronological, biological, and subjective—that may serve as models for legal age. It is important to note that these three conceptions of age are meant to be illustrative rather than exhaustive, as there are several other possible conceptions of age that could have been included.<sup>66</sup> The chronological model, discussed in Section A, represents the status quo, which equates age with time.<sup>67</sup> The inclusion of the biological model, examined in Section B, is meant to demonstrate that there exists an alternative conception of age that is also based in some external criterion, drawing on biology rather than time.<sup>68</sup> The subjective model, explained in Section C, demonstrates that age need not exist in reference to an external benchmark but can be derived primarily from the internal sphere, making it a matter of individual choice.<sup>69</sup> Together these three models offer an instructive range of possible conceptions of age, and the two alternatives to

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263 (Mich. Ct. App. 2015) (declaring that “consideration of [the adoptive parents’] ages did not violate the [law]”); *In re Baby Boy P.*, 664 N.Y.S.2d 340, 341 (App. Div. 1997) (noting that “the age of the prospective adoptive parents is one factor that may be considered” even if it is not conclusive).

<sup>64</sup> See Piscitello et al., *supra* note 23 (noting how some states use age as a criterion for ventilator triage or allocation); *How CDC Is Making COVID-19 Vaccine Recommendations*, *supra* note 23 (recommending prioritizing vaccinating older members of the population).

<sup>65</sup> See Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1119 (2012) (“The law relies on age benchmarks for determining when a child is mature enough to participate in the polity, exercise independent economic power, or fulfill any other right or duty.”).

<sup>66</sup> See Richard A. Settersten, Jr. & Karl Ulrich Mayer, *The Measurement of Age, Age Structuring, and the Life Course*, 23 ANN. REV. SOCIOLOGY 233, 238–42 (1997) (discussing additional conceptions of age, including psychological age, social age, cognitive age, and other-perceived age).

<sup>67</sup> See *infra* notes 70–88 and accompanying text.

<sup>68</sup> See *infra* notes 89–105 and accompanying text; see also GAIL WILSON, UNDERSTANDING OLD AGE: CRITICAL AND GLOBAL PERSPECTIVES 7 (2000) (“[I]n gerontology, unlike feminism, we have no equivalent of sex and gender to distinguish between biological and social ageing.”). In fact, we lack the vocabulary to distinguish between chronological aging and most other types of aging. See *id.*

<sup>69</sup> See *infra* notes 106–122 and accompanying text.

chronological age also require us to imagine how these alternatives might be adapted into the legal system.

### A. Chronology

Chronological age is the amount of time that has elapsed since birth.<sup>70</sup> This understanding of age is ascriptive in nature, which means that age-based identity is assigned based on some objective underlying status.<sup>71</sup> In this case, that status is determined jointly by the timing of birth and the progression of time, both of which are outside of one's control.<sup>72</sup> As a result, there is generally a definitive answer—in the form of a number—to the question: “How old are you?”<sup>73</sup>

By itself, this number is not particularly informative or interesting, as it is merely a measure of time. Chronological age acquires much of its meaning through its relationship with biological processes and the social context in which it is considered.<sup>74</sup> Chronological age is correlated with various physiological or morphological processes at the population level.<sup>75</sup> For example,

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<sup>70</sup> Alexander A. Boni-Saenz, *Age, Time, and Discrimination*, 53 GA. L. REV. 845, 853 (2019) (“Age is a numerical measure of time since birth.”).

<sup>71</sup> See Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 757 (2015) (defining ascription as “any definition that assigns identity labels based on whether an individual meets certain biological, social, or cultural standards that are considered objective”); Bernice L. Neugarten, Joan W. Moore & John C. Lowe, *Age Norms, Age Constraints, and Adult Socialization*, 70 AM. J. SOCIOLOGY 710, 710 (1965) (“In all societies, age is one of the bases for the ascription of status and one of the underlying dimensions by which social interaction is regulated.”).

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

<sup>73</sup> Antiabortion activists contest birth as the starting point for life and therefore age, though legal arguments to this effect have largely been unsuccessful. See, e.g., *Stiles v. Blunt*, 912 F.2d 260, 269 (8th Cir. 1990) (rejecting a request to calculate age based on the date of conception rather than the date of birth); *State v. Lee*, 569 S.W.3d 488, 493 (Mo. Ct. App. 2018) (“[W]e find no inconsistency in defining life as beginning at conception in terms of determining whether a child *in utero* can be the victim of a crime, and treating age in other statutes as constituting the time since a person's date of birth.”).

<sup>74</sup> 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.”).

<sup>75</sup> See, e.g., Fergus I.M. Craik, *Age-Related Changes in Human Memory*, in COGNITIVE AGING: A PRIMER 75, 75–76 (Denise C. Park & Norbert Schwarz eds., 2000) (describing age-related changes in memory); Jennifer Gonik Chester & James L. Rudolph, *Vital Signs in Older Patients: Age-Related Changes*, 12 J. AM. MED. DIRS. ASS'N 337, 340–42 (2011) (describing various physiological changes in older adults). The popular association of chronology and biology is in part the result of the rise of the scientific study of human life at the beginning of the twentieth century, as scientists began using chronological age as an explanatory variable for various observable trends in the human population. See HOWARD P. CHUDACOFF, *HOW OLD ARE YOU? AGE CONSCIOUSNESS IN AMERICAN CULTURE* 51–59 (1989) (noting these scientific trends).

most humans experience rapid development of the physical body and mental capacities at young ages.<sup>76</sup> Reproductive capacities typically only extend over a certain range of chronological ages, and there are significant differences by sex on this dimension.<sup>77</sup> As individuals age, they are also more likely to exhibit morphological characteristics such as wrinkling skin or grey hair.<sup>78</sup>

Chronological age also has strong associations with social phenomena. There are various sequences of socially-defined roles and events associated with certain chronological ages, which combine to form a standardized lifecourse.<sup>79</sup> For instance, there are certain ages or age ranges at which it is more common to wed, have children, or retire from the labor market, and these can convert into cultural narratives or scripts that people are encouraged to follow.<sup>80</sup> Chronological age thus indicates one's temporal location on the standardized lifecourse, along with any qualities that might be associated with the particular life stage one is assumed to occupy.

The substantive content of the standardized lifecourse, however, is unstable and changes over time. While chronological age is an important element of personal identity and social categorization today, this was not always the case. In some ancient civilizations, one's annual accounting of age mattered less than what period of life one was experiencing, of which there were nine or ten depending on the context.<sup>81</sup> As recently as the mid-nineteenth century in the United States, people did not generally celebrate birthdays or even commonly

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<sup>76</sup> 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).

<sup>77</sup> See Sheri L. Johnson, Jessica Dunleavy, Neil J. Gemmill & Shinichi Nakagawa, *Consistent Age-Dependent Declines in Human Semen Quality: A Systematic Review and Meta-Analysis*, 19 AGEING RSCH. REVS. 22 (2015) (noting the sex gap in fertility but also describing how age has an important impact on the quality of semen produced, with various consequences).

<sup>78</sup> See William Montagna & Kay Carlisle, *Structural Changes in Aging Human Skin*, 73 J. INVESTIGATIVE DERMATOLOGY 47, 52 (1979) (noting skin tissue changes with age); D.J. Tobin & R. Paus, *Graying: Gerontobiology of the Hair Follicle Pigmentary Unit*, 36 EXPERIMENTAL GERONTOLOGY 29, 30–32 (2001) (describing the physiological processes behind greying hair).

<sup>79</sup> 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”).

<sup>80</sup> 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 . . . .” (footnotes omitted)); Neugarten et al., *supra* note 71, at 711 (“There exists what might be called a prescriptive timetable for the ordering of major life events: a time in the life span when men and women are expected to marry, a time to raise children, a time to retire.”).

<sup>81</sup> See STEPHEN FINEMAN, *ORGANIZING AGE* 4 (2011) (“Ancient depictions of the lifespan did not tally the years in annual sequence but tended to favour broad, but definitive, ‘ages.’”).

know their exact birthdates.<sup>82</sup> Age segregation was also much less common, as one's primary social world was a household in which cross-age socialization was the norm.<sup>83</sup> These trends and social understandings also vary significantly by cultural context.<sup>84</sup>

Chronological age situates an individual in an historical context in relation to other groups as well.<sup>85</sup> This is because age signifies membership in a generation, or a cohort of people born around the same time who experience similar formative socio-historical moments in a particular cultural context.<sup>86</sup> These shared experiences, in turn, shape a given generation's outlook and values, or at the very least expectations about the qualities that an individual with membership in that generation might possess.<sup>87</sup> For example, millennials' formative experiences with the Internet often make them "digital natives," in contrast to prior generations who are "digital immigrants."<sup>88</sup>

Thus, the chronological conception of age is closely linked to time, but it derives much of its meaning through its relationship to other facets of biological or social life, which are culturally and historically situated. The next Section explores the biological conception of age.

### B. Biology

Whereas chronological age represents the amount of time that has elapsed since birth, biological age refers to the physiological state of the body along a human lifespan.<sup>89</sup> Similar to chronological age, biological age is an ascriptive

<sup>82</sup> See CHUDACOFF, *supra* note 75, at 27 ("American society before the latter half of the nineteenth century was characterized by a lack of sharp age awareness, age norms, and age grading . . .").

<sup>83</sup> See *id.* at 10–14.

<sup>84</sup> See WILSON, *supra* note 68, at 20–21 (describing how conceptions of age and aging vary significantly across cultures).

<sup>85</sup> See Victor W. Marshall, *Generations, Age Groups and Cohorts: Conceptual Distinctions*, 2 CANADIAN J. ON AGING 51, 55–56 (1983) (describing age groups and age strata).

<sup>86</sup> KARL MANNHEIM, *THE PROBLEM OF GENERATIONS* (1928), *reprinted in* ESSAYS ON THE SOCIOLOGY OF KNOWLEDGE 276, 290 (Paul Kecskemeti ed., Routledge 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."). Some scholars, however, question the utility of generations analysis. See, e.g., Philip N. Cohen, *A Little 'Generation' Debunking Data Exercise*, FAM. INEQ. (May 31, 2021), <https://familyinequality.wordpress.com/2021/05/31/a-little-generation-debunking-data-exercise/> [<https://perma.cc/33WF-MHB7>].

<sup>87</sup> See, e.g., GLEN H. ELDER, JR., *CHILDREN OF THE GREAT DEPRESSION: SOCIAL CHANGE IN LIFE EXPERIENCE* 183–200 (Univ. Chi. Press 1974) (discussing the effects of economic deprivation on the outlook of people who experienced the Great Depression).

<sup>88</sup> See Chris Jones, *Students, the Net Generation, and Digital Natives*, in *DECONSTRUCTING DIGITAL NATIVES: YOUNG PEOPLE, TECHNOLOGY AND THE NEW LITERACIES* 30, 30–43 (Michael Thomas ed., 2011) (discussing and critiquing the concepts of "digital natives" and "digital immigrants").

<sup>89</sup> See LEONARD HAYFLICK, *HOW AND WHY WE AGE* 15 (1994) (defining biological age in terms of its three component parts: longevity, aging, and death).

conception, with the underlying status being the state of the physical body or the proximity to death as opposed to the timing of birth.<sup>90</sup> Although there are some correlations between the two, one's chronological age does not determine one's physiological state.<sup>91</sup> For example, individuals with progeria experience premature aging, including alopecia, hardening and tightening of the skin, and problematic organ function, even though this affliction affects the very young.<sup>92</sup> To cite a less extreme example, one can infer very little about the health status of two fifty-year-olds based simply on their shared chronological age. One might be in good physical shape with an extended life expectancy, while the other may be suffering from various health conditions that make it unlikely that she will survive long.

Scientists studying human development and aging have made significant progress in unlocking the mysteries of the human body.<sup>93</sup> This has resulted in the discovery of various biomarkers of human development and aging.<sup>94</sup> During periods of early development, the focus is on evaluating whether the individual has progressed to the end state of bodily maturation.<sup>95</sup> Thus, measures such as skeletal development, brain development, sexual maturity, dental development, and hormone levels would be the primary indicators.<sup>96</sup> In some legal cases, biological indicators such as these have been used to determine chronological age when it is otherwise unknown.<sup>97</sup>

After the adult state has been reached, the focus shifts to measures of physiological degradation, which can be measured using various "biological

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<sup>90</sup> See S. Michal Jazwinski & Sangkyu Kim, *Examination of the Dimensions of Biological Age*, FRONTIERS GENETICS, Mar. 2019, at 1, 2–6 (describing the ways to model biological aging).

<sup>91</sup> Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 687 (1991) (noting that "biological age—physical and mental condition—is only loosely related to chronological age").

<sup>92</sup> Melissa A. Merideth et al., *Phenotype and Course of Hutchinson–Gilford Progeria Syndrome*, 358 NEW ENG. J. MEDICINE 592, 602 (2008) (describing the various negative health effects of progeria syndrome).

<sup>93</sup> See, e.g., Healy, *supra* note 7 (discussing advances in aging science).

<sup>94</sup> See, e.g., Paola Sebastiani et al., *Biomarker Signatures of Aging*, 16 AGING CELL 329, 333–36 (2017) (exploring the relationship between various biomarkers and aging); Jason L. Sanders & Anne B. Newman, *Telomere Length in Epidemiology: A Biomarker of Aging, Age-Related Disease, Both, or Neither?*, 35 EPIDEMIOLOGIC REVS. 112, 123 (2013) (concluding that telomere length is connected with aging).

