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AGE DISTINCTIONS AND THEIR SOCIAL FUNCTIONS:
A CRITIQUE OF THE AGE DISCRIMINATION
ACT OF 1975

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In 1977, the United States Commission on Civil Rights issued *The Age Discrimination Study*,¹ a report by a special committee charged with translating the Age Discrimination Act of 1975² into an administrable set of rules and regulations.³ Analyzing a draft of the report at that time, this author noted serious problems with the committee's proposals. Read simply, the report was attractive; its recommendations were to be cheered as progressive; and its methodology appeared to be sound, even scientific. But read intently, and in theoretical context, the same words became threatening; the report's recommendations approached absurdity; and its methodology seemed farcical.

The proposals would have divested society of age status differentials. The demanded quota system would have produced more discrimination than the drafters could have imagined. Title VII, OAA, Meals on Wheels, and other programs would have been allocated by quotas. If, for example, the watchdogs found that a higher percentage of those over 75 than those 65-69 were served meals at home, then meals would have been denied to some over 75 and some in the 65-69 age group might have been advised to stay at home for a delivered lunch in order to bring up the percentages.

The report showed no grasp of cohort effects. For example, the Vietnam War may well have produced severe mental health strains upon the young. But, according to the report, it appeared that mental health services would have to be withdrawn from the young and rerouted to older persons, regardless of the need or demand for services.

Another fundamental flaw in the report was that it forced a sharp either/or approach to law. That is, it appeared that if Congress specified age discrimination, say, for Medicare, then absolute discrimination

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was to be implemented; if Congress, in its wisdom, funded a program without legitimizing age discrimination, then absolute quotas would prevail. Becoming enslaved by a demographer’s computer printout hardly seemed to be progress. To deny, as this report seemed to, the relevance of both age and cohort differences through the rigid application of a formula is to promote both injustice and inefficiency.

Although the final regulations implementing the Age Discrimination Act of 1975 have since been issued by the United States Department of Health and Human Services, this author’s disquiet persists. Evidence from history, from anthropology, and from numerous sociological and descriptive observations makes it clear that a functional prerequisite for every society is the confrontation of the facts of aging of its members and age differentials among its members, and the institutionalizing of means to accommodate those facts. Children and adults have been given different assignments, different rights, and different privileges.

In commenting on the functions of age distinctions in the context of the legal system, there are three major issues which must be addressed. The first issue is that of age status termini. When does life begin? When does it end? When does infancy end and adulthood begin? These simple questions are complicated by the fact that an individual may not move into a new age status all at one time. This author has called this phenomenon age status asynchronization. Possibly the most publicized example of this phenomenon is the “old enough to fight, old enough to vote” campaign slogan of a generation ago.

This issue remains an important and timely one, as any number of examples will show. For instance, a congressional committee recently conducted hearings on a proposed constitutional amendment which would declare that life, with all the protections bestowed by law upon the living, begins at the time of conception. In recent years the United States Supreme Court has adopted the concept of trimesters during pregnancy to distinguish legalized abortion from murder. Several years ago, a 15-year-old youth was declared to have the same criminal due process rights as an adult citizen. But issues of responsibilities to parallel the rights of adults remain unclarified.

One of the thorniest age termini problems of the 1980s relates to the timing of old age. With the abolition or postponement of

mandatory retirement, an older worker is protected as an adult under the law. Yet, as under Medicare, older persons are provided with protections and resources not available to other adults.

The second issue relates to age determination. There are at least three widely recognized definitions of age—chronological, functional, and social. The use of chronological age to determine status differentiation between children and adults can be traced to antiquity. In the past few decades, however, chronological age has also been used to distinguish between adulthood and old age. The legal terminus for adulthood has been established, and “old age” has become a statistical category, both through use of chronological age. Yet many studies have revealed vast variations in rates of aging, retention of skills, ability to learn and adapt in later years, and in retention of stamina in old age. All these are measures of functional age. Thus, at the same time that chronological age has increasingly become a determinant for assignment to the old age status, researchers confirm its inadequacy as an appropriate method for determining old age. The postponing of mandatory retirement is an example of how the conjoining of chronological age and functional age creates problems for policymakers.

With regard to social age, an example of its use is seniority rights for workers. In recent years this concept has been undergoing various tests in the courts, especially by those who advocate affirmative action strategies for minority groups.

A fourth definition of age, less widely known, but perhaps most important, is that of counting backward from projected death rather than counting forward from birth (chronological age):

[T]he further an individual moves from the year of his birth, the less significant is that fact for the purposes of gauging functional capacity. A major breakthrough is likely to come as indicators of the length of time until death become perfected. We know a bit about the significance of longevity of parents; we know that cigarette smoking shortens life; we predict how long a cancer patient is likely to live. The practice of retiring everyone at an age counting from birth results in some workers receiving only a few months return from many years of contribution to pension funds; others will receive payments for decades. If age could be counted backward from death, rather than forward from birth, more equitable opportunity to receive return on pension investments could be accomplished, housing and health service planning could be improved, and a larger percentage of the elderly could have the option of a few years of leisure at the end of their lives.7

The concept has also been suggested by Ryder, who wrote:

We measure age in terms of the number of years elapsed since birth. This seems to be a useful, meaningful index of the stages of development from birth to maturity. Beyond maturity, however, such an index becomes progressively less useful . . . To the extent that our concern with age is what it signifies about the degree of deterioration and dependence, it would seem sensible to consider the measurement of age not in terms of years elapsed since birth (chronological age) but rather in terms of the number of years remaining until death.

