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LEGAL REPRESENTATION OF CLIENTS WITH DIMINISHED LEGAL CAPACITY IN GERMANY

Anton Geier*

I. INTRODUCTION

German law takes the protection of minors and other people with diminished legal capacity very seriously. The provisions of the German Civil Code (BGB)[1] contain the essential rules in this regard, defining the circumstances under which a person's legal capacity is limited and establishing an extensive legal-protection regime for the person's benefit, including the possibility for courts to appoint a guardian or a custodian for the person in question.

It is thus not surprising that the sensitive area of legal representation is also subject to several rules and regulations that ensure protection of the rights of the person with diminished capacity. The contractual and precontractual relationship between an attorney and his or her diminished-capacity client is set between the conflicting priorities of respecting the client's autonomy when deciding his or her own legal representation and safeguarding his or her rights—including effective legal representation—when he or she is not able to do so. This constitutes the framework for the attorney's protection duties toward his or her client.

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[1] Bürgerliches Gesetzbuch (BGB) (German Civil Code) (Aug. 18, 1896;enforced Jan. 1, 1900); Reichsgesetzblatt 195 (1896).

Working with diminished-capacity clients imposes special responsibility on an attorney, both morally and legally. The challenge becomes even greater if the client's diminished capacity is at first unknown to his or her attorney. In such a case of *concealed lack of legal capacity*, the attorney only disposes of a limited number of resources to inquire into his or her client's health and to take actions to protect him or her if need be. It is essential for an attorney to know how and where to find the relevant information and to understand what his or her obligations are when confronted with a client who appears to be restricted in his or her legal capacity.

II. BASIC PROVISIONS ON LEGAL CAPACITY, GUARDIANSHIP, AND CUSTODIANSHIP IN THE GERMAN CIVIL CODE

A. Legal Capacity: BGB Section 104

German Civil Code Section 104 sets out the basic provisions on legal capacity.[2] Pursuant to Section 104, two categories of people generally lack legal capacity: minors younger than the age of seven and people with a permanent mental disturbance. According to this Section, a person lacks legal capacity if: (1) he is not yet seven years old; or (2) he is in a state of pathological mental disturbance, which prevents the free exercise of will unless the state by its nature is a temporary one.[3]

Section 105 governs the consequences of a lack of legal capacity.[4] Most importantly, pursuant to Section 105, a declaration

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[2] BGB § 104. The English translations of the provisions of the BGB in this Article follow the official translations of the German Ministry of Justice, which are available online at http://www.gesetze-im-internet.de/englisch_bgb/. It should be noted that the English title of BGB § 104, suggested by the ministry, "Incapacity to Contract," is somewhat misleading because the provision covers legal capacity in general and not only in contractual matters. *Id.*

[3] Id.

[4] BGB § 105.

of intent[5] issued by a person without legal capacity is null and void: (1) the declaration of intent of a person incapable of contracting is void; and (2) also void is a declaration of intent that is made in a state of unconsciousness or temporary mental disturbance.[6]

Sections 106 to 113 contain rules on the *limited capacity* of minors between the age of seven and eighteen to contract, which shall not be covered in detail in this Article.[7] Essentially, these provisions ensure that a person with limited capacity must have prior consent of his or her legal representatives to conclude a contract if that contract does not merely confer a legal benefit to the minor, i.e., only establishes obligations of other parties toward the minor.[8] Contracts that are not purely beneficial, which are concluded without such consent, are null and void unless the legal representatives subsequently authorize the transaction. However, the possibility to subsequently authorize a declaration of intent and thus render it valid is limited to declarations aiming at the conclusion of a contract. Unilateral declarations that do not require a response, such as the cancellation of a contract or the conferment of legal authority to another person to act on one's behalf, are always and definitely null and void if the legal representatives did not consent to it *in advance*.[9]

Finally, it is worth mentioning that any declaration of intent directed to a person without or with limited capacity does not become effective until it reaches the legal representative (the parents, the guardian, or the custodian).[10]

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[5] The term "declaration of intent" (*willenserklärung*) refers to any sort of legally binding statement, such as the offer or acceptance to conclude a contract.
[6] Id.
[7] *Id.* at§§ 106–113.
[8] Id.
[9] *Id.* at § 111.
[10] *Id.* at § 131. This provision does not apply to offers or acceptances for the conclusion of a contract toward minors with limited capacity because BGB Sections 107 and 108 contain special rules for such declarations that override BGB Section 131.

B. Guardianship and Custodianship

Because of their legal incapacity or limited capacity, minors and mentally disturbed people generally require the help of a third party to engage in legal activities. Depending on the age of the person, that third party will either be a guardian who substitutes for the parents of a minor or a custodian for adults lacking legal capacity or otherwise lacking the ability to take care of their own affairs.

The BGB family law section governs both guardianship and custodianship.[11] The relevant provisions were subject to several legislative reforms.[12] The most recent reform in 2011 responded to long-known deficiencies of the outdated laws and regulations that were in force before; the reform particularly tackled financial issues, inefficiency of inter-agency communication, and problems regarding the quality of the guardianship exercised by public authorities (the youth welfare offices), which were notoriously short of funds.[13] However, the last reform, which substantially changed the prerequisites and consequences of custodianship, dates back to 1990.[14] Thus, it can be said that the current legal situation with regard to the law governing guardianship and custodianship is well settled and essentially undisputed among scholars and courts.

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[11] *Id.* at §§ 1297–1921.

[12] Gesetz zur Reform des Rechts der Vormundschaft und Pflegschaft für Volljährige (Betreuungsgesetz or BtG) (enacted Sept. 12, 1990; enforced Jan. 1, 1992); Bundesgesetzblatt I 2002 (1990); 1st, 2d, & 3d Betreuungsrechtsänderungsgesetz (BtÄndG) (enforced Jan. 1, 1999; July 1, 2005; and June 18, 2009, respectively); Bundesgesetzblatt I 1580 (1998); Bundesgesetzblatt I 1073 (2005); Bundesgesetzblatt I 2286 (2009); Gesetz zur Änderung des Vormundschafts- und Betreuungsrechts (June 29, 2011); Bundesgesetzblatt I 1306 (2011). More information on these bills can be found online at http://www.rechtlichebetreuung.de/betreuungsrecht.html (presenting the bills in German).

[13] Thomas Wagenitz, *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB* § 1773, ¶ 16(b) (Franz Jürgen Säcker & Roland Rixecker eds., 6th ed., CH Beck 2012).

[14] Gesetz zur Reform des Rechts der Vormundschaft und Pflegschaft für Volljährige (Betreuungsgesetz or BtG) (Sept. 12, 1990; enforced Jan. 1, 1992); Bundesgesetzblatt I 2002 (2000).

*1. Guardianship over Minors (*Vormundschaft*)*

A minor is usually legally represented, cared for, and looked after by his or her parents. Within their parental custody, parents have a comprehensive right and duty to care for personal- and property-related matters of their child. If they cannot or must not exercise this right, a guardian must be appointed by the family court acting as the "guardianship court" (*vormundschaftsgericht*).

a. Requirements

If a child's parents are deceased, have lost legal custody over their child, or if the child's personal status cannot be determined, the family court must order guardianship on its own motion (*ex officio*). The only situation in which someone can become a guardian without an explicit appointment by court is described in Section 1791.[15] If a newborn child whose parents are not married requires a guardian, the local youth welfare office automatically assumes this position unless the guardianship court appoints another entity or person.

The court may appoint a natural person, an authorized private association with legal personality, or the competent youth welfare office as guardians. The court exercises discretion with respect to the choice of the person, which it is obliged to exercise to the benefit of the ward. As long as the parents have not lost legal custody over the child, they may designate a person who shall become their child's guardian after they are deceased by making a testamentary disposition.[16] The parents may also make a negative choice and thus preclude someone from becoming the guardian.[17] When the parents have made such a designation, the court must

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[15] BGB § 1791.
[16] *Id.* at §§ 1776, 1777.
[17] *Id.* at § 1782.

follow that choice as long as the person is not unfit for becoming a guardian within the terms of Section 1780 or the person in question agrees to the appointment of someone else.