<sup>95</sup> See Gaston P. Beunen, Alan D. Rogol & Robert M. Malina, *Indicators of Biological Maturation and Secular Changes in Biological Maturation*, 27 FOOD & NUTRITION BULL. (SUPP.) S244, S244 (2006) ("Maturation is a process that marks progress toward the adult (mature) state.").

<sup>96</sup> See Rhodri S. Lloyd et al., *Chronological Age vs. Biological Maturation: Implications for Exercise Programming in Youth*, 28 J. STRENGTH & CONDITIONING RSCH. 1454, 1455–58 (2014) (discussing the various indicia of biological maturation).

<sup>97</sup> See, e.g., *State v. Barnett*, No. 20A-CR-1967, 2021 WL 3745780, at \*1 (Ind. Ct. App. filed Aug. 25, 2021) (noting how a probate court ordered a fourteen-year age change based on assessments by a physician and social worker).



clocks.”<sup>98</sup> For example, scientists have established the length of telomeres—the compound structure at the end of chromosomes—as a reliable indicator of bodily aging,<sup>99</sup> while the epigenetic clock is a measure of DNA methylation that can predict the aging of cells and the likelihood of the onset of disease.<sup>100</sup> A further measure that adopts a different approach is the frailty index, which is a comprehensive health assessment tool that examines “the number of health deficits” of different types present in an individual.<sup>101</sup> These adult measures of biological age are in some sense predictive, in that they provide information about how close to mortality an individual might be based on biological facts.

Although the science of aging is rapidly developing, there is some consensus that biological age is the product both of inherited genetic traits and various environmental factors.<sup>102</sup> Thus, like chronological age, biological age is in large part objective, as a major contributor to one’s physiological state—one’s genetic makeup—is outside of one’s control. Another way in which biological age is outside of one’s individual control is the degree to which societal forces help to shape it. For instance, economic and social stressors faced by racial minorities can lead to “weathering” and poorer health outcomes compared to their White peers.<sup>103</sup> To the degree that individuals can control certain environmental influences on biological age, such as stress or diet, biological age may be subject to some form of indirect control.<sup>104</sup> Nevertheless, at our

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<sup>98</sup> See Jylhävä et al., *supra* note 8, at 30–33 (discussing several such biological clocks).

<sup>99</sup> See Alison J. Montpetit et al., *Telomere Length: A Review of Methods for Measurement*, 63 NURSING RSCH. 289, 290–91 (2014) (describing methods for telomere measurement); Shammass, *supra* note 35, at 30 (“Telomere length, shorter than the average telomere length for a specific age group, has been associated with increased incidence of age-related diseases and/or decreased lifespan in humans.” (citations omitted)).

<sup>100</sup> See Steve Horvath & Kenneth Raj, *DNA Methylation-Based Biomarkers and the Epigenetic Clock Theory of Ageing*, 19 NATURE REV. GENETICS 371, 375–76 (2018) (outlining this particular measurement tool).

<sup>101</sup> See Samuel D. Searle et al., *A Standard Procedure for Creating a Frailty Index*, BMC GERIATRICS (Sept. 30, 2008), <https://bmgeriatr.biomedcentral.com/articles/10.1186/1471-2318-8-24> [<https://perma.cc/2SD9-59UG>] (discussing the process of selecting criteria for a frailty index). Some have suggested that the biomarker and frailty approaches can be combined to create a better measure. See, e.g., Arnold Mitnitski et al., *Age-Related Frailty and Its Association with Biological Markers of Ageing*, BMC MED. (July 13, 2015), <https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-015-0400-x> [<https://perma.cc/4BS5-3NHY>].

<sup>102</sup> See ROBERT ARKING, *BIOLOGY OF LONGEVITY AND AGING: PATHWAYS AND PROSPECTS* 204–05 (4th ed. 2018) (discussing the interaction of genetic and environmental factors in contributing to human longevity).

<sup>103</sup> See Allana T. Forde, Danielle M. Crookes, Shakira F. Suglia & Ryan T. Demmer, *The Weathering Hypothesis as an Explanation for Racial Disparities in Health: A Systematic Review*, ANNALS EPIDEMIOLOGY, Mar. 2019, at 1, 12–16 tbl.5 (finding evidence for the weathering hypothesis across studies).

<sup>104</sup> See, e.g., Byung Pal Yu, *Aging and Oxidative Stress: Modulation by Dietary Restriction*, 21 FREE RADICAL BIOLOGY & MED. 651, 652–55 (1996) (discussing the relationship between diet, stress, and biological aging).

current state of scientific knowledge, it is not clear how to manipulate one's various biomarkers directly, despite the presence of a large field of "anti-aging" goods and strategies.<sup>105</sup>

Biological definitions of age are evolving as science progresses, but those focused on adult biological age share the traits of being tied to the state of the human body and the information that it conveys about one's proximity to mortality. The next Section explores a vastly different definition of age than the ones that have been discussed thus far.

### C. Subjectivity

In contrast to both the chronological and biological models of age, subjective age is not based on some underlying status, but instead on the individual's own self-identifications.<sup>106</sup> This is an elective rather than ascriptive model of identity, which emphasizes the choice of the individual with respect to their identity.<sup>107</sup> Because subjective age is rooted in an individual's self-perceptions rather than an underlying status, it is subject to change based on an individual's changing views, rather than on the systematic change embodied in chronology or the gradual but variable change embodied in biological age.<sup>108</sup>

For most, subjective self-identification will map well onto chronological age. This may be because many people exhibit the biological or social traits associated with their chronological age, or they feel they fit in well with members of their generation. Others, however, may feel dissonance. Consider the 2017 Minnesota Court of Appeals case *In re Doe*, which concerns a man who experienced mental illness early in his life that "robbed him of normal and expected adolescent developmental experiences."<sup>109</sup> As a result, he identifies as someone "5 to 15 years younger than his chronological age" and he submitted evidence from a doctor and a psychologist corroborating his claims.<sup>110</sup> He petitioned a Minnesota court "to alter his date of birth" on his birth certificate in

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<sup>105</sup> See Lucille Tournas & Gary E. Marchant, *The Fountain of Youth Revisited: Regulatory Challenges and Pathways for Healthspan Promoting Interventions*, 74 FOOD & DRUG L.J. 18, 38–45 (2019) (discussing the various regulatory options for the FDA in regulating anti-aging products).

<sup>106</sup> Settersten & Godlewski, *supra* note 6, at 11 ("Research on subjective age identification examines how old a person feels, into which age group an individual categorizes himself or herself, or how old one would like to be, regardless of his or her actual age.").

<sup>107</sup> See GUTMANN, *supra* note 13, at 24 (distinguishing between voluntary and involuntary identity groups); Rich, *supra* note 14, at 1512–13 (exploring elective identity in the context of racial self-identification).

<sup>108</sup> See Clarke, *supra* note 71, at 763 ("Elective identity is akin to a contractual right to opt into or out of a particular identity.").

<sup>109</sup> No. A16-1392, 2017 WL 1375331, at \*1 (Minn. Ct. App. filed Apr. 17, 2017) (unpublished opinion) (quoting David L. Stagner, M.D.).

<sup>110</sup> *Id.*

order to help him “develop a more cohesive sense of self” and “relate more satisfactorily to his peers.”<sup>111</sup> Although the court did not doubt the veracity of his claims, it ultimately denied his request as beyond the authority of the court under the Minnesota Vital Records Act.<sup>112</sup>

John Doe does not appear to be alone. Communities have formed on the Internet around the experience of having age dysphoria, or the experience of psychological distress due to the fact that one’s chronological age does not match one’s subjective one.<sup>113</sup> While not representing the final word on identity for a variety of reasons,<sup>114</sup> at this time the medical establishment has yet to recognize age dysphoria as they have gender dysphoria.<sup>115</sup> These communities may also not be widely recognized due to the absence of an organized activist community or high profile cases, as with other identities that reject societal ascriptions.<sup>116</sup>

Nevertheless, one need not experience psychological distress in order to feel a mismatch between one’s chronological and subjective age. Something more mundane, such as going prematurely grey, preferring music or art trends that are characteristic of individuals of a different generation, or waiting to go to college or have children until you are in your fifties may also create an in-

<sup>111</sup> *Id.* (quoting psychologist Gary R. Perrin).

<sup>112</sup> *Id.* at \*3 (“Nothing in Minnesota Statutes section 144.218, subdivision 4, allows for modification of a petitioner’s date of birth . . .”).

<sup>113</sup> *See, e.g., When the Body Got Older but the Mind Remained a Child*, *supra* note 5 (“A place for people who grew up on the outside but still feel like a child mentally (age dysphoria). To discuss, understand and help each other.”). In exploring this forum, it appears that the mismatch is often based on having a subjective age that is younger than one’s chronological age, and not vice versa.

<sup>114</sup> Historically, the psychiatric establishment has not always made decisions about the status of conditions based on the relevant scientific knowledge. *See* Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCIS. 565, 570–71 (2015) (describing how the American Psychiatric Association ignored scientific studies of homosexuality and only removed it from the DSM in light of activist pressure).

<sup>115</sup> *See* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452–54 (5th ed. 2013) (describing gender dysphoria as an incongruence between one’s assigned sex at birth and one’s gender identity, which results in significant distress).

<sup>116</sup> In contrast, both transgender and transracial individuals have captured the public’s imagination in recent years. *See, e.g., Buzz Bissinger, Caitlyn Jenner: The Full Story*, VANITY FAIR (June 25, 2015), <https://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz> [<https://perma.cc/7NND-UFAP>] (detailing the story of Caitlyn Jenner, a transgender woman); Allison Samuels, *Rachel Dolezal’s True Lies*, VANITY FAIR (July 19, 2015), <https://www.vanityfair.com/news/2015/07/rachel-dolezal-new-interview-pictures-exclusive> [<https://perma.cc/QPC5-5FMD>] (detailing the firestorm around a woman of European descent who claims to be Black). Some, however, balk at drawing analogies between different trans identities. *See* Jennifer Schuessler, *A Defense of ‘Transracial’ Identity Roils Philosophy World*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/arts/a-defense-of-transracial-identity-roils-philosophy-world.html> [<https://perma.cc/QRY3-YMGG>] (discussing the furor caused by a philosophical defense of transracialism by comparing it with being transgender).

ternal mismatch.<sup>117</sup> There are already various phrases to encompass these types of mismatches, as revealed in widely used terms such as “old soul” or “young at heart.”<sup>118</sup> Similarly, age self-identifications are highly sensitive to context and might change within a short time frame.<sup>119</sup> For example, a forty-year-old might feel particularly old when attending a birthday party for a twenty-five-year-old, as cross-age socialization is not currently the norm in American society. However, that same forty-year-old might feel quite young while visiting their grandparents in a nursing home.

Such subjectivity around age can lead a person to make choices either to project an image of age that is consonant with their self-concept or to encourage others to see them as a particular age.<sup>120</sup> Passing as another age by simply not being forthcoming about one’s chronological age is quite common, and passing in general is perhaps more prevalent with age than it is with other salient categories of identity, such as race or sex.<sup>121</sup> Teenagers regularly want to appear older than they are in order to be able to purchase alcohol, while others want to appear younger in order to appear more attractive to potential mates. Individuals may also make choices to alter their morphology in ways that will affect how others see them, by pursuing strategies such as cosmetic surgery, Botox, or other interventions.<sup>122</sup>

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<sup>117</sup> See Anne E. Barrett & Joann M. Montepare, “*It’s About Time*”: *Applying Life Span and Life Course Perspectives to the Study of Subjective Age*, in 35 ANNUAL REVIEW OF GERONTOLOGY AND GERIATRICS: SUBJECTIVE AGING: NEW DEVELOPMENTS AND FUTURE DIRECTIONS 55, 58 (Manfred Diehl & Hans-Werner Wahl eds., 2015) (“As individuals mature, knowledge and experiences derived from an age-differentiated world form the basis for internalized conceptions of the life course that include beliefs and expectations about past, present, and future age-related behaviors and events against which people evaluate themselves.” (citation omitted)).

<sup>118</sup> See Ann Thomas, *Wingo Dedication*, 54 SMU L. REV. 1913, 1915 (2001) (describing an elderly couple as “young at heart”).

<sup>119</sup> See Kohn, *supra* note 17, at 190 (“Moreover, age is in many ways a relative characteristic. One may feel ‘old’ in a certain context, and ‘young’ in another.”).

<sup>120</sup> See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 47–50 (1994) (describing the choice-based elements in the construction of racial identities); Daniel G. Renfrow, *A Cartography of Passing in Everyday Life*, 27 SYMBOLIC INTERACTION 485, 490 (2004) (discussing how passing is processed through narrative).

<sup>121</sup> See Elaine K. Ginsberg, *Introduction: The Politics of Passing*, in PASSING AND THE FICTIONS OF IDENTITY 1, 1–16 (Elaine K. Ginsberg ed. 1996) (discussing passing in the context of race, gender, and sexual orientation); Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 WM. & MARY L. REV. 2097, 2161 (2015) (“[P]eople may pass anytime a particular attribute is not readily apparent, including ethnicity, religion, age, or disability.”); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 925–26 (2002) (comparing racial and sexual passing).

<sup>122</sup> See Barbara A. Noah, *In Denial: The Role of Law in Preparing for Death*, 21 ELDER L.J. 1, 23–24 (2013) (discussing the dubious claims of the anti-aging products industry).