. . . Such a suggestion is inapplicable in the individual case. . . . We propose that some arbitrary length of time, such as 10 years, be selected and that we determine at what age the expectation of life is 10 years, that age to be considered the point of entry into old age.8

Ironically, what Ryder says is "inapplicable in the individual case" is precisely what the law is developing. Thus, the court reasoned in Weeks v. Alonzo Cothron, Inc.:9

Decedent was age 50 at the time of death in August, 1968. . . . His life expectancy under standard tables was 23 years. Plaintiff's expert computed the future value of decedent's earnings on an expectancy of his working 15 years to age 65, assuming that he was in good physical condition and would be able to perform heavy manual work until age 65. . . . The trial court concluded:

In fact, there is a very serious question as to whether or not he would have lived to age 65 with his heart condition and drinking problem. The greater weight of the credible evidence indicates, and I so find, that the deceased would not have worked past age 60, or a total of ten years, if, in fact, he lived that long from the date of his death. . . .

Bearing in mind decedent's family history, his medical history, and the type of work he did, we are unable to say that the trial court erred in concluding that his work expectancy would not exceed 10 years.10

The concept of "counting backward" is yet to be systematically developed in jurisprudence; it is yet to be systematically utilized in legislation; and it is yet to be identified and adopted in administration. However, the concept is clearly present in policy recommendations. For example, a policy change under consideration at present is the age of eligibility for Social Security benefits. A report recently released by the President's Commission on Pension Policy cautiously approached the "counting backward" issue:

The Commission believes that the age of normal retirement

9. 493 F.2d 538 (5th Cir. 1975).
10. Id. at 543-44.
should change as average life expectancy in the population changes, rather than being set at an age chosen arbitrarily. However it appears that, over time, implementing a formula to achieve such an outcome may be impracticable. An increase to age 68, as suggested by many groups, reflects increases in life expectancy since the beginning of social security and thus reflects changes that have already occurred in the proportion of adult life that is being spent in retirement. . . . Therefore, because of the need to plan for the future retirement age, that age could be reevaluated in the future as life expectancies change.11

It is likely that "counting backward" will become one of the more controversial and vital issues in aging and the law during the final decades of this century.

The third issue may be identified as inter-status equality/inequality versus inter-status equity/inequity. Specifically, how is the "equal protection of the laws" to be applied to the several stages of the life course? It can be argued that current national policy centers upon providing justice by accepting the elderly as unequals and by enacting laws which are designed to overcome the negative consequences of that inequality. Thus, a separate legal status for the elderly takes form.12

This issue is of prime concern for both theoretical and humane reasons. Justice requires consideration of the equity rather than the equality issue. In recent years the gerontological movement especially has become ensnared by advocating both equality and equity simultaneously. The prime example is the move to abolish mandatory retirement practices and thus extend adult rights to those who have been identified in law as old, when at the same time there are continuing moves to expand the special rights of those very same people on the grounds that they are old and thereby different from adults in their needs and in their rights to have those needs met.

CONCLUSION

Because of these and other complicated issues, Congress was ill-informed when it enacted the Age Discrimination Act of 1975. A myriad of problems have already flowed, and many more are likely to flow, from this poorly conceived law.

The Civil Rights Commission report was beset with the inadequacy of a narrow definition of equality, rather than a more appropri-
ate concern for equity among age categories. The current regulations issued by the Department of Health and Human Services to implement the Act continue to be plagued by this inadequacy.\footnote{13. 45 C.F.R. §§ 90.1-90.62 (1980).}

Those who pressed most strongly for the Act assumed that its thrust would be exclusively, or at least primarily, directed toward protection of the elderly; but the implementation of the Act is, instead, properly directed toward all age categories. Thus, special privileges are likely to be exposed, and the justice sought for the elderly through the principle of equity may be in peril.

Social scientists, practitioners, policymakers, and consumers each have a responsibility to examine the Act and the implications inherent in its enactment. Social scientists need to explore the concepts relevant to age status differentials. Practitioners need to take to heart the dictate that they may be unwittingly adding to age discrimination. Policymakers need to delay enforcement of the current Act until fuller information is available. Elderly consumers need to question the real costs and benefits which will accrue to them under the law. What the Age Discrimination Act needs is a thorough testing of its premises and its translation in the light of both descriptive evidence of age status systems and life course theory. Either an outright rescinding of the ill-fated law, or drastic amendment, will surely follow.