In principle, every German citizen is obliged to accept the court's order to act as a guardian for a minor, and there are only few exceptions that render a person unfit for being a guardian.[18] Pursuant to Sections 1780 and 1781, a person who lacks legal capacity *must not*, and a minor or a person for whom a custodian has been appointed *should not*, be appointed as a guardian.[19] In the latter case, the court exercises discretion and may find that exceptional circumstances justify the appointment despite the lack of legal capacity or the custodianship. However, the appointment of a minor or a person under custodianship by the family court remains valid even if the court had no knowledge of these circumstances, whereas an appointment of a person who lacks legal capacity is always invalid and does not produce any legal effects.[20] Furthermore, some public servants and church officers require an official authorization by their superiors to become a guardian and should not be appointed as guardians without such permission.[21]

b. Rights and Duties of the Guardian

Pursuant to Section 1793, the guardian has the right and the duty to care for the person and the property of the ward and, in particular, to represent the ward legally.[22] Essentially, the duties of a guardian correspond with the parental duty of care set forth in Section 1626, which is referred to in Section 1793(1) and (2).[23] Therefore, the guardian is competent and, as the case may be,

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[18] *Id.* at § 1785.
[19] *Id.* at §§1780, 1781.
[20] Wagenitz, *supra* n. 13, at § 1781, ¶ 6; Christian Berger & Heinz-Peter Mansel, *Bürgerliches Gesetzbuch: BGB § 1782*, at ¶ 2 (Othmar Jauernig ed., 14th ed., CH Beck 2011).
[21] BGB § 1784.
[22] *Id.* at § 1793.
[23] *Id.* at §§ 1629, 1793(1), (2).

obliged to take any measure relating to the person or property of the ward unless the law provides for an exception.[24]

One of these exceptions is contained in Section 1794, which states that the parents' and the guardians' right and duty to care does not extend to matters for which a curator (*pfleger*) has been appointed by the family court.[25] A curator must be appointed for specific tasks if the parents or the guardians are legally or factually prevented from carrying them out.[26] This particularly applies to legal transactions in which the legal representatives (parents or guardians) may not represent the ward pursuant to Sections 1795 and 1796:[27]

> [Section 1795: Exclusion of Power of Agency]
> (1) The guardian may not represent the ward:
>
> 1. in a legal transaction between his spouse, his civil partner[,] or one of his lineal relatives on the one hand and the ward on the other hand, unless the legal transaction consists solely in the performance of an obligation[;]
>
> 2. in a legal transaction the subject of which is the transfer or encumbrance of a claim of the ward against the guardian secured by pledge, mortgage, ship mortgage or suretyship or the cancellation or reduction of this security or which creates an obligation of the

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[24] Wagenitz, *supra* n. 13, at § 1793, ¶ 2.
[25] BGB § 1794.
[26] *Id.* at § 1909; Dieter Schwab, *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB § 1909*, at ¶ 1 (Othmar Jauernig ed., 6th ed., CH Beck 2012).
[27] BGB §§ 1795, 1796; Dieter Schwab, *supra* n. 26, at § 1909, ¶ 11.

> ward to effect such a transfer, encumbrance, cancellation or reduction; 3. in a legal dispute between the persons designated in no. 1 and in a legal dispute on a matter of the kind designated in no. 2.
>
> [Section 1796: Revocation of Power of Agency]
>
> (1) The family court may revoke from the guardian the power of agency for individual matters or for a specified group of matters.
>
> (2) The revocation should occur only if the interest of the ward is to a substantial degree contrary to the interest of the guardian or of a third party represented by the guardian or of one of the persons designated in section 1795 no. 1.[28]

In the present context, it should be noted that Section 1795(1) does not generally prevent the guardian from engaging in a legal dispute before a court on behalf of the ward and entering into a contract with an attorney for this purpose.

In addition to the guardian, a supervisory guardian may be appointed, which may also be the competent youth welfare office. Such a supervisory guardian is usually appointed if the guardianship involves the management of substantial financial assets. While a supervisory guardian does not have legal authority to represent the ward,[29] his or her task is to exercise control over the guardian's activities and to involve the family court if need be.[30]

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[28] BGB §§ 1795, 1796.
[29] BGH (*Bundesgerichtshof*); NJW 789 (1956); BayObLGZ 105 (1975).
[30] BGB § 1799.

Pursuant to Section 1833, both guardians and supervisory guardians are liable for damages arising out of a culpable breach of obligation to the ward.[31]

> (1) The guardian is answerable to the ward for the damage arising from a breach of duty if he is at fault. The same applies to the supervisory guardian.
>
> (2) If more than one person together are responsible for the damage, they are liable as joint and several debtors. If, in addition to the guardian, the supervisory guardian or a co-guardian is responsible only by reason of breach of his duty to supervise, then as between them the guardian alone is liable.[32]

*2. Custodianship for Adults (*Rechtliche Betreuung*)*

If an adult lacks legal capacity or is otherwise unable to take care of his or her own affairs, a custodian may be appointed by the custodianship court to take care of specifically designated tasks within the fields of personal or property matters. It differs from guardianship in two fundamental regards.[33] First, custodianship only applies to adults whereas guardianship only applies to minors. Second, the scope of custodianship is principally limited to those matters specified by the family court's order in the individual case while a guardian has a comprehensive duty of care in all personal and property related matters unless otherwise provided for by the law.

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[31] *Id.* at § 1833.
[32] Id.
[33] Wagenitz, *supra* n. 13, at § 1773, ¶ 3.

a. Requirements

The requirements for appointing a custodian are set forth in Section 1896:

> (1) If a person of full age, by reason of a mental illness or a physical, mental or psychological handicap, cannot in whole or in part take care of his affairs, the custodianship court, on his application or of its own motion, appoints a custodian for him. The application may also be made by a person incapable of contracting. To the extent that the person of full age cannot take care of his affairs by reason of a physical handicap, the custodian may be appointed only on the application of the person of full age, unless the person is unable to make his will known.
>
> (1a) A custodian may not be appointed against the free will of the person of full age.
>
> (2) A custodian may be appointed only for groups of tasks in which the custodianship is necessary. The custodianship is not necessary to the extent that the affairs of a person of full age may be taken care of by an authorised person who is not one of the persons set out in section 1897 (3), or by other assistants for whom no legal representative is appointed, just as well as by a custodian.
>
> (3) The assertion of rights of the person under custodianship vis-à-vis the person authorised by him may also be defined as a group of tasks.

> (4) The decision on the telecommunications of the person under custodianship and on the receipt, opening and withholding of his post are included in the group of tasks of the custodian only if the court has expressly ordered this.[34]

Pursuant to Section 1896(1), the person who shall be subjected to custodianship must be of full age, i.e., eighteen years old. This not only constitutes the first requirement for custodianship, but also sheds light on the reason for the restrictive nature of this legal mechanism. As pointed out by the German Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*), custodianship always strongly interferes with the subject's constitutional right of self-determination guaranteed by Article 2(1) and Article 1(1) of the German Constitution (*Grundgesetz*).[35] The fact that the person to be put under custodianship is an adult adds to the importance of protecting his or her autonomous will and limiting the application of legal mechanisms that interfere with that right as much as possible. Thus, the requirements for imposing custodianship are much stricter and the consequences are much more limited than those that apply to guardianship for minors.