While the definition of legal age as chronological is nearly universal, age itself is multidimensional. This creates the possibility of alternative definitions, which this Part explored. With this foundation, the next Part examines the normative arguments for and against these three conceptual models of age.

## II. NORMATIVE ASSESSMENT

This Part assesses the normative attractiveness of the chronological, biological, and subjective definitions of legal age. The first two Sections examine how different definitions of legal age operate within the legal system, with Section A discussing accuracy<sup>123</sup> and Section B exploring administrability.<sup>124</sup> Using age as a legal category might add to legal rules by making them more accurate, reducing legal errors.<sup>125</sup> Nevertheless, the increased accuracy of particular legal processes must be balanced against their administrative costs.<sup>126</sup>

The next two Sections then turn to how different definitions of legal age may have effects outside of the legal system through their interactions with a particular social context. Section C focuses on autonomy,<sup>127</sup> and Section D examines antisubordination.<sup>128</sup> The legal definition of an identity category implicates autonomy interests in constructing personal identity, either helping or hindering those efforts.<sup>129</sup> It also has effects on the relationships of power between different groups in society as a whole, with potential effects on social equality.<sup>130</sup>

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<sup>123</sup> See *infra* notes 131–151 and accompanying text.

<sup>124</sup> See *infra* notes 152–193 and accompanying text; see also Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307–08 (1994) (“Accuracy is a central concern with regard to a wide range of legal rules. One might go so far as to say that a large portion of the rules of civil, criminal, and administrative procedure and rules of evidence involve an effort to strike a balance between accuracy and legal costs.”).

<sup>125</sup> See, e.g., Tracy E. Higgins, “*By Reason of Their Sex*”: *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1538 (1995) (discussing feminist analysis of the accuracy of gendered legal categories).

<sup>126</sup> See Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 92 (1990) (“Some equitable rules simply are not administrable in practice. Other rules, even if administrable, would impose unduly burdensome compliance costs on tax administrators and taxpayers.”).

<sup>127</sup> See *infra* notes 194–214 and accompanying text.

<sup>128</sup> See *infra* notes 215–247 and accompanying text; see also Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1417 (1997) (noting how autonomy and antisubordination provide separate intellectual inquiries).

<sup>129</sup> See JOHN J. DAVENPORT, *NARRATIVE IDENTITY, AUTONOMY, AND MORTALITY: FROM FRANKFURT AND MACINTYRE TO KIERKEGAARD* 2–4 (2012) (describing identity as an exercise in self-narrative and autonomy as a deep responsibility to control the volitional aspects of one’s character).

<sup>130</sup> See MACKINNON, *supra* note 30, at 117 (making the analytical focal point “whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status”); Bracey, *supra* note 30, at 860 (“The thrust of the antisubordination principle is that a law is objectionable on equality grounds if it has the effect of creating or reinforcing second-class citizenship on the basis of race, ethnicity, gender, or similar category.”).

This evaluative exercise highlights the tradeoffs that are inherent in any definition of legal age, as some definitions may score more highly on some normative criteria than others. The goal is to illustrate these tradeoffs clearly so that the reader can evaluate what definition might be most attractive to them based on their normative priors. This will pave the path for the next Part, which addresses the possible paths forward with respect to legal age using the normative assessment in this Part.

### A. Accuracy

One of the reasons for incorporating age into the legal system is that it captures something substantive that society has deemed an important consideration in the allocation of rights or responsibilities. If the definition of legal age accurately captures such facts about the world, it will make the legal system more efficient by improving its accuracy.<sup>131</sup> This subsection evaluates how the chronological, biological, and subjective models of legal age may affect the accuracy of age-based law.

Chronological age is a measure of time, so it allows the legal system to integrate temporal elements into legal directives. Consider the use of age in rationing schemes for medical resources such as ventilators during the COVID-19 pandemic.<sup>132</sup> One of the various arguments for using chronological age as one of the criteria for the allocation of scarce medical resources is that older individuals have had more time to experience life, whereas younger individuals have not had the same opportunity.<sup>133</sup> Thus, it is sensible, the argument goes, to give preference to the young over the old in order to give them that opportunity.<sup>134</sup> For those who wish to adopt such a rationing scheme, chrono-

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<sup>131</sup> Kaplow, *supra* note 25, at 1332 (“Much of legal system design directly addresses or indirectly implicates the accuracy of outcomes in adjudication.”).

<sup>132</sup> See Govind Persad, *Evaluating the Legality of Age-Based Criteria in Health Care: From Non-discrimination and Discretion to Distributive Justice*, 60 B.C. L. REV. 889, 922–37 (2019) (making the affirmative case for rationing by age).

<sup>133</sup> See Alan Williams, *Intergenerational Equity: An Exploration of the ‘Fair Innings’ Argument*, 6 HEALTH ECON. 117, 119, 129 (1997) (making this “fair innings” argument in the context of healthcare). Chronological age may also be a proxy for years left to live, though it is an imperfect measure compared with biological age. See *infra* notes 146–147 and accompanying text.

<sup>134</sup> *Id.* at 129. This view is certainly contested in the bioethical literature from a variety of perspectives. See, e.g., Michael M. Rivlin, *Why the Fair Innings Argument Is Not Persuasive*, BMC MED. ETHICS 1–6 (Dec. 21, 2000), <https://bmcomedethics.biomedcentral.com/track/pdf/10.1186/1472-6939-1-1.pdf> [<https://perma.cc/XD4M-GRBV>] (making six arguments for why the fair innings argument is flawed); Richard Wagland, *A Fair Innings or a Complete Life: Another Attempt at an Egalitarian Justification of Ageism*, in JUSTICE FOR OLDER PEOPLE 161, 170 (Harry Lesser ed., 2012) (concluding that an “effective . . . anti-ageist argument should appeal to the idea that there are certain synchronic interests that have equal moral value irrespective of the chronological age of the individual who holds them”).

logical age conveys important information—time—which has some value in the application of a legal rule.

Chronological age also provides indirect information to the legal system by acting as a proxy for various variables of interest.<sup>135</sup> Despite the ubiquitous use of chronological age in this way, courts have occasionally noted their discomfort with it. For instance, the dissenting Justices in *Roper v. Simmons* questioned the use of chronological age as a proxy for maturity in generating a prohibition on executions that was not found in the constitutional text.<sup>136</sup> Similarly, the dissenting Justices in *Massachusetts Board of Retirement v. Murgia* criticized the allowance of a mandatory retirement provision for police officers when the individual subject to them was physically fit enough for the job.<sup>137</sup> In the antidiscrimination context, the Court has also refused to allow employers to use age as a proxy without at least some justification.<sup>138</sup>

These reservations point to the fact that the value of chronological age as a proxy will vary based on the nature of its relationship with the variable for which it stands in and the cost of measuring that underlying variable.<sup>139</sup> Where the correspondence between age and the target variable is strong and the target variable itself is difficult to measure, the case for using chronological age as a proxy in the law will be strong. For example, compulsory schooling laws are often triggered based on age, which in this context serves as a proxy for the

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<sup>135</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (“[A] State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State’s legitimate interests.”).

<sup>136</sup> 543 U.S. 551, 601–02 (2005) (O’Connor, J., dissenting) (“Chronological age is not an unfailing measure of psychological development, and common experience suggests that many 17-year-olds are more mature than the average young ‘adult’ . . . . Indeed, the age-based line drawn by the Court is indefensibly arbitrary—it quite likely will protect a number of offenders who are mature enough to deserve the death penalty and may well leave vulnerable many who are not.”).

<sup>137</sup> See 427 U.S. 307, 327 (1976) (Marshall, J., dissenting) (describing as “the height of irrationality” the automatic termination of police officers at age fifty when fitness tests were easy to administer); see also *Gault v. Garrison*, 569 F.2d 993, 996 (7th Cir. 1977) (noting that “no evidence [had been] presented” that teachers were unable to fulfill their job duties after the mandatory retirement age of sixty-five).

<sup>138</sup> See *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422–23 (1985) (“Unless an employer can establish a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position, the age selected for mandatory retirement less than 70 must be an age at which it is highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications for the job.”).

<sup>139</sup> 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”).

mental capacity to benefit from education.<sup>140</sup> At the other end of the age spectrum, legal rules sometimes use chronological age as a proxy for mental or physical degradation, such as with those rules requiring that older drivers be screened more frequently for driving fitness.<sup>141</sup> In general, chronological age has a stronger relationship with various biological variables at younger ages, as physiological variation in the population trumps the predictive power of chronological age in the upper reaches of the lifespan.<sup>142</sup>

Chronological age may also be a proxy for social vulnerability to ageism or economic vulnerability in the labor market. The federal Age Discrimination in Employment Act (ADEA), which prohibits discrimination on the basis of age for those over forty, is often justified based on the need to protect those over this age, as they are more likely to be subject to these negative social forces.<sup>143</sup>

The reason why chronological age is particularly useful in this way is because legal age has both reflected and informed cultural understandings of age, ageism, and life stages.<sup>144</sup> Its continued power as a proxy for social phenomena is reliant on how closely people adhere to the behavioral scripts it generates or reinforces. The more people deviate from standard lifecourse sequencing—for instance by pursuing childrearing later in life or retiring in their forties—the more the predictive power of chronological age on this dimension may decline. As a consequence, its utility to the legal system is very much contingent on the social context.<sup>145</sup>

Biological age brings two types of information to the legal system. First, it provides temporal information, but of a different sort than does chronological age. Instead of simply measuring the time from the set event of birth, several of the measures of biological age may have value in estimating the amount

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<sup>140</sup> See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 586–88 (1992) (discussing the history of mandatory schooling laws).

<sup>141</sup> See, e.g., FLA. STAT. § 322.18 (2021) (requiring regular testing of drivers who have attained the age of eighty). Nevertheless, other states impose additional requirements much earlier in the driver's life. See, e.g., MD. CODE ANN., TRANSP. § 16-115 (West 2021) (imposing additional vision tests on those over the age of forty). This suggests that these chronological cutoffs are more political than scientific choices.

<sup>142</sup> 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.”).

<sup>143</sup> See Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1815 (1996) (arguing that the ADEA may be justified because it ties employers' hands and prevents them from shedding employees who are a higher salary cost due to age).

<sup>144</sup> See *supra* notes 79–84 and accompanying text (discussing how law helps to construct age and life stages).

<sup>145</sup> Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 114 (1984) (“[W]hen you situate law in social context, it varies with variations in that context.”).



of time that an individual has left before death.<sup>146</sup> Returning to the case of age rationing of medical resources during the COVID-19 pandemic, this information could be useful if one wanted to ration ventilators not by how long patients had lived, but instead by how many years of life would be likely saved by providing a ventilator to a particular patient.<sup>147</sup> This would give preference to healthy individuals with higher chronological ages over unhealthy individuals with lower chronological ages. As noted earlier in this Section, several age-based legal rules rely on chronological age as a proxy for the physiological facts that biological age would more directly measure.<sup>148</sup> Thus, if biological age is easy to measure, it will usually contribute more to accuracy than chronological age.

Subjective age provides less information that might be of use to the legal system. Both chronological and biological age are definitions of age that are based directly in a series of facts that are external to the individual. In contrast, subjective age is an elective model of age that relies on the self-perceptions of the individual. It is hard to imagine how these self-perceptions would be useful in designing or applying legal rules, particularly when those rules serve to distribute resources among members of society. Nevertheless, sometimes the legal system does rely on subjective assessments of identity. For example, the census uses self-identification through box-checking, and various governmental affirmative action programs rely on racial self-identifications to decide whether a particular program might apply to an individual.<sup>149</sup> This method of ascertaining race is adopted in part because there is no significant consensus on a readily available external definition of race.<sup>150</sup> One could argue that this is not the case for legal age, for which there is chronological age as well as the nas-

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<sup>146</sup> See WARREN C. SANDERSON & SERGEI SCHERBOV, PROSPECTIVE LONGEVITY: A NEW VISION OF POPULATION AGING 32 (2019) (noting the utility both of “backward-looking” chronological age and the virtually ignored “prospective age,” which is a measure of remaining life expectancy).

<sup>147</sup> See Alexander A. Boni-Saenz, David Dranove, Linda L. Emanuel & Anthony T. Lo Sasso, *The Price of Palliative Care: Toward a Complete Accounting of Costs and Benefits*, 21 CLINICS GERIATRIC MED. 147, 151 (2005) (describing how “quality-adjusted life year[s]” are a method for assessing the desirability of health interventions). This approach is heavily disputed in the bioethical literature. See Aki Tsuchiya, *QALYs and Ageism: Philosophical Theories and Age Weighting*, 9 HEALTH ECON. 57, 57 (2000) (summarizing the philosophical perspectives).

<sup>148</sup> See *supra* notes 139–142 and accompanying text.

<sup>149</sup> See Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367, 383–85 (2006) (discussing racial self-identification in various governmental programs).

<sup>150</sup> See Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1239 (1994) (discussing the difficulties with different methods of ascertaining race).

cent biological age. In addition, age is used in a far wider array of contexts, many of which involve the distribution of resources as well.<sup>151</sup>

### B. Administrability

Administrability concerns whether a particular legal structure “will waste judicial resources, whether it will prove impossible or burdensome to administer, [and] whether it will result in unclear or unpredictable rules.”<sup>152</sup> Even if there might be powerful arguments for a particular definition of legal age, if it cannot be successfully incorporated into the legal system at acceptable cost, then it will be normatively unattractive.<sup>153</sup> This Section assesses each of the three models using this lens, and in the process it sketches out the contours of what biological and subjective age might look like in practice. Before assessing the alternatives, however, it is worth examining the administrative aspects of the status quo.