Section 1896(1) goes on to set forth that the person in question must be partly or fully incapable of taking care of his or her own affairs. This does not necessarily require a lack of legal capacity within the terms of Section 104(2) even though the standards of Section 104(2) and Section 1896 are somewhat similar.[36] It is sufficient that the person lacks the *natural ability* to reason or to act according to his own reasoning.[37] This requirement is not fulfilled to the extent that the person is capable of remedying his or her difficulties by vesting another person with legal authority to act on his or her behalf. In the present context, it should also be

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[34] BGB § 1896.
[35] BVerfG; FamRZ 312, 313 (2002); FamRZ 2260 (2008); FamRZ1624 (2010).
[36] BGH; FamRZ 630 (2011); Werner Bienwald, *Staudinger BGB § 1896*, ¶ 17 (2006).
[37] BGH; FamRZ 630 (2011); Schwab, *supra* n. 26, at § 1896, ¶ 29.

noted that such inability to take care of one's own affairs will not automatically be assumed by German courts if an average person in the same situation required the help of an attorney; incapacity in this context requires that the person be psychologically unable to ask for legal advice or to understand the necessity therefore.[38]

Furthermore, the incapacity must be due to a mental illness or a physical, mental, or psychological handicap. This calls for a causal link between the illness or handicap and the incapacity.[39] A person who cannot take care of his or her own affairs for other reasons—e.g., language difficulties, carelessness, or inexperience—does not have the right to apply for custodianship and must therefore resort to an agent who acts on his or her behalf. Not every person who is unable to take care of his or her own affairs has the right to a (tax-paid) custodian.

The order of custodianship by the court must contain the specific tasks for which the custodian shall be competent. Although it is possible to order custodianship for all personal- and property-related matters, Section 1896(1) and (2) aim at a restrictive use of this mechanism. Therefore, Section 1896(1) and (2) contain the principle of proportionality that applies both to the question of if custodianship should be ordered at all as well as to the question of to what extent it should be ordered, i.e., for which specific tasks the custodian shall be competent. Section 1896(3) explicitly allows the custodian to be competent to exercise the rights of the person under custodianship against the person that he or she has authorized.[40] It is thus possible for the person under custodianship to authorize someone to act on his or her behalf for specific matters and to ask the court to order custodianship only for purposes of monitoring that person's actions.

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[38] BayObLG; FamRZ 1249 (2001); Bienwald, *supra* n. 36, at § 1896, ¶ 17.
[39] Bienwald, *supra* n. 36, at § 1896, ¶ 17; *cf.* FamRZ 1968 (2003).
[40] BGB § 1896(3).

Custodianship may be ordered by the court *ex officio* or may be applied for by the person to be put under custodianship. However, in case of a physical disability, the custodian may only be appointed upon application of the person in question unless he or she is unable to make his or her will known.[41]

Pursuant to Section 1896(1a), the custodianship court must never act against the subject's *free* will.[42] This provision was only added in 2005[43] and reflects a long scholarly discussion of the past decades in the course of which the German Constitutional Court had established that under the constitutional right of self-determination a person may not be put under custodianship against his or her will unless he or she is unable to form his or her will freely. [44] Thus, if the person objects to being put under custodianship, [45] the court will have to proceed by deciding whether this choice reflects the person's *free* will. It is legally presumed that a person objecting to custodianship is acting on his or her own free will.[46] Only if the court positively concludes that this is not the case may it order custodianship against the person's will.[47]

Nevertheless, it should be noted that ordering custodianship does not necessarily or even primarily have to serve the personal interest of the person to be put under custodianship. Under exceptional circumstances, custodianship may even be ordered on the sole basis of benefitting a third person, e.g., in case someone would like to cancel a lease contract and cannot validly declare

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[41] *Id.* at § 1896(1)(3).
[42] *Id.* at § 1896(1a).
[43] 2d BtÄndG (enforced July 1, 2005); Bundesgesetzblatt I 1073 (2005).
[44] BVerfG, FamRZ 1624–1625 (2010).
[45] The objection must concern the order of custodianship itself and not the question of which person shall be appointed as custodian. In case the objection only concerns the person to be appointed and not the custodianship itself, the court merely has to consider the objection. *Cf.* BGB § 1897; Schwab, *supra* n. 26, at § 1896, ¶ 31.
[46] Schwab, *supra* n. 26, at § 1896, ¶ 29.
[47] *Id.* at ¶ 26.

cancellation (due to Section 131) because the other party lacks legal capacity.[48]

b. Rights and Duties of the Custodian

The custodian's rights and duties are primarily defined by the court order establishing the custodianship. Within the group of tasks that the custodian has been expressly entrusted with, he or she exercises legal authority to act on the person's behalf, including the right to represent him or her before court or to hire an attorney for this purpose. Pursuant to Sections 1902 and 164(1)(1), the legal declarations of the custodian in the name of the person under custodianship directly bind the latter if it falls within the scope of the custodian's tasks under the court order.[49]

Furthermore, it is possible for the court to order a "reservation of consent" for specific declarations.[50] In that case, the person under custodianship requires prior or subsequent permission of the custodian in order to make a legally binding statement or declaration. The mechanism applying to minors between the age of seven and eighteen applies analogously.

> [Section 1903: Reservation of Consent]
> (1) To the extent that this is necessary to prevent a substantial danger for the person or the property of the person under custodianship, the custodianship court orders that the person under custodianship requires the consent of the custodian for a declaration of intention that relates to the group of tasks of the custodian (reservation of consent). Sections 108–113, 131 (2) and

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[48] BayObLGZ 52 (1995); FamRZ 1369 (1996); Bienwald, *supra* n. 36, at § 1896, ¶ 17.
[49] BGB §§ 164(1)(1), 1902.
[50] *Id.* at § 1903.

> [S]ection 210 apply with the necessary modifications.
>
> (2) A reservation of consent may not extend to declarations of intention that are directed to entering into a marriage or creating a civil partnership, to dispositions mortis causa and to declarations of intention for which a person with limited capacity to contract under the provisions of Books Four and Five does not need the consent of his legal representative.
>
> (3) Where a reservation of consent is ordered, the custodian nevertheless does not require the consent of his custodian if the declaration of intention merely confers a legal advantage on the person under custodianship. To the extent that the court does not order otherwise, this also applies if the declaration of intention relates to a trivial matter of everyday life.
>
> (4) Section 1901(5) applies with the necessary modifications.[51]

In addition to his or her legal powers when acting as an agent, the custodian may also be entrusted with the right to make factual decisions for the person under custodianship, such as determining contact and visiting rights with respect to third parties or determining the place of residence.[52]

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[51] Id.
[52] Schwab, *supra* n. 26, at § 1896, ¶ 12.

c. Procedural Questions

The local county court (*amtsgericht*), acting as guardianship court (*vormundschaftsgericht*) or custodianship court (*betreuungsgericht*), is generally [53] competent to decide on all guardianship and custodianship matters.[54]

In some proceedings, a procedural curator may be appointed if this is necessary to safeguard the subject's interests. This discretionary measure may be taken by the court in proceedings that aim at ordering guardianship or custodianship that deal with any family law matter that concerns the person of a minor or aim at the involuntary commitment to a medical facility or other measures involving deprivation of liberty. The procedural curator (*verfahrenspfleger*) is not to be confounded with a curator (*pfleger*) for a minor under guardianship within the terms of Section 1909. His or her task is to keep the child or person to be put under custodianship informed, to assess his or her needs and interests independently, and to brief the court accordingly before it renders a decision. It is legally presumed that the appointment of a procedural curator is not necessary if an attorney in the proceedings is representing the person in question. This indicates the high level of confidence that German law puts in the attorney's ability to look after his or her clients who require special attention and protection.

Pursuant to FamFG (Act on the Procedure in Family Matters and in Matters of Noncontentious Jurisdiction) Section 280, the court is obliged to ask for a medical-expert opinion before ordering custodianship. The expert is obliged to actually meet and examine the person in question. The medical report must include: (1) the symptoms of the disease, including its development; (2) the

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[53] There are only few exceptions where other courts are competent: e.g., for estate and inheritance disputes, the probate court is competent even if the inheritor is a minor or a person under custodianship. *Cf.* Wagenitz, *supra* n. 13, at § 1773, ¶ 5

[54] Gerichtsverfassungsgesetz (GVG) (Judicature Act) was promulgated anew on May 9, 1975. Bundesgesetzblatt I 1077.

conducted investigations and research underlying these findings; (3) the physical and psychiatric condition of the person concerned; (4) the scope of the tasks to be conferred to the custodian; and (5) the expected duration of the custodianship.[55]

III. THE CONTRACTUAL AND PRE-CONTRACTUAL RELATIONSHIP BETWEEN AN ATTORNEY AND ITS DIMINISHED CAPACITY CLIENT

The attorney-client contract usually qualifies as a service contract within the terms of Section 611.[56] The contract specifies the matters on which the attorney shall advise and represent his or her client, stipulates the attorney's fee, and usually also provides for the respective power of attorney. There is no form requirement, and the contract may thus be concluded by virtue of implicit statements or conduct.[57]

As explained above, a person lacking legal capacity cannot conclude a valid contract or validly confer legal authority—including the power of attorney—to another person.[58] However, if the person loses his or her legal capacity only *after* he or she has concluded a contract and/or conferred legal authority, the contract and the legal authority remain valid.[59]

Even if the contract is invalid due to lack of legal capacity on the part of the client, the attorney still has a number of precontractual protection duties toward his or her client. As a reaction to the relatively lax character of German tort law, German courts have developed the concept of precontractual duties

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[55] FamFG § 280.
[56] Only in cases in which the attorney is hired to produce a specific result such as writing an expert opinion may the contract be qualified as a contract to produce a work within the terms of Section 631. BGB § 631.
[57] BGH IX ZR 111/03 (Oct. 6, 2005)
[58] *Cf. supra* sec. I(A).
[59] *Cf.* BGB §§ 672, 168(1).

between parties who engage in contractual negotiations or otherwise expose their interests to each other in a similar fashion as parties who have actually concluded a contract. Since 2002, the precontractual duties are codified in Sections 311(2) and 241(2).[60]

> [Section 311: Obligations Created by Legal Transactions and Obligations Similar to Legal Transactions]
>
> . . .
>
> (2) An obligatory relation with duties within terms of § 241 (2) also comes into existence by
>
> 1. the commencement of contract negotiations
>
> 2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or
>
> 3. similar business contacts.

> [Section 241: Duties Arising from an Obligatory Relation]
>
> . . .
>
> (2) An obligatory relation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.

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[60] Furthermore, Section 44 of the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*) contains a *lex specialis* liability that renders an attorney liable if he or she does not intend to accept a mandate but only refuses it with unexcused delay. Bundesrechtsanwaltsordnung § 44 (2012).

The precontractual duties have to be determined with due consideration of the parties' statements and conduct as well as all relevant circumstances. In particular, they include the obligation to inform the other party of issues that he or she is unaware of and that are evidently important to him or her. A culpable failure to fulfill any contractual or pre-contractual duty makes the party in breach liable for damages under the contractual damage regime, which is considerably more favorable to the damaged party than tort law.[61]

Once the contract is validly concluded, the parties' rights and duties are to be determined according to their agreement, again with due consideration of the surrounding circumstances and the individual facts of the case. According to the German Supreme Court (*Bundesgerichtshof*), the attorney has a comprehensive duty to advise his or her client in all concerns that affect his or her interests in the context of the mandate.[62] The purpose of legal advice by an attorney is to overcome the clients' lack of legal expertise and to enable the client to look after his or her own interests and to make an autonomous and effective decision with regard to his or her own legal affairs.[63]

It should be noted that German courts tend to subject lawyers to high standards that come close to perfectionism when assessing negligence in the context of the advice given to a client.[64] Some prominent examples of the high standards established by German courts include: lightening-fast reactions during oral arguments;[65] almost zero tolerance for errors in finding

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[61] The main advantage being that under the contractual regime the culpability of the injuring party is presumed while under "normal" tort law the aggrieved party will have to prove the other party's intent or negligence. *Cf.* BGB § 823(1).
[62] NJW-RR 195 (2006); NJW-RR 1654 (2005).
[63] NJW-RR 274 (2006); NJW-RR 195 (2006).
[64] *Beck'sches Rechtsanwalts-Handbuch* § 51, recital 4 (Brigitte Borgmann et al. eds., 10th ed., CH Beck 2011).
[65] OLG Düsseldorf (*Oberlandesgericht Düsseldorf*); AnwBl 283 (1987).

and applying the law;[66] duties to correct the court when it is about to commit a legal error;[67] and a very wide conception of the mandate, which leads to extensive duties to advise the client in every respect.[68]

IV. CONCEALED DIMINISHED CAPACITY: RESOURCES AND DUTIES OF THE ATTORNEY

When facing a client who appears to lack legal capacity or to be otherwise unable to take care of his or her own affairs, an attorney must be very cautious; any breach of pre-contractual or contractual obligations might result in substantial damages for which the attorney is liable if his or her breach was culpable. In addition to the legal liability, he or she might find him or herself morally responsible for the grave consequences that may arise if a person in need is left without the necessary help to take the appropriate measures with respect to his or her personal and legal affairs.

In the event that the attorney faces a client who appears to lack legal capacity or is otherwise unable to take care of his or her own affairs, the client might require a guardian or custodian to protect his or her rights effectively. For instance, he or she might be incapable of making important legal declarations of intent (including those necessary for the conclusion of the attorney-client contract). Further, the client might simply not understand his or her situation on a factual level and thus lack the ability to assess the situation, recognize the necessity and nature of measures to be taken, and oversee their potential consequences.

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[66] NJW 1044 (1972); NJW 501 (2006).
[67] NJW 987 (2009); NJW 73 (2010). Interestingly, although a lawyer is generally not excused for an error of law just because the court commits the same legal mistake, he or she may be excused if three known legal commentaries contain the error as well. NJW 495 (1985).
[68] NJW-RR 1210 (2004); *cf.* NJW-RR 1645 (2006).

If the attorney becomes aware of such circumstances, the attorney is obliged to advise his or her client to file for custodianship and to inform the custodianship court so that it may initiate a proceeding to appoint a guardian or custodian if the client refuses to file for custodianship. As explained above, once informed, the court would be able to proceed *ex officio* (unless there is only a physical disability) and would also clarify any doubts on the client's mental and physical state when seeking the obligatory medical-expert opinion.[69] If the court concludes that the client is not capable of taking care of his or her own affairs with respect to the legal mandate in question and that the client's refusal to accept custodianship is not based upon free will, the court will appoint a custodian.

Oftentimes, the attorney is appointed as a custodian for his or her client and his or her competences as limited to the object of the mandate, i.e., the legal dispute at hand.[70] At least with respect to procedural matters, the law appears to deem an attorney trustworthy enough to guide and supervise his or her own diminished capacity-client and does not fear a conflict of interests.[71] However, when the facts of the individual case give rise to the slightest appearance of impropriety, the attorney should be cautious to deal with the situation and should consider consulting with the relatives as well as medical or psychological experts. In a number of cases there have been disputes between custodians and relatives of the person under custodianship, in particular when the custodianship involved the management of financial assets.

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[69] *Cf. supra* sec. I(B)(3). With respect to minors, the court would merely have to determine whether the parents are deceased, whether the parents have lost legal custody over their child, or whether the child's personal status cannot be determined in order to order guardianship.

[70] Because the guardian generally has a comprehensive duty of care for the minor, an attorney is rarely appointed as guardian. With respect to minors, it would be advisable to appoint someone else (preferably a relative) as a guardian on a long-term basis and to maybe appoint the attorney as curator within terms of § 1909 for the mandate in question.