Chronological age scores highly on administrability, and there are two primary reasons why. The first is that chronological age is easily determined by reference to a birth certificate and a timepiece.<sup>154</sup> While there are slightly different methods for determining one’s chronological age in the law, these two referents are always involved in the calculation.<sup>155</sup> With chronological age, there is also no need to expend resources updating individuals’ ages, as the progression of time naturally takes care of that administrative task once one knows the timing of birth. There are certainly administrative costs associated with the bureaucratic infrastructure of the state vital records departments that have been set up to maintain chronological age, but those costs have largely

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<sup>151</sup> See *supra* notes 49–64 and accompanying text (discussing the various legal entitlements that are contingent on age).

<sup>152</sup> Krishnakumar, *supra* note 26, at 246.

<sup>153</sup> See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1329 (2001) (“[A] virtue of welfare economics is that it highlights these costs and makes recommendations that are contingent on their significance, whereas many notions of fairness appear to be insensitive to administrative costs.”).

<sup>154</sup> See Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27, 34 (1979) (“[Chronological a]ge is a highly objective, easily measured characteristic, especially when compared to those qualities, such as maturity or susceptibility to certain physical conditions, for which it often serves as a proxy. Thus, age classifications can be administered more easily than those dependent upon criteria that are difficult to measure directly or that require individualized determinations.”).

<sup>155</sup> See, e.g., *People v. Woolfolk*, 848 N.W.2d 169, 176 (Mich. Ct. App.) (describing the differences between the common law computation of age and the “birthday rule”), *aff’d*, 857 N.W.2d 524 (Mich. 2014). This issue of calculation also arises when calculating age gaps, for instance for the purpose of applying sexual offense laws. See MODEL PENAL CODE § 213.8(8) (AM. L. INST., Tentative Draft No. 5 2021) (describing the “whole integers of years,” “calendar year,” and “hour of birth” rules for calculating legal ages).

already been incurred.<sup>156</sup> In addition, chronological age's numerical nature means that it can be integrated into bright-line rules relatively easily, reducing the need for adjudications on the meaning of age in a particular context.<sup>157</sup>

The second advantage of chronological age is that it benefits from widespread public acceptance precisely because it represents the status quo. Acceptance of the definition of legal age is important for two reasons. First, it significantly cuts down on enforcement costs.<sup>158</sup> When there is a discrepancy between public sentiment or custom and the law, there is a greater chance that the population may ignore, disobey, or contest laws that do not conform with their understandings.<sup>159</sup> That is not an issue with chronological age, but it may be so with alternative definitions, at least in the short term. Second, there would be no transition costs for keeping chronological age, and fewer transition costs for reforming it while retaining the basic chronological definition.<sup>160</sup> This alone is not a reason to dismiss calls for legal reform. Nevertheless, it does highlight potential barriers to more ambitious reform efforts.<sup>161</sup>

Biological and subjective definitions of age undoubtedly pose more administrative difficulties than chronological age. There are three primary reasons why this is so for biological age. First, it requires the selection of relevant scientific indices to be incorporated into the law. Because the science in this area is rapidly developing, it may be difficult to select biological clocks that will stand the test of time.<sup>162</sup> This creates the need for a vigilant legal entity to periodically review the measures being employed by the law. If the measure is changed, this may create confusion amongst the population and become a barrier to public acceptance.<sup>163</sup>

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<sup>156</sup> See *supra* Part I (discussing the bureaucratic machinery around chronological age).

<sup>157</sup> See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688–89 (1976) (describing the tradeoffs for rules, using an age-based rule as an example).

<sup>158</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972) (noting the importance of taking enforcement costs into consideration in the allocation of legal entitlements).

<sup>159</sup> See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 637–38 (1986) (discussing the interplay of custom and law in the property law context); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 212–13 (1937) (noting the importance of custom to the enforcement of law by courts).

<sup>160</sup> See Michael D. Gilbert, *The Law and Economics of Entrenchment*, 54 GA. L. REV. 61, 69–70 (2019) (noting the tradeoff between stability and transition).

<sup>161</sup> See Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 858–61 (2002) (discussing strategies for mitigating legal transition costs).

<sup>162</sup> See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2427 (1995) (discussing the challenges of incorporating scientific changes into law in the context of environmental law).

<sup>163</sup> See Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 152 (1999) (“[L]egal rules evolve too slowly to accommodate rapid

The second challenge is one of translation. Because current age-based law is framed in terms of chronological age, either the various legal rules that incorporate age will have to be changed to reflect the new measure, or there will need to be a translation of such biological scales into traditional chronological terms.<sup>164</sup> Third, the costs for assessment of biological age are greater than that for chronological age. Although not all measures of biological age require complex genetic analyses,<sup>165</sup> the current market price for many consumer tests of biological age can range up to several hundreds of dollars.<sup>166</sup> These prices will likely decrease over time, as has been the case with the cost of DNA sequencing,<sup>167</sup> but they will always still be more costly than examining a calendar.

The subjective definition of age is likely the greatest departure from the current regime, as it locates definitional power not in time or science, but instead in each individual. Because peoples' subjective understandings of their own age are informed by the dominant chronological paradigm, it is likely that subjective ages will fall within the standard chronological lifespan, making their use in the current regime of age-based law possible. However, because subjective self-identification is only bounded by the perceptions of the individual, there would probably need to be limits on the range of ages that an individual might claim.<sup>168</sup> For example, one could not claim to be timeless or eternal, nor could individuals claim an age that is outside the normal human lifespan, such as 1,000 years.

A further issue is updating one's age.<sup>169</sup> Specifically, what would be the means to ensure that the measure of age on file is up to date? As noted earlier this issue is addressed with chronological age through its very definition,

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technological change . . . and legal actors are typically not, as an institutional matter, well qualified to gather and analyze the [relevant] information . . .").

<sup>164</sup> See Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 5–6 (2004) (discussing the different methods of borrowing and translation in legal contexts).

<sup>165</sup> See *supra* note 101 and accompanying text (discussing the frailty index). Nevertheless, even non-blood or genetic testing requires paying individuals to administer the tests.

<sup>166</sup> See Rachel Burger, *6 Best Biological Age Tests for 2021*, LONGEVITY ADVICE (Jan. 25, 2021), <https://www.longevityadvice.com/best-biological-age-tests/> [<https://perma.cc/9LTA-YGR2>].

<sup>167</sup> Kathryn A. Phillips, Patricia A. Deverka, Gillian W. Hooker & Michael P. Douglas, *Genetic Test Availability and Spending: Where Are We Now? Where Are We Going?*, 37 HEALTH AFFS. 710, 715 (2018).

<sup>168</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–4 (2000) (discussing how the law may proscribe certain categories in order to improve the efficiency of the legal system in the property context); see also Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 401 (2017) (applying this principle to the identity category of sex).

<sup>169</sup> See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 959 (2015) (describing how the law permits updating of gender as a way of recognizing transgender people).

which is based on the progression of time.<sup>170</sup> Biological and subjective age are by their nature more individualized measures, which requires that the legal system regularly confirm or assess what age to use.<sup>171</sup> In an ideal world, one would continually update individuals' biological or subjective ages in order to have the most accurate estimate at any given point in time, but this would likely entail too many administrative costs for both individuals and the legal system.

This problem could be solved for adults by establishing an interval at which to assess biological age or report subjective age.<sup>172</sup> This can be conceptualized as the renewal of an identity contract with the state.<sup>173</sup> For instance, individuals might be required to update their legal age every ten years, similar to the time frame required to update another important identity document: the passport.<sup>174</sup> At that point, those benchmarks could serve as one's legal age until the next benchmark, or individuals could be allowed to update more frequently. Alternatively, or additionally, one could rely on chronological progression between benchmarks, which would create a hybrid biological/chronological or subjective/chronological legal age. For example, an individual who is forty years of chronological age could get tested or report at that age. She might find out that she has a biological age of thirty-five, or she might report that she believes herself to be thirty-five. Between that and the next benchmark—at the chronological age of fifty—she would progress from thirty-five to forty-five, at which point she would receive her next test of biological age or make her next report. This may be the most feasible system for integrating biological and subjective definitions of age into the legal system, as it would allow for imperfect but frequent updating of legal age between benchmarks.<sup>175</sup>

These administrative issues are more onerous and likely insurmountable when considering the context of children. Because there are such rapid physiological changes at young ages, the implementation of biological age for younger populations would require nearly continuous updating of biological age, entailing large administrative costs. In addition, chronological age func-

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<sup>170</sup> Boni-Saenz, *supra* note 70, at 849 (“[A]ge’s mutability is deterministic rather than being a consequence of choice or chance. In other words, people *inevitably* age.”).

<sup>171</sup> See Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 *FORDHAM L. REV.* 73, 102–03 (1994) (discussing the costs and benefits of individualized measures in the tort law context).

<sup>172</sup> See Geoffrey P. Miller, *The Legal Function of Ritual*, 80 *CHI.-KENT L. REV.* 1181, 1215 (2005) (describing how rituals can serve to renew identities).

<sup>173</sup> See Clarke, *supra* note 71, at 763 (“Elective identity is akin to a contractual right to opt into or out of a particular identity.”).

<sup>174</sup> See 22 U.S.C. § 217a (“A passport shall be valid for a period of ten years from the date of issue . . .”).

<sup>175</sup> Another potential hybrid option is setting chronological age as a default from which individuals might opt out. See Räsänen, *supra* note 17, at 461 (arguing that individuals should be able to change their legal age if it does not match either their biological age or their subjective age).

tions best as a proxy at these earlier ages, so it serves as an imperfect but workable substitute.<sup>176</sup> Subjective age would also be difficult to assess at younger ages. Children may not have well-formed concepts of age or how old they feel, or they may be subject to manipulation by adults in their orbit, meaning they would be unreliable sources of information.<sup>177</sup> This significantly strengthens the case for the maintenance of chronological age for children, along with a series of bright-line rules dividing childhood and adulthood.<sup>178</sup>

A final administrative issue is the risk of identity fraud. With respect to an elective model of identity, fraud does not mean that one claims an identity that contradicts some objective measure of age, such as chronology. Instead, it means that an individual claims an identity that does not reflect their own subjective age, regardless of whether this maps onto some objective measure.<sup>179</sup> For example, in the framework of an elective model of identity, a person with a chronological age of thirty-five and a subjective age of thirty would not be engaging in fraud by claiming an age of thirty. However, they would be engaging in fraud by claiming an age of twenty-five.

Thus, while some individuals may sincerely claim age identities not in line with their chronology, others may do so solely to seek the advantages that a particular identity might entail. Depending on the relative proportions of those who might fall into each category, the elective model may overall represent a genuine expression of autonomy or an exercise in opportunism. This concern is heightened when a particular identity category carries certain benefits, as a person's inauthentic claiming of that identity may represent an attempt to harness the benefits of a particular identity without experiencing the costs.<sup>180</sup>

Consider the recent case of Jessica Krug, who illustrates this problem.<sup>181</sup> Krug is White, but for many years she claimed an Afro-Latina identity and

<sup>176</sup> See Boni-Saenz, *supra* note 17, at 316–17 (discussing chronological age as a proxy at early ages).

<sup>177</sup> There is minimal research on the subjective age of minors. Nevertheless, the research on emerging adults indicates some regularities in subjective age in that population. See Nancy L. Galambos, Pamela K. Turner & Lauree C. Tilton-Weaver, *Chronological and Subjective Age in Emerging Adulthood: The Crossover Effect*, 20 J. ADOLESCENT RSCH. 538, 547 (2005) (finding that emerging adults start feeling younger than their chronological age around 25.5 years of age).

<sup>178</sup> See Hamilton, *supra* note 39, at 62 (“Childhood and adulthood are also socially and legally constructed statuses whose meanings have varied dramatically over time and across cultures.”).

<sup>179</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 10 cmt. a (AM. L. INST. 2021) (“Fraud depends on a subjective test. The defendant must be shown to have had a culpable state of mind. Liability for fraud requires a conscious discrepancy between some feature of a defendant’s representation and the truth.”).

<sup>180</sup> See Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 327–47 (2017) (describing the many ways in which one might acquire legal or cultural benefits from “reverse passing”).