[71] *Cf.* FamFG §§ 158, 276, 277, 317, 318, 419; *cf. supra* sec. I(B)(3).

With respect to the mandate in question, it should be noted that a person unable to take care of his or her own affairs and put under custodianship does not necessarily have to lack legal capacity. Thus, if he or she wanted to reverse a transaction that he or she deems to be invalid due to a lack of legal capacity, the client would have to prove that lack of capacity before court. Independent of whether legal capacity is given, such proof would not be necessary when a reservation of consent within terms of Section 1903 has been ordered by the custodianship court. Then, the validity of any legal statement would depend on the consent of the custodian even if the person in question does not lack legal capacity.[72] This in turn renders supervision of the person much easier, safeguards his or her rights toward third parties, and establishes legal certainty for all people concerned—including the attorney who might find him or herself scrutinizing the validity of the attorney-client contract and his or her power of attorney. Under such circumstances, it is thus advisable to not only apply for custodianship but also apply for a reservation of consent within the terms of Section 1903.

If the mandate concerns a proceeding that aims at subjecting the client to custodianship, the legal capacity of the client to participate in such a proceeding is explicitly guaranteed by FamFG Section 275, independently of any lack of legal capacity. Accordingly, it must be possible for the client to validly conclude a contract with an attorney for the purpose of legal representation in that proceeding. However, it is disputed among German scholars and courts whether the attorney-client contract is also to be regarded as valid with respect to the attorney's claims towards his or her client in their internal relationship.[73] It is thus advisable to request the explicit consent of the custodian for the attorney-client agreement to obtain legal certainty in this regard.

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[72] *Cf. supra* sec. I(B)(2)(b).
[73] *Beck'sches Rechtsanwalts-Handbuch* § 32 recital 6 (Hans-Ulrich Büchting et al. eds., 10th ed., CH Beck 2011).

During the process, a person under custodianship who lacks legal capacity is not capable of making any valid procedural statements or other acts[74] but may be represented by either the custodian or anyone to whom authority has been validly conferred.[75] If the person under custodianship does not lack legal capacity, he or she may also make valid statements and acts before court. However, if the custodian is competent and actually decides to take over the process, the person under custodianship is treated as if he or she lacked legal capacity.[76] The same applies if the custodianship court orders a reservation of consent pursuant to Section 1903.[77]

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[74] BGB §§ 104(2), 105, 51; ZPO (*Zivilprozessordnung*) (German Procedural Code) (Aug. 30, 1877); Reichsgesetzblatt 83 (1877) (enforced Oct. 1, 1879).

[75] Legal representation by an attorney is only obligatory before German courts if the law explicitly provides so. This is for instance the case if the district court (*landgericht*) or higher regional court (*oberlandesgericht*) is competent to decide on the matter. *Cf.* ZPO § 78.

[76] ZPO § 53.

[77] *Cf.* Von Crailsheim & Mühlbauer, *supra* n. 63, at § 32, recital 5; Danah Adolph & Axel Foerstner, *Prozessfähigkeit von Betreuten und Unerwünschten Prozessen* in BtPrax 126–131 (2005).

CCEL Conference 2012
November 17, 2012
"Advocacy and Aging: From Storytelling to Systemic Change"

DO THEY SERVE COFFEE ON THIS TRAIN?

Marion Allan [*]

The theme of this year's conference is "Advocacy and Aging: From Storytelling to Systemic Change." So, I am going to tell you a story. It is a story about my ninety-six-year-old mother's last three months in the hospital last year. It is, as you may anticipate, a sad story. She died on December 12, 2011 in the Lady Minto Hospital, which is a very small hospital on Salt Spring Island. Her journey in the hospital highlighted a number of ways in which our current healthcare, housing, and guardianship policies are failing our aging seniors. I suggest that there are many lessons to be learned from her experience, and I hope that you, as passionate advocates for the elderly in a wide variety of professions, will continue to work to redress these failings.

I have called my story: "Do they serve coffee on this train?" I realize that you may have trouble concentrating if you are

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wondering why my story has such a seemingly nonsequitorial title, so I am not going to start at the beginning of my story. I am going to start close to the end.

Lady Minto Hospital is a small but very busy, rural hospital. As you may know, Salt Spring Island has a large elderly population and, demographics being what they are, most of those aging and increasingly frail people are women. Residents of the Gulf Islands have a higher life expectancy than those in British Columbia. In 2008, life expectancy in the Gulf Islands averaged 83.46 years (compared to 80.90 years for the Vancouver Island Health Authority and 81.14 years for British Columbia). Of course, we would expect the life expectancy for women to be higher than for men, and, indeed, elderly women far outnumbered men in the hospital while my mother was there.

In 2008—2009, although people older than seventy-five years of age accounted for around twelve percent of the population on Salt Spring Island, they comprised approximately forty percent of hospital cases.

The Lady Minto Hospital has an Extended Care Unit of thirty-one subsidized units. It is always full and has an extensive waiting list. Each of those units has two or four beds. The hospital has a very small emergency department. The odd maternity case whisks in and out. My mother was in the acute care ward, which has nineteen beds. Some patients' rooms are single; most are double.

The nurses confirmed to me that about nineteen percent of the patients in the acute ward are elderly people waiting for placement in extended care, in either the hospital or elsewhere in the community. They are classified as receiving an Alternate Level of Care —i.e., care for people who no longer require acute care or who have been assessed for eligibility in residential care but who remain in an acute care ward pending transfer to a suitable facility.

The Vancouver Island Health Authority (VIHA) conducted a SSI Health Review in May 2010. It found that in 2008 to 2009, thirty-five percent of those in the Lady Minto who were waiting for placement were aged seventy-five to eighty-four, and sixty-two percent were aged eighty-five or older.

When I was at the hospital, I was told that most of the remaining ten percent of the patients suffer from psychiatric or drug-related problems. In the acute ward, the patients' rooms all line up on one side of a long narrow corridor. Each morning, most of the patients are taken from their beds and sit in huge vinyl-padded chairs outside their doors along the corridor wall. There they sit until it is time to go to bed again. They eat their meals there; they may look at a book or a magazine; only a few have the occasional visitor; the nurses give the patients whatever attention they can spare; but mostly, the old people just sit quietly and wait.

My mum was in palliative care for about two weeks before she died. One day, while she was apparently in a coma, the fire alarm went off. The thought of getting all of the patients out of the hospital was daunting. But fortunately, it was a false alarm. Of course, fire alarms are loud and seemingly endless. I think they are less alarming to the deaf elderly and most alarming to the young with psychiatric problems.

With the alarm, all of the doors automatically slammed shut. That was alarming to everyone. One young woman pulled a cigarette out of her housecoat—she had no matches except when the nurses gave her one a few times a day so she could smoke outside. Seeing her with the cigarette, two old men started screaming that she had obviously started the fire and insisted that she immediately leave the hospital.

By that time, I had spent most of two-and-a-half months in the hospital every day and knew many of the patients and nurses. I helped when I could. I did my best to mediate the cigarette dispute and calm a hysterical patient who could not stand that her door was

closed. She did not want to be inside her room by herself, and she did not want to be outside in the hall with so many anxious people.

Then, I thought I should check on my mum just in case she emerged from her coma and became confused. It was unlikely, but none of us are immune from irrational thoughts at such times. As I walked down the hall, a small elderly lady in her huge comfy chair grabbed my hand and stopped me. She was not at all upset, but she was seemingly bemused by the frenzied activity. She looked up at me and asked: "Excuse me, dear. Do they serve coffee on this train?"

Yes, that is exactly what it must feel like, sitting in a chair lined up with all the other chairs, facing forward all day: a train! I told her I thought they did indeed serve coffee on this train and I would look for a waitress. I then reported accordingly to a nurse whom I thought had a good sense of humor and would oblige. It was an amazing insight.

But, what of my mother? Interwoven through this narrative is the regrettable fact that I learned too many lessons too late. It is ironic because in the past seven years I have helped organize Elder Law conferences for judges and lawyers; I have written articles on a number of Elder Law issues, particularly capacity; and I have learned a lot from listening to many marvelous professionals, including some of you here today. As a judge for twenty-four years, I heard a number of cases that involved disputes over whether a committee should be appointed in a particular case.

However, I have found that real life is much more complicated and untidy than theoretical knowledge. And when it is *your* parent who is aging, there is a constant struggle between respecting and building up her independence and ensuring that she is safe, physically and psychologically. It is hard to be very objective when it is your mother who is fighting hard to maintain

her independence, but you are deeply concerned that she is becoming at risk.

My mother had been an amazingly independent woman who lived by herself quite happily and very competently in a large two-story house on Salt Spring Island until her last hospitalization. Over the years, beginning with an elopement at age nineteen, she had been married four times but shed each husband long before they developed any health problems at all. She resisted any suggestions that she join any organizations for seniors because it depressed her to be around old people. She was an avid reader, finished the daily crossword, loved a glass or two of sherry each evening, and sparkled in the presence of any man younger than the age of seventy.

She cultivated a lovely garden on a couple of acres and worked on it until she was about ninety-three. Until she was ninety-four, she drove ten kilometers or so each week to get her groceries. After that, she insisted on being driven down to Ganges to shop herself. Eventually, she took advantage of Thrifty's senior-delivery service every Thursday. She dedicated a lot of time to perfecting her grocery list each week.

Any suggestion that my mum even consider assisted living was instantly and firmly rebuffed. In the last few years, she needed a pacemaker and was later treated successfully for lung cancer. I took her to either Victoria or Vancouver for her medical treatments. When she recovered, she just wanted to go home. I would take her home, stay a while, and then arrange for regular home care. Before the ferry berthed in Tsawwassen, she had usually fired the homemakers. Does that sound familiar?

My mum's insistence on independence was relentless, although gradually she began to rely heavily on one set of neighbors, who could only be described as saints, for assistance. And in any actual crisis situation, my mother would phone me, her only child, at any time of day or night to summon me or my

husband or both to deal with the problem. By that time, I was a supernumerary, or half time, Supreme Court judge, so I did have some flexibility unless I was in the middle of a criminal trial that simply had to proceed to the end. But as I began to take more and more time off my trial rota, I worried how I would ever make up that lost time.

I have read numerous reported cases, mostly in Ontario oddly enough, in which elderly parents have been removed from their children's homes in a desperate state—ill, filthy, and malnourished. The children, then charged with criminal neglect, often testify that their parents refused to go into care, to the doctor, or to the hospital. Of course, our response is horror—how could they possibly allow their own parents to deteriorate to that extent? I confess that I had some inkling of the adult child's predicament when my mother developed an aversion to having her hair washed a few months before she went into the hospital. I would think up ways to entice her to allow me to wash her hair, but it became increasingly difficult and it was always tempting to let it slide for just one more day. It gave me insight into just how difficult it could be to reason with someone who, although clearly as competent as me in most—but not all—aspects, presented as just damn unreasonable. Really, a lifetime of obeying and then respecting one's parents makes it very difficult to insist that they do something they adamantly refuse to do.

The last time my mother stayed with my husband and me in Vancouver in August 2011, I finally succeeded in getting her hair washed by putting on my bathing suit and getting into the shower with her. During that visit, she complained about feeling sick but would not or could not explain what exactly was wrong. When I took her to a clinic here, she told the doctor that there was nothing wrong with her and then brightly asked him if he did not agree that she was remarkable for ninety-six. Of course, the answer was always a resounding: "Yes, you are truly amazing." That unproductive visit convinced me that she was ready to go home.

Once back on Salt Spring Island, I immediately took her to her own doctor. By that time, in August 2011, she was probably suffering from difficulties that were to develop into a serious urinary tract infection and a bowel obstruction, but she gave no clues. Her doctor administered that GP's aide, the Mini-Mental State Exam, and you will not be surprised to hear that her score was off the charts for her age. I sat listening, thinking: "OK, she can count backwards from 100 in sevens faster than I can."

I expressed to the doctor some of the concerns I had about her apparently deteriorating mental state in some areas. She complained adamantly and persistently that her next-door neighbor, a crabby woman in her nineties, was stealing the plants from her garden. When her doctor asked me if that was possible, I replied (thinking of the answer a witness will always give eventually under persistent cross-examination): "Well, anything is possible." Some months after my mother died, the saintly neighbors actually observed the thieving neighbor in action.

But what blunt instruments there are on a gulf island for a GP to determine capacity! I had tried to get an appointment with a psychiatric geriatrician at Vancouver General Hospital (VGH) in August but was unable to get an appointment until February 2012, which was two months after she died.

As you know, an elderly adult's capacity is not a light switch. She is not totally competent, or "on," one day and completely incapable, or "off," the next day. Most people can be expected to lose capacity gradually and in certain areas before others. But that light-switch concept is, of course, the underlying and very false theory of the Patients Property Act, the statute that governs any legal determination of competence or capacity in British Columbia. That statue is a sadly outdated relic that harks back to the English Lunacy Laws of the nineteenth century.

There have been many efforts over the years to encourage or pressure the government to enact modern guardianship legislation. Part Two of the more modern Adult Guardianship Act (RSBC 1996), which deals with Decision Makers, Guardians and Monitors, was intended to replace the provisions of the Patients Property Act. However, Part Two of the Act is still not yet in force. That leaves British Columbia as one of the very few jurisdictions in at least the western world that has not progressed to the civilized appointment of guardians for adults according to need rather than the archaic appointment of holus bolus property or personal committees for patients.

After I left my mum at home in August, and phoned regularly, my mum would say she felt "sickish" but would not, or again could not, explain what she meant. I wondered if she was eating properly or enough, but she assured me she expected to be fine in a day or two.

In October, the kind neighbors became worried about her, and I began to become increasingly concerned that she was increasingly vague, confused, and paranoid. My husband and I tried to talk my mum into going to the doctor or the hospital. She would promise to do so until the next day, but the next day we realized that she had not done so.

I telephoned her doctor a number of times and asked if he would make a house call, but understandably, he was far too busy to leave his office and repeatedly suggested she come into see him or go to the hospital. I tried to get a community nurse to visit her but was told that such a visit just to check on my mother—without a doctor's direction—was not within her mandate.

In retrospect, it was inevitable that events would spiral out of control. On the evening of October 24, her neighbors visited and found her usually immaculate kitchen in a terrible mess and uneaten food on a number of plates and counters. Clearly, the situation had reached crisis proportions.

Ironically, I had agreed to speak at Geriatric Medicine and Geriatric Psychiatry Rounds at VGH at 7:30 a.m. on October 25. I had met with Dr. Martha Donnelly several times and heard her present on capacity issues at Elder Law conferences for judges and lawyers. One of the things we agreed on was that in litigious proceedings, doctors often mistakenly believe that capacity is a medical determination. Of course, when there is a legal challenge to a person's competence, the finding of capacity or incapacity is a legal determination to be made by the judge, not the doctor. The doctor's opinion regarding capacity is useful evidence but not in itself determinative.

In addition, some doctors who are retained as experts on the issue of capacity in a legal proceeding view their role as the advocate of the patient or the party that retained them rather than as a neutral expert to assist the court. I had mentioned to Dr. Donnelly that it was fine being a judge hearing a lecture from doctors, but I thought that perhaps the doctors should hear a lecture from a judge.

The next thing I knew, Dr. Donnelly had set me up presenting on the topic of "The Role of the Doctor in Assessing Legal Competence: Patient's Advocate or Neutral Expert?" There were about fifty doctors present and many more from around the province over thirteen video screens.