<sup>181</sup> See Marisa M. Kashino, *The True Story of Jess Krug, the White Professor Who Posed as Black for Years—Until It All Blew Up Last Fall*, WASHINGTONIAN (Jan. 27, 2021), <https://www.washingtonian.com/2021/01/27/jess-krug/>.

took advantage of various opportunities meant to assist scholars of color; she had great success, becoming a tenured professor of history at George Washington University.<sup>182</sup> She eventually outed herself and admitted her deception, but she was able to succeed in her deception because race is largely determined through self-identification.<sup>183</sup> There have been similar cases of individuals attempting to take advantage of affirmative action programs by claiming races to which they did not sincerely believe they belonged.<sup>184</sup>

As applied to age, this drawback of the elective model is quite relevant. Age acts as a trigger for the payout of various public benefits and serves to allocate various legal entitlements across the lifespan.<sup>185</sup> Thus, the temptation to assert a particular identity in order to access benefits of a certain age would be persistent. For example, a person in their twenties might be enticed to claim an age below twenty-six for purposes of staying on their parents' health insurance.<sup>186</sup> Alternatively, a person in their thirties or forties may claim to be over sixty-five in order to get access to the COVID-19 vaccine, as two women in Florida recently did.<sup>187</sup> In contrast, because they are objective conceptions of age, chronological and biological age lessen the opportunities for fraud or manipulation. Although the fabrication of birth records is not unheard of, this is a difficult task given the variety of legal and bureaucratic systems through which one's date of birth passes.<sup>188</sup> Similarly, manipulation of one's chromosomes, DNA, or health deficits is largely beyond one's control as well.<sup>189</sup>

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washingtonian.com/2021/01/27/the-true-story-of-jessica-krug-the-white-professor-who-posed-as-black-for-years-until-it-all-blew-up-last-fall/ [https://perma.cc/Q9D5-H6LW] (explaining how a White professor claimed to be of Afro-Latin heritage).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*; see Jessica A. Krug, *The Truth, and the Anti-Black Violence of My Lies*, MEDIUM (Sept. 3, 2020), <https://medium.com/@jessakrug/the-truth-and-the-anti-black-violence-of-my-lies-9a9621401f85> [https://perma.cc/HWN8-FHV9] (“For the better part of my adult life, every move I’ve made, every relationship I’ve formed, has been rooted in the napalm toxic soil of lies.”).

<sup>184</sup> See, e.g., *Malone v. Haley*, No. 88-339 (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989) (regarding White Boston-area firefighters who claimed Black identities in order to benefit from an affirmative action program).

<sup>185</sup> See *supra* notes 49–64 and accompanying text (discussing the various legal entitlements that are contingent on age).

<sup>186</sup> See 42 U.S.C. § 300gg-14(a) (establishing that health insurance coverage obtained for an adult child through their parents’ plan “shall continue . . . until the child turns 26 years of age”).

<sup>187</sup> Meryl Kornfield, *Video Shows Deputies Confronting Young Women Who Dressed as ‘Grandmas’ for Coronavirus Vaccines*, WASH. POST (Feb. 19, 2021), <https://www.washingtonpost.com/nation/2021/02/18/florida-women-dress-elderly-vaccine/> [https://perma.cc/U2Q3-JUQF].

<sup>188</sup> See *supra* notes 43–46 and accompanying text (discussing the bureaucratic infrastructure of chronological age).

<sup>189</sup> See *supra* notes 102–105 and accompanying text (discussing the lack of manipulability of biological age).

The traditional method for combatting the problem of identity fraud is by imposing formal legal requirements on subjective identity claims.<sup>190</sup> One possibility is to impose good faith requirements on those who assert a particular identity, as is common in the religion context and has been suggested in the gender context as well.<sup>191</sup> To succeed, these would require that an individual be unlikely to assert a fraudulent age identity across life domains. Another possibility is to impose evidentiary requirements. For example, of those states that allow the change of sex or gender designations on birth certificates, many require either corroboration from members of the medical profession or the pursuit of certain surgeries to alter one's body to conform to standard notions of a particular sexed body.<sup>192</sup> Imposing such requirements has the benefit of narrowing the number of inauthentic claims, but it cuts against the benefits of subjective models of identity, as it imposes some external validation on one's subjectively felt identities.<sup>193</sup>

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The analysis in this Section indicates that shifting from chronological age to one of the alternatives would involve heightened administrative costs. These costs may be justified by other normative concerns, such as improving the accuracy of the legal system as a whole, or ensuring that the legal system promotes autonomy or antisubordination interests. These last two are the subjects of the next two Sections, which examine how the legal category of age might operate in society at large, both with respect to individuals and social groups more broadly.

### C. Autonomy

In *Obergefell v. Hodges*, Justice Kennedy loftily proclaimed that: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and ex-

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<sup>190</sup> See Clarke, *supra* note 71, at 828 (“Formalization, in theory, is an attractive compromise between ascriptive and elective models because it serves evidentiary, cautionary, and channeling functions.”).

<sup>191</sup> See Clarke, *supra* note 10, at 972 (discussing good faith requirements in the context of religion and gender).

<sup>192</sup> See Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 400–03 (2013) (describing the proof requirements in various states).

<sup>193</sup> See Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 155–68 (2011) (describing the legal and medical management of sex designations).



press their identity.”<sup>194</sup> Although the nature of the autonomy interest that the Constitution protects has not been defined with precision,<sup>195</sup> at the very least it involves some power for individuals to engage in self-authorship or self-determination.<sup>196</sup> This is a normative concern because identity is the means through which we craft our own stories or self-definitions, which are key exercises of autonomous decision-making.<sup>197</sup> In addition, the law has traditionally played an important role in the social construction of identity, both for individuals and groups.<sup>198</sup>

There are two primary ways in which autonomy interests are implicated in legal definitions of identity. First, the legal system serves as a way for the state to recognize and legitimize individuals’ identities. At the individual level, this can enhance autonomy by increasing the option set of identities from which an individual can choose.<sup>199</sup> Because identity is often formed relationally with others, state recognition of group identities can also facilitate the autonomy interests of individuals.<sup>200</sup>

Legitimizing identity in this way can have positive consequences, as it helps to maintain a coherent sense of self across legal and social domains.<sup>201</sup> Consider the case of those who have lived in the United States and feel strong ties to the country but may not have citizenship status. The conferral of citizenship on this group not only conveys the rights implied in that legal status, but

<sup>194</sup> 576 U.S. 644, 651–52 (2015); *see also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (describing having the power “independently to define one’s identity” as “central to any concept of liberty”).

<sup>195</sup> *See* Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2358–59 (2020) (collecting vagueness critiques of Justice Kennedy’s opinion in *Obergefell*).

<sup>196</sup> *See* DWORKIN, *supra* note 27, at 20 (understanding autonomy as “a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values”); FEINBERG, *supra* note 27, at 28 (describing autonomy as a capacity for self-government).

<sup>197</sup> *See* ROS HAGUE, *AUTONOMY AND IDENTITY: THE POLITICS OF WHO WE ARE 1* (2011) (“Autonomy is important to identity because it offers the prospect of taking control of identity and the means for self-definition.”).

<sup>198</sup> *See, e.g.*, IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 8 (10th ed. 2006) (noting how race has been socially constructed over time, with the law playing a large part in creating races).

<sup>199</sup> *See* WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 81–83 (1996) (describing the importance of individuals having options with a culture from which to choose their identities and live autonomously).

<sup>200</sup> *See* Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25–36 (Amy Gutmann ed., 1994) (noting the importance of recognition to cultural minority groups).

<sup>201</sup> *See* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1844 (1995) (“The theory of the situated self views autonomy in terms of the innate human capacity to act upon culturally-inscribed beliefs and values, to embrace or to reject them, in a process of self-reflection and self-understanding that ideally produces a coherent, if unstable, personal identity.”).

also the psychological benefits associated with having the state recognize the individual's place within it.<sup>202</sup> Conversely, when there is dissonance between an individual's self-identity and that ascribed by the state or other relevant social actors, there can be negative psychological impacts. For example, many transgender individuals experience negative mental health consequences when there is a disconnect between their own felt identity and that which is imposed by society or the state.<sup>203</sup> State legitimation of age identity can be important for those who experience a mismatch between their chronological and subjective age as well, as *In re Doe* demonstrated.<sup>204</sup>

Although state recognition of personal identity can affirm or empower, state regulation of identity may also constitute an oppressive force.<sup>205</sup> According to this view, the law creates or reinforces fixed identities by defining them into legal categories. This has two important effects. First, it stabilizes the boundaries of the identity categories that it touches.<sup>206</sup> Thus, while those who fall within a legal definition may feel legitimized, those who do not will either be misrecognized or not recognized at all.<sup>207</sup> Second, the law helps to define the content of particular categories of identity. This essentializes identities, defining the characteristics, roles, or behaviors that are thought to be constitutive of them.<sup>208</sup> These essentialized identity categories exert normative force

<sup>202</sup> See Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMANITIES 110, 130–31 (2011) (describing the importance of connectedness and affective interests in the immigration context).

<sup>203</sup> See Ayden I. Scheim, Amaya G. Perez-Brumer & Greta R. Bauer, *Gender-Concordant Identity Documents and Mental Health Among Transgender Adults in the USA: A Cross-Sectional Study*, 5 LANCET PUB. HEALTH E196, E202 (2020), <https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930032-3> [<https://perma.cc/XE8E-A23K>] (concluding that gender-concordant identity documents might improve the mental health outcomes of transgender adults).

<sup>204</sup> See *generally* No. A16-1392, 2017 WL 1375331 (Minn. Ct. App. filed Apr. 17, 2017) (unpublished opinion).

<sup>205</sup> See Clarissa Rile Hayward & Ron Watson, *Identity and Political Theory*, 33 WASH. U. J.L. & POL'Y 9, 21–22 (2010) (“[T]he universe of recognized identities defines what counts as intelligible ways of living and being, thus rendering unintelligible those who fall within no identity-category. For people who conform, identities serve as mechanisms of power that constrain freedom. For people who do not, they are mechanisms of power that legitimize violence and coercion.”) (emphasis omitted).

<sup>206</sup> See CONNOLLY, *supra* note 28, at 93 (“If humans are not predesigned, and if they therefore are ill suited to fit neatly into any particular social form, then any set of enabling commonalities is likely to contain corollary injuries, cruelties, subjugations, concealments, and restrictions . . .”); Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1233 (1994) (“By writing or revising the scripts of social roles, the law participates in the constitution of selves and in the construction of collectivities.”).

<sup>207</sup> See NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 14 (1997) (understanding the “cultural or symbolic” harms of recognition as “rooted in social patterns of representation, interpretation, and communication”).

<sup>208</sup> See DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE 2 (1989) (“Essentialism is classically defined as a belief in true essence—that which is most irreducible, unchanging, and therefore constitutive of a given person or thing.”); Devon W. Carbado & Cheryl I.

on individuals and can serve as the basis for policing behavior as appropriate or inappropriate for individuals within a given identity category.<sup>209</sup> This is embodied in the phrase: “Act your age!”<sup>210</sup> The beliefs, demands, and expectations produced by the social construction of age and the lifecourse—sometimes reinforced by law and sometimes not—can serve to constrain autonomy in various ways.<sup>211</sup>

The subjective model of age would better promote autonomy interests as compared to the chronological or biological alternatives.<sup>212</sup> As an elective form of identity, it would allow individuals to bring the state’s designation of age-based identity in line with their own self-conceptions, whereas the other definitions would put age identity largely or completely outside the control of the individual.<sup>213</sup> This would be most significant and beneficial for those who experience age dysphoria that causes psychological distress, but it would help others who simply feel a mismatch between their chronological and subjective age as well. The subjective model would also help to destabilize age categories by allowing individuals to adopt identities that may or may not be consonant with the dominant chronological definition.<sup>214</sup>

#### D. Antisubordination

If the focus of autonomy in this context is how the law assists or hampers individuals’ attempts at constructing their own identities, then the principle of antisubordination is concerned primarily with how the law affects the equality

Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2205–06 (2019) (noting that essentialism is not always a negative).

<sup>209</sup> See RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 61–65 (2005) (describing social identity as performance, with certain performances being required).

<sup>210</sup> EGLIT, *supra* note 80, at 7 (“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 . . . .” (footnote omitted)).

<sup>211</sup> See Boni-Saenz, *supra* note 70, at 894 (“[A] liberty-based theory of discrimination embraces a critical stance toward a socially or legally prescribed life course. In other words, the pathways that one might take in pursuit of one’s life goals should not be dictated by age, and certain opportunities should not be foreclosed solely because of age.”).

<sup>212</sup> Due to administrability concerns discussed in Section II.B, it would not be possible to adopt the most autonomy-enhancing view of subjective legal age, which would allow changing age designation at any moment.

<sup>213</sup> See Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1189 (2001) (“Rather than seeking to chain people forever to the racial statuses into which they are born, we should try both to eradicate the deprivations that impel people to want to pass *and* to protect individuals’ racial self-determination, including their ability to revise racial identities.”).

<sup>214</sup> See Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1407 (2008) (arguing for a broad definition of Latino in order to destabilize race and ethnicity categories).

of social groups in society.<sup>215</sup> The antisubordination principle is typically deployed with respect to various identity characteristics in the realms of antidiscrimination law and Equal Protection jurisprudence.<sup>216</sup> Nevertheless, it also has application here as the legal definition of age affects societal age subordination as well as subordination on the basis of other identity characteristics with which age intersects.<sup>217</sup>

A conceptual starting point is a brief description of the subordination based on age that an antisubordination approach would seek to undo.<sup>218</sup> In some ways, systemic ageism operates similarly to other systemic ills, as it is embedded in cultural attitudes and societal institutions in ways that hinder the goal of social equality.<sup>219</sup> The law plays a role by integrating age into legal rules and creating and reinforcing age identities and a standardized lifecourse. The social understandings produced by these legal categorizations can promote stereotyping or discrimination, which in turn can reinforce status hierarchies for the social groups referenced in the law.<sup>220</sup>

Consider the age of sixty-five. When it was selected as the initial age for the collection of Social Security retirement benefits, there was no particular

<sup>215</sup> See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157 (1976) (“[W]hat is critical, however, is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group.”).

<sup>216</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 445–46 (2000) (discussing an antisubordination approach to the Americans with Disabilities Act); Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809, 832–37 (2017) (reviewing KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* (2016)) (discussing antisubordination in sex discrimination law); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1534–44 (2004) (discussing antisubordination in modern Equal Protection jurisprudence with respect to race).