I resolved to go ahead with my talk before dealing with my mum's crisis. Delivering the paper was easy, as I had thoroughly prepared for it. But when I was asked questions, I was so exhausted and worried that my mind was blank and my responses were totally inadequate. Of course, in retrospect, I should have told the audience exactly what my problem was and begged off answering questions.

As soon as I was finished at VGH, I telephoned my mother's family doctor and insisted that he make a house call. When he arrived, he called an ambulance to take her to the local hospital. He did not think it was necessary for me to go to Salt Spring Island at that time. In the hospital, the doctors performed many expensive tests and involved a visiting internist and radiologist. They seemed surprised that they could not find anything wrong with her. They were unable to explain why she was so suddenly confused and paranoid. The doctors decided that perhaps she had suffered a bleed in her brain, and she was taken by ambulance on October 26 to Saanich Hospital for a CT scan, but it proved negative. They performed more tests but reached no conclusions.

On October 27, her doctor telephoned me at work to say that my mum had gotten out of bed to go to the bathroom at about 6:30 a.m., and she had fallen and broken her hip. They transferred her to Cowichan District Hospital in Duncan, and I immediately left for Duncan. My mum looked awful, and she was in excruciating pain. They hoped to operate that day but their schedule was full. The following day, the surgeon replaced her hip. He told me that she was suffering from a bladder infection. He was the only person who ever gave me that information.

As you know, it is widely understood that urinary tract infections commonly cause confusion and temporary incapacity in elderly people. I would have thought that when she presented at the Lady Minto Hospital, a urinary tract infection would be high on the list of things to check for in any differential diagnosis. After the surgery, my mum was completely alert but in tremendous pain. She had had a remarkably high threshold for pain all of her life. From that day, she was never free from pain.

Tragically, as with so many elderly people, she never recovered from her broken hip. I believe the statistic is that twenty percent of Canadians older than the age of sixty-five who fracture their hip when they fall die within a year. In any event, the longer

she was in hospital, the more problems she developed. What is even more tragic is that most of those problems arose from the very fact that she was in hospital.

A few days after surgery, she was returned to the Lady Minto with the superbug— methicillin-resistant Staphylococcus aureus (MRSA). Serious staph infections, which are difficult to treat, are, of course, more common in people with a weakened immune system. She was placed "in isolation" in a small double room with an elderly gentleman who was not infected. Some of the nurses and doctors washed their hands, gowned, and gloved when they treated her; others did not. Those who gowned just threw their gowns and gloves into a large bucket between the beds; it was not regularly emptied.

A few weeks later, she also contracted C. Difficile, a bacterial infection. The symptoms of that infection are persistent diarrhea, fever, loss of appetite, nausea, and abdominal pain and tenderness. As time went on, my mother became less coherent and complained of pain constantly unless she was given so much medication that she lost consciousness. She suffered from severe edema, bowel difficulties, and later sepsis. When she was in palliative care for the last two weeks, she was either in extreme pain or unconscious.

While she was still coherent, she repeatedly said that she had slipped and fallen on a wet floor when she got out of bed. It seemed improbable at first. However, when I started to go to the hospital each morning at about seven, I saw that the cleaner washed the floors early in the morning and put a "Caution: Wet Floor" sign out in the doorway facing the hall, presumably to warn the nurses and doctors of the dangers of a wet floor.

I have to say that the nurses in the hospital were caring toward my mother and the patients, but they were so overworked that it was often impossible to get pain medication or other care for my mother in a timely fashion. My mother refused to undergo any

rehabilitation despite the valiant efforts of the physiotherapists. She told the doctor and the nurses that she just wanted to die. No one considered her capable of making that decision. She stopped eating about two weeks before she died. She stopped taking fluids several days before she died.

I have questions about the quality of palliative care in hospitals, but I must say that what impressed me most had nothing to do with our medical system per se. For the last two weeks of my mum's life, hospice volunteers from the community sat with her every single night in four-hour shifts. I would leave at about 9:00 p.m. and arrive at 7:00 a.m., and during that period there was always someone sitting with her. They were the most remarkable individuals—calm, kind, generous, and spiritual. I owe them a tremendous debt.

So, inevitably, my mother died on December 12, 2011.

A few weeks later, I was shocked when the Vancouver Island Health Authority sent her a letter asking her to complete a survey with respect to the inpatient services she received at the Lady Minto Hospital. It advised that her participation was very important and her opinions were valuable. Her feedback would be used to improve how they provided care.

I responded to say that I was offended that they would send such material, as a very cursory check of the hospital records would quickly reveal that she died in that hospital on December 12. However, I went on to set out my observations and opinions.

I actually did not expect to get any sort of meaningful reply. The doctors and nurses in the Lady Minto knew that I was a judge, and it was obvious, albeit unstated, that they were apprehensive that I would launch a lawsuit against the hospital. Cynically, I believed that VIHA would have any lawyer vet their reply to my letter to ensure that they did not make any potentially damaging admissions. So, I was very surprised to receive quite a

responsive letter from the Health Authority. It stated that they were aware that my mother's presenting problem was a urinary tract infection and regretted that such information was not communicated clearly to me. Now, that of course raises the issue of why the doctors advised me that none of the extensive testing they conducted explained her confusion and disorientation.

VIHA recognized the systemic issues such as overcrowding, the preponderance of elderly patients awaiting care in an extended-care facility, and the heavy workload of nursing staff. The letter said that they were making short- and long-term plans for the future to address those challenges. Well, I am not sure just what that means except that it takes a lot of money to redress those problems, and it is not likely that adequate funding is foreseeable. My concerns with respect to the delivery of pain medication and infection-control procedures were to be discussed with the nursing team as a learning opportunity.

However, the most satisfactory response to my letter concerned a concrete proposal regarding the floor washing in the patients' rooms. A new process was being put in place to replace wet mops with microfiber mops that will result in a dry floor almost immediately after washing. Staff would be requested to put any wet floor signs that may be necessary in the middle of the rooms rather than at the doorways.

So, what, if any, lessons can be learned from this story? The demographics are irrefutable. Our aging population has begun to swamp our healthcare system. I cannot provide any answers, but I want to try to identify some of the problems that I think need to be urgently addressed.

1. Resources Lacking in Rural Environments

Aging in a rural community presents additional challenges. We all recognize that elderly people are best served by sufficient home support to allow them to live at home for as long as possible.

That requires appropriate support from community and health services. Elderly people are obviously at a significant disadvantage in rural areas where services are not accessible. If they cannot drive, taxis to the doctor or the hospital may be scarce and too expensive. Doctors and nurses are too busy to do house calls. It has been estimated that one in three Canadians live in rural parts of the country, but only one in ten of Canada's family doctors, and far fewer specialists, practice there. Another gulf island, Galiano Island, has been without a resident doctor for almost three years.

Homecare workers can alert family or authorities if there are obvious signs of decline in an adult, but their services are limited and vary in quality. On the rare occasions that I did persuade my mother to utilize homecare workers, the experience was generally unsatisfactory. Their tasks seemed limited to things like washing dishes, making tea, and making beds, which my mother could do. According to her, they often tracked mud into the house on their shoes, which she would have to clean up when they left.

I think there is a need for more community nurses to visit frail elderly people who cannot easily access a doctor. Nurses can provide a certain level of care and even more importantly, assess whether the patient requires more serious medical intervention.

Conversely, there are many more resources in urban areas. For instance, the St. Paul's Hospital Falls Prevention Clinic was opened in 2007. It has geriatricians, a physiotherapist, an occupational therapist, and a social worker. It specializes in finding ways to prevent and address falls—which we all know is a leading cause of health decline (and eventual death) among elderly adults.

Services that support people to maintain their existing good health as they age will result in fewer people needing complex care and hospitalization as a result of age-related illness and disability. But those services are nonexistent in many rural communities.