<sup>217</sup> 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 race or gender or class, but by many axes that work together and influence each other.”); 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).

<sup>218</sup> See Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1008–09 (1986) (“[T]he anti-subordination perspective is a group-based perspective, in two ways. First, it focuses on society’s role in creating subordination. Second, it focuses on the way in which this subordination affects, or has affected, groups of people.” (footnote omitted)).

<sup>219</sup> 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); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328–44 (1987) (describing the nature of “unconscious racism”).

<sup>220</sup> See Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 673–74 (2013) (discussing the interplay of stereotyping and discrimination); Thomas Nicolaj Iversen, Lars Larsen & Per Erik Solem, *A Conceptual Analysis of Ageism*, 61 NORDIC PSYCH. 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.’”).

logic behind its selection nor did it necessarily have the social meaning it does today.<sup>221</sup> However, over time that age has come to demarcate a separate life stage of retirement, with associated expectations that a person of that age lacks attachment to the labor market and may have no desire to be part of it.<sup>222</sup> In other words, it evolved from a bright legal line into a social one, with essential characteristics attributed to those on either side of it. This unfortunately facilitates stereotyping and discrimination against older individuals based on their perceived interest or ability to pursue paid work.<sup>223</sup> These cultural attitudes also become embedded in the laws and policies structuring the nature of work, which is not traditionally hospitable to phased retirement and part-time work that might accommodate older workers.<sup>224</sup> Further, these dynamics can be particularly harmful to women, low-income individuals and people of color, who are more likely to have experienced poorer employment opportunities earlier in life and who might need to work past traditional retirement age to avoid old age poverty as well.<sup>225</sup>

The positive story is that law can also address age subordination by changing the substantive position of subordinated age or other groups within society. However, much depends on the specific context in which age is deployed and the way in which laws are structured. Consider elder abuse laws, which typically criminalize offenses committed against those who are above a

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<sup>221</sup> See WILBUR J. COHEN, RETIREMENT POLICIES UNDER SOCIAL SECURITY 24 (1957) (“[T]here was no scientific, social, or gerontological basis for the selection. . . . [I]t was the general consensus that 65 was the most acceptable age.”); see also Comment, O’Neil v. Baine: *Application of Middle-Level Scrutiny to Old-Age Classifications*, 127 U. PA. L. REV. 798, 812 (1979) (“The concept that a person at age sixty-five, or for that matter seventy or seventy-two inexorably has suffered a loss of ability and functional capacity is completely at variance with known facts. . . . There is no rational basis for taking age sixty-five as a milestone as [sic] either physical or mental capacity.” (alteration in original) (quoting *Age Discrimination in Employment Amendments of 1977: Hearings on S. 1784 Before the Subcomm. on Lab. of the S. Comm. on Hum. Res.*, 95th Cong., 1st Sess. 174 (1977) (statement of Albert E. Gunn, Assistant Professor of Medicine (Geriatrics) and Assistant Director (Hospitals) of the University of Texas System Cancer Center/M.D. Anderson Hospital and Tumor Institute))).

<sup>222</sup> See CHRIS PHILLIPSON, RECONSTRUCTING OLD AGE: NEW AGENDAS IN SOCIAL THEORY AND PRACTICE 28–41 (1998) (describing the various forces, including science and social welfare programs, that help to socially construct old age).

<sup>223</sup> See PALMORE, *supra* note 219, at 119–21 (describing how age discrimination plays out in the employment context).

<sup>224</sup> See Richard W. Johnson, *Phased Retirement and Workplace Flexibility for Older Adults: Opportunities and Challenges*, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 68, 69 (2011) (outlining the various barriers to more flexible work arrangements for older workers).

<sup>225</sup> See Chenoa Flippen & Marta Tienda, *Pathways to Retirement: Patterns of Labor Force Participation and Labor Market Exit Among the Pre-Retirement Population by Race, Hispanic Origin, and Sex*, 55B J. OF GERONTOLOGY: SOC. SCIS. S14, S24–S26 (2000) (discussing the cumulative disadvantage faced by certain groups and ambiguous meaning of retirement for these groups).

certain age or enhance penalties if the victim is above a certain age.<sup>226</sup> On the one hand, the use of the criminal law in this way would seem to combat age subordination by both protecting the population of older adults from violence and exploitation and communicating that such abuse is unacceptable.<sup>227</sup> On the other hand, the way these statutes are often drafted removes elder abuse victims from decision-making in the criminal process, which has the effect both of robbing them of agency and reinforcing stereotypes of older adults as incapable.<sup>228</sup> In short, any attempt to use the law to remedy age subordination must proceed cautiously.

Although systemic ageism is an important social ill, there are at least three key ways in which it is unique and conceptually difficult.<sup>229</sup> First, the harm of age subordination is muddled in part by the temporal nature of chronological age. Aging is an inevitable process that requires individuals move involuntarily between superordinate and subordinate age groups.<sup>230</sup> This produces some form of equality amongst individuals over their respective lifetimes that does not exist for other identity categories.<sup>231</sup> Nevertheless, this “equality over lifetimes” does not erase the objectionable nature of age-based hierarchies that might exist in society at any given moment in time.<sup>232</sup> These still conflict with an antisubordination principle, which requires the dismantling of status hierarchies in society regardless of whether there may be an equality of inequalities during any particular individual’s lifetime.<sup>233</sup>

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<sup>226</sup> See, e.g., CAL. PENAL CODE § 368(b)(2)(B) (West 2021) (enhancing prison terms if abuse is committed against someone over the age of seventy); NEV. REV. STAT. § 200.5099 (2021) (making it a felony to impose various harms on an older person).

<sup>227</sup> See Nina A. Kohn, *Elder (In)justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 18 (2012) (“The experience with the criminal justice response to domestic violence suggests that treating elder abuse as a prosecutable crime will protect at least certain victims and would-be victims from future abuse, and can serve as a productive way of communicating public values.”).

<sup>228</sup> See *id.* at 20–23 (describing how criminal elder abuse statutes can hinder elder autonomy, “promot[e] stereotypes about older” people, and “divert resources from [needed] social services”).

<sup>229</sup> Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It’s Been, Where It Is Today, Where It’s Going*, 31 U. RICH. L. REV. 579, 677 (1997) (“Ageism is not equivalent, either in its genesis nor its manifestations, to racism.”).

<sup>230</sup> See Boni-Saenz, *supra* note 17, at 308 (“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>231</sup> See Boni-Saenz, *supra* note 70, at 870–75 (explaining the “lifetime egalitarianism” approach).

<sup>232</sup> *Id.*; see Carina Fourie, Fabian Schuppert & Ivo Wallimann-Helmer, *The Nature and Distinctiveness of Social Equality: An Introduction*, in SOCIAL EQUALITY: ON WHAT IT MEANS TO BE EQUALS 1, 1 (Carina Fourie, Fabian Schuppert & Ivo Wallimann-Helmer eds., 2015) (“When we appeal to the value of equality, we mean the value primarily of egalitarian and nonhierarchical relationships . . .”).

<sup>233</sup> See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1454 (1991) (“The goal of antisubordination

Second, although age is a significant social category, its salience is perhaps more variable throughout the lifecourse than race or gender, fluctuating by the sphere in which it is considered and in its intersections with other identity categories.<sup>234</sup> The social salience of an identity category is important because it helps to determine the degree to which that category produces distinct status groups, which is a prerequisite to group-based subordination.<sup>235</sup> To the degree that age is less salient than race or sex, at least at certain moments in the lifecourse, it is less likely to serve as a basis for sharp societal divisions.

Finally, unlike race or gender, the structural disadvantages associated with age are not as caste-like in that they do not extend across a variety of domains of life in the same way.<sup>236</sup> The “old” tend to be thought of as the disfavored social group in an age-based analysis, and there is significant evidence that this is the case.<sup>237</sup> For example, the COVID-19 pandemic put into stark relief the ageist system of long-term care, whose many regulatory failures helped produce disproportionate fatalities amongst older adults.<sup>238</sup> At the same time, and seemingly contradictorily, age—especially older age—can be tied to height-

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law is a society in which each member is guaranteed equal respect as a human being.”); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 694 (1990) (“‘Equal protection,’ for the progressive, means the eradication of social, economic, and private, as well as legal, hierarchies that damage.”).

<sup>234</sup> See Persad, *supra* note 132, at 914 (claiming that “[t]here is also more evidence that race, gender, and religion are more subjectively important identities than age”); Richard A. Settersten, Jr., *The Salience of Age in the Life Course*, 40 HUM. DEV. 257, 273–77 (1997) (describing the ways in which age salience varies by domain and demographic characteristics).

<sup>235</sup> See Max Weber, *Class, Status, Party*, in THE INEQUALITY READER: CONTEMPORARY AND FOUNDATIONAL READINGS IN RACE, CLASS, AND GENDER 56, 63 (David B. Grusky & Szonja Széleányi eds., Routledge 2018) (2011) (“[T]he caste structure transforms the horizontal and unconnected coexistences of ethnically segregated groups into a vertical social system of super- and subordination.”).

<sup>236</sup> See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2429 (1994) (“A systematic disadvantage is one that operates along standard and predictable lines in multiple and important spheres of life and that applies in realms that relate to basic participation as a citizen in a democracy.”).

<sup>237</sup> See, e.g., E-Shien Chang, Joan K. Monin, Daniel Zelterman & Becca R. Levy, *Impact of Structural Ageism on Greater Violence Against Older Persons: A Cross-National Study of 56 Countries*, BMJ OPEN 4–5 (May 2021), <https://bmjopen.bmj.com/content/bmjopen/11/5/e042580.full.pdf> [<https://perma.cc/9WPM-ASVM>] (drawing a connection between structural ageism and violence against older persons across various countries); E-Shien Chang et al., *Global Reach of Ageism on Older Persons’ Health: A Systematic Review*, PLOS ONE 13 (Jan. 15, 2020), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0220857&type=printable> [<https://perma.cc/ZFM5-TEZZ>] (connecting ageism with adverse health outcomes for older persons across several countries).

<sup>238</sup> See Nina A. Kohn, *Nursing Homes, COVID-19, and the Consequences of Regulatory Failure*, 110 GEO. L.J. ONLINE 1, 3 (2021), [https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/04/Kohn\\_Nursing-Homes-COVID-19-and-the-Consequences-of-Regulatory-Failure.pdf](https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/04/Kohn_Nursing-Homes-COVID-19-and-the-Consequences-of-Regulatory-Failure.pdf) [<https://perma.cc/244L-UQ26>] (arguing that the massive nursing home deaths during the COVID-19 pandemic were the result of structural ageism).

ened social status in one's family or society at large.<sup>239</sup> In some realms, such as employment, the structural age-based barriers that one faces vary significantly by the type of job and industry, with younger workers sometimes being disfavored.<sup>240</sup> What complicates the picture further is that other forms of subordination intersect with age-based subordination to mitigate or exacerbate its effects.<sup>241</sup> This all makes it difficult to come to any sweeping conclusions about whether a particular definition of legal age will support or hinder antisubordination goals. With that cautionary note, it is still worth noting a couple of ways in which the alternatives to chronological age might affect group-based subordination.

Shifting to an alternative definition of age in the law would likely weaken the salience of chronological age, as the law would no longer reinforce the importance of chronology.<sup>242</sup> This does not mean that chronological age as a meaningful social category would simply disappear, as its importance is maintained by aspects of the social context independent of the law. Implementing biological age in the law would likely weaken the negative associations between chronological age and physical degradation, as those associations would perhaps become the province of biological age. This might have the effect of reducing negative stereotypes associated with chronological age, which, in turn, would make subordination on the basis of old chronological age more difficult.

Nevertheless, it is possible that over time a new biologically-informed conception of age could grow to be more pernicious than chronological age can be today. Biological age would have all the negative associations of older age that chronological age possesses, such as proximity to death and frailty,

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<sup>239</sup> See Geoffrey Cupit, *Justice, Age, and Veneration*, 108 ETHICS 702, 714–18 (1998) (exploring the “veneration thesis” and concluding that age may in fact enhance moral status by virtue of its entailing that there is more to us as historical beings).

<sup>240</sup> See JESSICA KRIEGEL, UNFAIRLY LABELED: HOW YOUR WORKPLACE CAN BENEFIT FROM DITCHING GENERATIONAL STEREOTYPES 54–60 (2016) (describing stereotypes and discrimination encountered by millennials in the workplace); Naomi Schoenbaum, *The Case for Symmetry in Anti-discrimination Law*, 2017 WIS. L. REV. 69, 103–04 (collecting cases and studies in which younger workers faced stereotypes and discrimination).

<sup>241</sup> See, e.g., Robert N. Butler, *Age-Is: Another Form of Bigotry*, 9 THE GERONTOLOGIST 243, 243 (1969) (using an intersectional example of low-income, Black, senior citizens to illustrate ageism); 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/53LM-KKGQ>?type=image] (“[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.”).

<sup>242</sup> See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2325 (1997) (“Although the legal status of individuals and the sociological status of groups are distinct concepts, law often directly reflects social status or helps preserve status markers.”).



but without the positive aspects, such as wisdom or experience. Because of the racial disparities that exist in the health sphere, those who are classified as older using a biological definition may also disproportionately turn out to be people of color.<sup>243</sup> This could serve to racialize legal age and make it a site for racial subordination in a way that it currently is not with chronological age. This highlights the possibility that any definition of legal age has the potential to reinforce the existence of superordinate and subordinate status groups in society. The groups might take different forms based on the definition used, but some form of hierarchy could remain.

Subjective age may solve some of these problems, as it would decentralize the meaning of age to individuals, meaning the legal age would cease to have its unitary meaning in the law. This could destabilize the social meaning of age as people exercise their autonomy to choose varying ages, making it less suitable as an axis of subordination. However, people would be choosing their subjective ages in a context in which possessing a certain age has social value. Thus, it is possible that when confronted with the choice of age, many might exercise their autonomy to select for younger ages in ways that could reinforce rather than subvert the idea that youth is more valued than age.<sup>244</sup>

To the extent that biological age more accurately captures certain vulnerabilities associated with the aging process, it has the potential to make the law more targeted in addressing these vulnerabilities than chronological age. If those vulnerabilities are more likely to appear with racial minorities, this might allow legal age to serve as a vehicle through which to address racial disparities in health and racial subordination as well.<sup>245</sup> Much depends on the nature of the law at issue, and there may be a tricky line to walk in terms of assisting

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<sup>243</sup> See, e.g., Marissa Rewak et al., *Race-Related Health Disparities and Biological Aging: Does Rate of Telomere Shortening Differ Across Blacks and Whites?*, 99 *BIOLOGICAL PSYCH.* 92, 97–98 (2014) (suggesting racial differences in this measure of biological age); see also Ichiro Kawachi, Norman Daniels & Dean E. Robinson, *Health Disparities by Race and Class: Why Both Matter*, 24 *HEALTH AFFS.* 343, 346–47 (2005) (arguing that race is an independent explanatory variable for health disparities).

<sup>244</sup> See Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 *CALIF. L. REV.* 1243, 1278–85 (2014) (describing the tension between individual autonomy in identity and “group-based” antisubordination goals in the context of multiracialism and Equal Protection jurisprudence). If benefits would still accrue to those who were older, then this dynamic might not appear, as there would be incentives to identify as older ages as well. Nevertheless, as explained in Section III.A., the adoption of a subjective model of legal age would likely require the unraveling of these various age-based legal entitlements. See *infra* Section III.A.

<sup>245</sup> See Oni Blackstock & Uché Blackstock, Opinion, *Black Americans Should Face Lower Age Cutoffs to Qualify for a Vaccine*, *WASH. POST* (Feb. 19, 2021), [https://www.washingtonpost.com/opinions/black-americans-should-face-lower-age-cutoffs-to-qualify-for-a-vaccine/2021/02/19/3029d5de-72ec-11eb-b8a9-b9467510f0fe\\_story.html](https://www.washingtonpost.com/opinions/black-americans-should-face-lower-age-cutoffs-to-qualify-for-a-vaccine/2021/02/19/3029d5de-72ec-11eb-b8a9-b9467510f0fe_story.html) [<https://perma.cc/X3RJ-WCMT>] (arguing that chronological age alone might not be the best allocation for vaccines given racial disparities in health).

subordinated groups without stigmatizing them.<sup>246</sup> Precisely because subjective age does not capture facts that might be useful in policy targeting, both its positive and negative possibilities are more limited on this front.

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Which definition of legal age one prefers is a product of the weights one assigns to the four normative criteria of accuracy, administrability, autonomy, and antisubordination.<sup>247</sup> If one is primarily concerned with making sure that age is useful to the legal system through the information it provides, one will prefer the biological definition for rules that aim to draw on information about the physiological state of the body, or the chronological definition for rules that aim to draw on other social phenomena that are associated with the passage of time. If one is only interested in constructing a system that will be inexpensive to run and easy to administer, the chronological definition will come out on top due to its objective nature and automatic updating. If one's paramount aim is in reducing the power of the government to define identity, in promoting individual autonomy in the expression of identity, then one will likely prefer a subjective model of age. If one is chiefly driven by social justice concerns and the desire to better the situation of subordinated groups, the choice of definition is more ambiguous, though there is potential in all of the definitions for pursuing antisubordination goals depending on the legal and social context.

### III. THE FUTURE OF LEGAL AGE

While Part II provided the normative analysis of the multiple definitions of legal age, this Part examines the options for the future of legal age given the advantages and disadvantages of the chronological, biological, and subjective models. Key to this analysis is that any definition of legal age will have to fit into the landscape of age-based law that is currently on the books, and this body of law was created with chronological age in mind.<sup>248</sup> Thus, if one were to adopt a different definition of legal age, that would necessarily entail broader changes in the system of age-based law. Section A considers the wholesale embrace of subjective age, which would require the abolition of many age-based rules.<sup>249</sup> Section B contemplates the possibility of particularizing legal

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<sup>246</sup> See Kohn, *supra* note 227, at 29 (discussing the need to balance various goals in elder policy).

<sup>247</sup> See Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1847 (2013) (describing how one's legal conclusions are often the product of one's normative priors).

<sup>248</sup> See Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 663 (2002) (describing the importance of fit when transplanting a legal concept from one area to another).

<sup>249</sup> See *infra* notes 252–271 and accompanying text.

age, which would allow the selective incorporation of the biological definition of age for rules where it would be appropriate.<sup>250</sup> Section C looks at more modest ways of reforming the chronological definition.<sup>251</sup>

### A. Abolition

The most radical path forward is age abolition.<sup>252</sup> This would entail either the rejection of age-based distinctions in law once one reaches the age of adulthood, or the adoption of a subjective model of age, which would demand a similar outcome. The goal of such an approach would be to make age less salient and to weaken age essentialism by eliminating or significantly reducing the law's role in reinforcing the meaning or importance of the social category.<sup>253</sup> The hope with such an approach is that it would promote the autonomy of individuals in their age identity and weaken age subordination more broadly, though there are other stories to tell about how such a move would play out.<sup>254</sup> This abolition effort may find natural alliances with other movements that are geared toward decreasing the importance of state identification and surveillance or the elimination of other identity categories on government identification.<sup>255</sup> As is the case with other abolition movements, this path would not come instantly or easily, and the end goal would be a different type of society than the one we currently inhabit.<sup>256</sup>

Although the state could simply withdraw from the business of making age distinctions in the law for adults, the adoption of a subjective definition of legal age would likely force this move, for two reasons.<sup>257</sup> First, age would no

<sup>250</sup> See *infra* notes 272–283 and accompanying text.

<sup>251</sup> See *infra* notes 284–293 and accompanying text.

<sup>252</sup> See Levine, *supra* note 32, at 283 (“An image of society characterized by age-irrelevance would perceive adulthood as indivisible. Policymakers would be blind to chronological age differences.”).

<sup>253</sup> See Foucault, *supra* note 33, at 281–83 (arguing for resistance to identity, particularly that imposed by disciplinary bodies).

<sup>254</sup> See *supra* notes 242–246 and accompanying text (discussing how the different definitions of legal age might lead to varying outcomes using an antisubordination lens).

<sup>255</sup> See, e.g., Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491, 523–26 (2016) (arguing for the removal of gender from government identification); Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 343 (2002) (“Identity systems and documents have a long history of being used for social control and discrimination.”).

<sup>256</sup> See Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1694 (2019) (“Abolition must be a cultural intervention. It must produce a new way of being even in the most challenging and difficult moments.”).

<sup>257</sup> See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 10 (2003) (“Roughly speaking, this principle holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden

longer convey consistent meaning that might be useful to legal rules.<sup>258</sup> Second, there would be a risk of large-scale inauthentic identity claims given that the law currently allocates many entitlements based on age.<sup>259</sup>

The reduction en masse of age-based law would take different forms based on the type of legal rule at issue. In some cases, it may be that the elimination of age from a legal rule does not severely impair legal functioning in that area. For example, in the criminal context, the elimination of elder abuse statutes would still leave much of the behavior that they capture punishable under other criminal statutes.<sup>260</sup> When age is central to the functioning of the legal rule, reform will necessitate additional work. For instance, many public benefits programs currently use age as a trigger.<sup>261</sup> One could replace age with another trigger, such as need, which would entail a more individualized process of assessment of the applicant for public benefits.<sup>262</sup> Alternatively, one could embrace more universal benefits to which everyone would be entitled—regardless of age or other identity categories—such as a basic income.<sup>263</sup> The choice would depend in large part on a variety of additional normative considerations as well as the feasibility of the different options.

In addition to withdrawing from age regulation, the government could go further in the name of age abolition and use the law to try to eradicate important age-based social distinctions in the private sphere.<sup>264</sup> This would likely require a significant reworking of the age-based antidiscrimination regime,

category: for example, their race.”); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 269 (1982) (discussing the possibility of delegalizing certain areas).

<sup>258</sup> See *supra* Section II.A (discussing how age provides information for the legal system, improving its accuracy).

<sup>259</sup> See *supra* notes 179–180 and accompanying text (discussing how age is particularly tempting for inauthentic identity claims due to the large number of entitlements that are contingent upon it).

<sup>260</sup> See Kohn, *supra* note 227, at 9–10 (noting that “[a]t both the federal and state level, the perpetrators of elder abuse can typically be prosecuted for a wide range of traditional common law crimes (e.g., battery, assault, manslaughter, rape)”).

<sup>261</sup> See *supra* note 22 and accompanying text (describing the age criteria for Social Security programs).

<sup>262</sup> See Elizabeth A. Kutza & Nancy R. Zweibel, *Age as a Criterion for Focusing Public Programs, in AGE OR NEED?: PUBLIC POLICIES FOR OLDER PEOPLE* 55, 82–91 (Bernice L. Neugarten ed., 1982) (discussing the advantages and disadvantages of using age for allocation of social resources).

<sup>263</sup> See Philippe Van Parijs, *Basic Income: A Simple and Powerful Idea for the Twenty-First Century, in REDESIGNING DISTRIBUTION: BASIC INCOME AND STAKEHOLDER GRANTS AS ALTERNATIVE CORNERSTONES FOR A MORE EGALITARIAN CAPITALISM* 3, 4 (Erik Olin Wright ed., 2006) (defining a basic income as “an income paid by a political community to all its members on an individual basis, without means test or work requirement” (emphasis omitted)); see also Miranda Perry Fleischer & Daniel Hemel, *Atlas Nods: The Libertarian Case for a Basic Income*, 2017 WIS. L. REV. 1189, 1270–71 (making a libertarian argument for basic income).

<sup>264</sup> See Boni-Saenz, *supra* note 70, at 862–65 (discussing the structure and scope of age-based antidiscrimination law).

which is currently tied in many ways to the chronological definition. For example, chronological age may not matter as much to discriminatory private behavior as the perceived age of individuals or the perceived mismatch between an individual's appearance and subjective age. Consequently, the Age Discrimination in Employment Act, which does not apply to individuals with a chronological age of less than forty, would likely need to be amended to remove its chronological cutoff or to include discrimination on the basis of perceived age.<sup>265</sup> This would bring the legal treatment of age more in line with that of disability, as regulated by the Americans with Disabilities Act.<sup>266</sup>

Besides antidiscrimination law, other attempts to decrease the importance of age in the private sphere would likely contribute to achieving the goals of age abolition. For example, in 2017, the California State Legislature passed a law that prohibited the Internet Movie Database from publishing the ages of actors so as to inhibit the use of that information in hiring decisions.<sup>267</sup> Similarly, some Internet dating sites and apps have been eliminating the use of racial filters as a ways to make race less salient in the selection of potential romantic or sexual partners.<sup>268</sup> Some scholars have suggested that Internet dating sites and apps be regulated to require the elimination of racial filters as well.<sup>269</sup> An analogous move could be made with age. Nevertheless, these regulatory intrusions into the private sphere must be pursued with caution and balanced against other interests as well. For example, the United States Court of Appeals for the Ninth Circuit struck down the California law on First Amendment

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<sup>265</sup> See 29 U.S.C. § 631(a) (“The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.”).

<sup>266</sup> See 42 U.S.C. § 12102(1)(A)–(C) (defining disability as “a physical or mental impairment” or “being regarded as having such an impairment”); Destiny Peery, *(Re)defining Race: Addressing the Consequences of the Law’s Failure to Define Race*, 38 CARDOZO L. REV. 1817, 1850–51 (2017) (discussing the problems with applying antidiscrimination law in cases of perceived identity).

<sup>267</sup> See CAL. CIV. CODE § 1798.83.5(b) (West 2021) (“A commercial online entertainment employment service provider . . . shall not . . . (1) Publish or make public the subscriber’s date of birth or age information in an online profile of the subscriber.”), held *unconstitutional* by *IMDB.com v. Becerra*, 962 F.3d 1111 (9th Cir. 2020). For discussion of how such attempts at age abolition might engage First Amendment concerns, see *infra* note 270 and accompanying text.

<sup>268</sup> See Amy Woodyatt, *Grindr Pulls Feature That Lets Users Sort by Race. It Says It’s Supporting Black Lives Matter*, CNN, <https://www.cnn.com/2020/06/03/tech/grindr-ethnicity-filter-intl-scli/index.html> [<https://perma.cc/2Y3M-2AAK>] (June 3, 2020) (reporting that Grindr, a gay dating app, has removed race-based filters).

<sup>269</sup> See SOLANGEL MALDONADO, RACIAL HIERARCHY AND DESIRE: HOW LAW’S INFLUENCE ON INTERRACIAL INTIMACIES PERPETUATES INEQUALITY (forthcoming 2023) (manuscript at 11) (on file with author) (“Dating websites may legally classify individuals on the basis of race so that other dataseekers can categorically exclude them without ever seeing their profiles. By permitting these practices, the law facilitates discrimination against members of racial and ethnic groups . . .”).

grounds, demonstrating that websites should perhaps be permitted to publish age information for a variety of reasons.<sup>270</sup>

The strategy of using the law to eradicate age-based social distinctions presents some risks as well. First, doing so necessarily engages the law more with the social category of age. This could have the effect of making age more, rather than less, salient by increasing the law's regulation of the social category. This would be counterproductive from an age abolition perspective. Second, there is some risk of backlash to governmental intrusion into the sphere of private age-based decision-making.<sup>271</sup> This could make the effort difficult to sustain politically.

### B. Particularization

Because age has been so strongly associated with time, the legal definition has also been associated with a chronological one. This has led to an embrace of legal universalism, in which age has the same definition across the various contexts in which it is employed.<sup>272</sup> This is not, however, an inevitable outcome. For example, some states have interpreted the statutory phrase "youthful age" as a factor in the imposition of criminal sentence not to refer to chronological age, but instead to something more amorphous, such as maturity.<sup>273</sup> This illustrates that it may be possible to particularize legal age, such that different definitions would be used in different situations.<sup>274</sup>

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<sup>270</sup> See *IMDB.com*, 962 F.3d at 1128 ("Unlawful age discrimination has no place in the entertainment industry, or any other industry. But not all statutory means of ending such discrimination are constitutional. Here, we . . . hold that AB 1687 is facially unconstitutional because it does not survive First Amendment scrutiny.").

<sup>271</sup> See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 61–88 (1991) (describing backlash in the context of gender and feminism).

<sup>272</sup> See, e.g., Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 922 (arguing for a universal definition of the fiduciary principle).

<sup>273</sup> See, e.g., *Bryant v. State*, 824 A.2d 60, 66 (Md. 2003) ("The next is No. 5, whether or not the Defendant was a youthful age at the time of the crime. Case law states that this is not a pure chronological age approach and that the Court must evaluate other factors in determining whether or not a defendant is of a youthful age."); *State v. Atkins*, 505 S.E.2d 97, 113 (N.C. 1998) ("When evaluating the (f)(7) mitigating circumstance, this Court has characterized 'age' as a 'flexible and relative concept.' We have also noted that 'the chronological age of a defendant is not the determinative factor under G.S. § 15A–2000(f)(7).'" (citations omitted) (first quoting *State v. Johnson*, 346 S.E.2d 596, 624 (N.C. 1986); and then quoting *State v. Oliver*, 307 S.E.2d 304, 333 (N.C. 1983))); see also *Pickett v. Astrue*, 895 F. Supp. 2d 720, 724 (E.D. Va. 2012) ("Where a borderline age situation exists, the ALJ must decide whether it is more appropriate to use the higher category or the claimant's chronological age.").

<sup>274</sup> See *Clarke*, *supra* note 10, at 933–36 (arguing for definitions that are tailored to a particular legal context in the area of sex and gender); *Minow & Spelman*, *supra* note 34, at 1601 (discussing the opposition between the universal and the particular).

Such particularization, in turn, would allow for the selective integration of different definitions of legal age, depending on the context. There are several advantages to such an approach. With respect to accuracy, the selection of the most appropriate definition in a given context will likely contribute to the overall accuracy of the legal system and avoid some of the mismatches between a universal definition and all the age-based rules into which it is incorporated.<sup>275</sup> This opens up the possibility that other definitions beyond those discussed in this Article could also be integrated if they conveyed useful information as well.

Any increased accuracy from particularizing the definition of legal age would come with the greater administrative costs of abandoning the universal chronological definition. However, a piecemeal particularization would allow for cost-benefit analyses of whether and when the substitution of a new definition for the chronological one would be beneficial.<sup>276</sup> Further, if the law employs multiple definitions of age, it will weaken the strong association between age and chronology. This could advance autonomy interests vis-à-vis age identity and help subvert age-based subordination as well.<sup>277</sup> Thus, particularization may provide some of the benefits of age abolition without requiring a wholesale replacement of the chronological definition or an abandonment of age-based law.

The process of considering age-based law in a more contextual fashion would also provide some additional benefits. Specifically, it would force us to surface the policy rationales behind using a particular conception of age, and this might reveal other issues with the use of age in the current legal system.<sup>278</sup> Consider the age-based cutoff for collecting Social Security retirement benefits, which is currently set at sixty-seven for those born after 1960.<sup>279</sup> One of the critiques of a set retirement age of this type is that it has a disproportionately negative impact on racial minorities.<sup>280</sup> Although they pay into the system as do their White peers, they are less likely to collect benefits due to lower aver-

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<sup>275</sup> See *supra* Section II.A (discussing the accuracy rationale).

<sup>276</sup> See *supra* note 37 and accompanying text.

<sup>277</sup> See *supra* notes 252–256 and accompanying text (noting one of the advantages of the abolition of age-based legal rules being the destabilizing effect this would have).

<sup>278</sup> See William J. Woodward, Jr., “*Passing-on*” the Right to Restitution, 39 U. MIA. L. REV. 873, 926 (1985) (noting how different doctrinal approaches can serve to surface or occlude policies lurking beneath the surface).

<sup>279</sup> See What Is Full Retirement Age?, 20 C.F.R. § 404.409 (2020) (describing the age at which one can collect Social Security retirement benefits).

<sup>280</sup> See Kathryn L. Moore, *Raising the Social Security Retirement Ages: Weighing the Costs and Benefits*, 33 ARIZ. ST. L.J. 543, 607 (2001) (“[R]aising the Social Security retirement ages is likely to have a greater adverse impact on groups with lower life expectancies, such as men, blacks, and lower-income workers, than on groups with higher life expectancies, such as women, Whites, Hispanics, Asians, and higher-income workers.”).

age life expectancies.<sup>281</sup> If biological age might better capture proximity to death, then it might be a more egalitarian measure of when individuals should be able to collect retirement benefits.<sup>282</sup> However, it is worth noting that this envisions quite a different understanding of retirement. Instead of being a chronologically-defined life stage characterized by detachment from the labor market, it would be a period of time before death that may vary chronologically based on the individual's characteristics.<sup>283</sup> It is important to remember that shifting the legal rule in this way would shape cultural norms about age, retirement, and their interaction, which is something that should also be subjected to its own normative analysis.

### C. Calibration

If one finds the normative arguments for the alternatives to chronological age unpersuasive, then one might prefer to continue with the status quo and its associated extensive age-based law. However, it might instead be possible to take seriously the critiques of chronological age implicit in the alternative definitions of age. This would lead to a calibration of existing age-based law in light of these critiques, while still largely retaining a chronological definition. This is the most modest approach to reform, but it could still entail an improvement over the current regime.

The biological model's implicit critique is that chronological age may not improve the accuracy of the legal system in all contexts.<sup>284</sup> Instead of replacing chronological age with another definition in whole or in part, one might instead adjust the use of chronological age in the various rules in which it is employed.<sup>285</sup> This would make those rules more accurate in that they would cap-

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<sup>281</sup> See, e.g., Kyle Moore, Teresa Ghilarducci & Anthony Webb, *The Inequitable Effects of Raising the Retirement Age on Blacks and Low-Wage Workers*, 46 REV. BLACK POL. ECON. 22, 30–35 (2019) (noting the differential longevity of White people and Black people and the implications for raising the retirement age); Anna Zajacova, Jennifer Karas Montez & Pamela Herd, *Socioeconomic Disparities in Health Among Older Adults and the Implications for the Retirement Age Debate: A Brief Report*, 69 J. GERONTOLOGY, SERIES B: PSYCH. SCIS. & SOC. SCIS. 973, 976–77 (2014) (noting the differential health status of individuals at different ages based on various demographics). Some of these racial effects may be mitigated by the fact that some individuals may have spouses, ex-spouses, or minor children who would be eligible for derivative benefits. See 42 U.S.C. § 402 (discussing the various categories of individuals entitled to Social Security retirement benefits).

<sup>282</sup> See *supra* notes 147–148 and accompanying text (discussing how biological age conveys direct information about proximity to death).

<sup>283</sup> Juliane Massarelli, *The Origins of Retirement*, 17 QUINNIPIAC PROB. L.J. 111, 111–12 (2003) (discussing the social construction of retirement in the past century).

<sup>284</sup> See *supra* notes 147–148 and accompanying text (making this critique about accuracy).

<sup>285</sup> See Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1208–09 (2015) (noting that capacity and incapacity determinations are context-specific); Hamilton, *supra* note 39, at 90–91 (arguing for the disaggregation of the legal age of the majority).



ture some underlying phenomenon rather than reflecting arbitrary cutoffs that have grown into social markers. For example, recent research into the neurobiology of human development indicates that full maturation in terms of cognitive capacities may come much later than many of the chronological cutoffs for achieving various legal entitlements.<sup>286</sup> If this is true, it raises questions about whether the legal entitlements to drive, marry, or vote are set in the correct chronological place.<sup>287</sup> However, one might not be able to rely on science to determine the “correct” ages for these various rules. Other normative goals will likely influence the placement of these bright lines as well.<sup>288</sup>

The subjective model’s implicit critique of chronological age is that it can serve to constrain autonomy or reinforce subordination through its role in the social construction of age and life stages.<sup>289</sup> This critique may not have much force if the employed definition of age corresponds to some factual reality that improves the accuracy of the legal system. One might also combine the two above critiques and analyze age-based law with them in mind. In other words, when chronological age serves as a particularly bad proxy for the variable for which it stands in, and it serves to construct age-based expectations that might constrain autonomy or subordinate on the basis of age, we might consider eliminating it or replacing it in the relevant legal rule in which it appears.<sup>290</sup>

This analytical lens could easily justify several age-based rules. Various maturity rules help to construct the life stages of childhood and adulthood, but the proxy value of chronological age is high in that context.<sup>291</sup> Similarly, the various age minima of twenty-five, thirty, and thirty-five in the Constitution

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<sup>286</sup> See, e.g., Jennifer Ann Drobac & Leslie A. Hulvershorn, *The Neurobiology of Decision Making in High-Risk Youth and the Law of Consent to Sex*, 17 NEW CRIM. L. REV. 502, 504 (2014) (arguing that neurobiological evidence demonstrates that juveniles have different and less developed cognitive processes for sexual decision-making).

<sup>287</sup> See Vivian E. Hamilton, *Liberty Without Capacity: Why States Should Ban Adolescent Driving*, 48 GA. L. REV. 1019, 1065 (2014) (proposing raising the age of full driving licensure); Hamilton, *supra* note 17, at 1860–61 (questioning the age of presumptive marital capacity); Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1504 (2012) (theorizing electoral competence).

<sup>288</sup> See Mihailis E. Diamantis, *Limiting Identity in Criminal Law*, 60 B.C. L. REV. 2011, 2076–86 (2019) (arguing that the criminal process should be tailored based on the nature of personal identity at different ages); Richard F. Storrow & Sandra Martinez, “Special Weight” for Best-Interests Minors in the New Era of Parental Autonomy, 2003 WIS. L. REV. 789, 792–815 (discussing the various considerations in judicial bypass procedures for minors obtaining abortions).

<sup>289</sup> See *supra* notes 212–214 and accompanying text (making this critique from autonomy).

<sup>290</sup> See Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 281 (2010) (“A strong case can be made that the Court should explicitly apply intermediate scrutiny to old-age classifications, and that doing so would be consistent with prior decisions.”).

<sup>291</sup> See Boni-Saenz, *supra* note 17, at 317 (noting the proxy value of chronological age early in the lifespan).

for federal officeholders do not necessarily map onto potential qualifications for holding public office. Nevertheless, these age restrictions also do not seem to shape understandings of the lifecourse because their impact on the general population is relatively limited and not particularly culturally salient.<sup>292</sup> Therefore, their autonomy-constraining or subordinating effects are likewise limited.

Some of the age-based rules that might be less justifiable are those that concern the later reaches of the lifespan, such as rules concerning mandatory retirement or the receipt of various public benefits such as Social Security retirement. In these cases, chronological age is not a particularly good proxy for physical degradation, and these rules do more to construct a life stage characterized by vulnerability, lack of attachment to the labor market, and decline.<sup>293</sup> This, in turn, fosters age essentialism by reinforcing negative stereotypes based on old age. This is not to make a pronouncement on any of these rules in particular. Instead, it is merely to suggest that they should be subject to more searching inquiry if one wishes to maintain a chronological definition of legal age but is sympathetic to the critiques raised by a consideration of the alternatives.

#### CONCLUSION

Chronological understandings of legal age have been hegemonic in the law. This Article invites a discussion of what the alternatives might offer to the law. Even if we might not favor an alternative definition of legal age in the final analysis, a consideration of these alternatives reveals the particular strengths and weaknesses of the chronological definition. In addition, it prompts us to think more deeply about the large landscape of age-based law that regulates our lives.

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<sup>292</sup> See U.S. CONST. art I, § 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . . .”); *id.* § 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years . . . .”); *id.* art. II, § 1 (“[N]either shall any person be eligible to that Office [of President] who shall not have attained to the Age of thirty five Years . . . .”).

<sup>293</sup> See STEPHEN KATZ, *DISCIPLINING OLD AGE: THE FORMATION OF GERONTOLOGICAL KNOWLEDGE* 76 (1996) (describing how various social processes identified age “as a social problem”).