When an adult's capacity is in issue, trained geriatrics who practice primarily in urban centers can perform appropriate assessments. The Salt Spring Health Study recommended exploring the feasibility of having visiting geriatricians and gerontologists come to Salt Spring Island. Clearly, such a practice would benefit all rural communities.

2. Inadequate Housing for Aging Seniors

Obviously, housing aging seniors who need assisted living or extended care in acute wards of hospitals is both inappropriate and unnecessarily expensive. Hospitals should be for the ill, and scarce acute beds should not be used as temporary housing for seniors who have special needs but are not ill. And given the predominance of hospital-acquired infections, those seniors are particularly vulnerable to illnesses they might not otherwise contract.

3. Assessing Capacity

If a geriatrician or gerontologist had properly assessed my mother in a timely fashion, could she have avoided the decline that led to hospitalization and the iatrogenic consequences?

In her struggle to remain completely independent, my mother had resisted any suggestion that she give me—or anyone else—a power of attorney. She declined to give any instructions in an advance directive. I think she was superstitious that any preparation for incapacity might hasten the process.

I mentioned earlier that British Columbia continues to labor under the archaic provisions of the Patients Property Act. One of the problems in my mother's case was that she did not lack capacity to the extent that I could have applied for an order of committeeship. Such an order requires a judicial finding that "the patient" lacks the necessary capability to manage him or herself, his or her affairs, or both by reason of mental infirmity or disorder

arising from disease, age, or otherwise. The test is high and requires the opinions of two qualified medical doctors that the patient is incapable.

In other jurisdictions, notably Australia, New Zealand, Japan, some American states, and some Canadian provinces, adult guardianship legislative reform has focused on the dignity and autonomy of the person with diminishing capacity as well as lack of capacity. When measures are required to protect the adult, the steps taken are more nuanced and layered than our system of committeeship in British Columbia. Those more flexible provisions of modern adult guardianship legislative schemes generally provide a spectrum of intervention to provide limited decision-making assistance where necessary while minimizing the intrusion into the adult's life. The individual's independence is maximized and governmental and judicial intervention is minimized. In contrast, the Patients Property Act provides no middle ground between an appointment of a committee and no intervention at all. British Columbia has had the legislation for adult guardianship since at least 1993 and revised it from time to time, but it has never enacted it.

The drafters of our Adult Guardianship Act clearly understood very well that capacity may gradually diminish and graduated assistance provided by guardianship orders should be the norm instead of the crude on-and-off light-switch approach mandated by the Patients Property Act. Part Two of the AGA provides the following guiding principles:

> This Act is to be administered and interpreted in accordance with the following principles:
>
> (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance[,] or protection as long as they do not harm others and they are capable of making decisions about those matters;

> (b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance[,] or protection when they are unable to care for themselves or their financial affairs;
>
> (c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.

Alas, Part Two has not been enacted. When relief is sought under the Patients Property Act, the court is forced to decide between taking away all of the frail adult's right to make his or her property or personal decisions or both, or granting no relief.

Since 2005, whenever I talked about the Adult Guardianship Act, I have consistently said that I expected Part Two to be enacted within a short time. I have stopped saying that. After almost twenty years of inactivity, it is difficult to be optimistic. Dr. Robert Gordon has described the Adult Guardianship Act as a whale—it comes to the surface and spouts every once in a while but then sinks below the surface again and disappears.

4. Improving Hospital Standards of Sanitation and Safety

This issue is not new. When I was preparing this paper, I came upon a report entitled "Falling Standards, Rising Risks: Issues in Hospital Cleanliness with Contracting Out." It was prepared in 2004 by the British Columbia Nurses' Union and the Hospital Employees' Union in consultation with the Health Sciences Association. This report examined cleaning services and monitoring mechanisms at St. Paul's Hospital in Vancouver. It

arose from concerns by nurses and other care providers in the Vancouver Coastal Health region who were alarmed by deteriorating standards in cleanliness and by communication difficulties with cleaning contractors. The observations and conclusions in that report closely mirrored my limited experience with hospital conditions in 2011, some seven years later.

This report stated that hospital staff were concerned that infection-control practices were slipping. They suggested that the Vancouver Coastal Health Authority did not have a monitoring system that could accurately gauge the cleanliness of facilities, the soundness of infection control practices, and the capacity of vendors to deliver knowledgeable, responsive, and stable cleaning services. The report recommended that the Vancouver Coastal Health Authority commission a comprehensive, independent audit of the region's housekeeping services, especially in the realm of infection control and other patient-safety issues.

That report estimated that the human cost of hospital-acquired infections was 8,000 deaths a year. They cited a study by Zoutman et al., that hospital-acquired infections in United States acute-care facilities were calculated to cost $4 billion annually; in Great Britain, the figure was £900 million. There were no published Canadian data on financial costs, but they were understood to be comparable.

The authors noted that a shortage of single-occupancy rooms prevented isolation of infected and vulnerable patients. As a result, a person with a compromised immune system or a surgical patient with an open wound was often forced to share a room with an MRSA-infected individual. Overcrowding was identified as a known ingredient in the spread of MRSA. Improving bed management and isolation facilities was said to be essential to prevent and control hospital-acquired infections.

The report called for a coordinated strategy that included conservative use of antibiotics, more isolation rooms, less pressure on beds, careful monitoring of patients and staff, regular hand washing, and high standards of environmental hygiene. It reiterated the obvious—poor hospital sanitation is not just an enemy of good healing; it can be a leading cause of disease and death. It quoted microbiologist S.J. Dancer who has stated that hospital cleaning "is, in fact, likely to be a critical factor in infection control and the continuing fight against hospital-acquired infections."

Presumably in response to that study, provincial standards were imposed in 2004 as a common measuring stick for cleanliness in British Columbia's six health authorities. In 2008, nearly one-third of Vancouver Coastal Health hospitals, including Vancouver General Hospital, failed to meet those cleanliness standards.

In 2005, a CBC report estimated that in Canada about 250,000 people a year contract a hospital-acquired infection. In Canada, treating antibiotic-resistant infections costs hospitals $100 million a year. Other countries, such as the Netherlands, have drastically reduced antibiotic-resistant infections thanks to strict patient-isolation policies and a "seek-and-destroy" approach to infection control. Those measures have reduced overall hospital costs.

In my opinion, the prevalence of hospital-acquired infections such as MRSA and C. difficile urgently requires that appropriate sanitation measures be taken in all of our hospitals. At a minimum, that requires isolation of infected patients, hand washing by hospital staff and visitors, proper disposal of used gowns, and effective surface sanitizing.

5. Palliative Care

Health Canada defines the focus of palliative care as achieving comfort and ensuring respect for the person nearing

death and maximizing quality of life for the patient, family, and loved ones.

In *Carter v. Canada*, the plaintiffs challenged the assisted-suicide prohibition in Section 24(1)(b) of the Criminal Code. I will not step into the controversy of the merits or dangers of physician-assisted dying today, but the case heard evidence from many experts on a number of issues including the state of palliative care in Canada. The Court noted that palliative care, although far from universally available in Canada, continues to improve in its ability to relieve suffering. However, Madam Justice Smith accepted the evidence of experts that even the very best palliative care cannot alleviate all suffering, except possibly through sedation to the point of persistent unconsciousness. She accepted evidence that some patients suffer pain that cannot be alleviated and some patients experience what is called "existential suffering," such as a profound sense of loss of dignity. Madam Justice Smith quoted Dr. Romayne Gallagher, a palliative care specialist, as saying:

> Palliative care services across Canada have often been referred to as a patchwork of services across the country because there is little strategic planning of palliative care. There are many places in Canada, particularly in rural or remote areas, where there is little or no access to palliative care specialist nurses or physicians. If we could guarantee that every medical student or nursing student received adequate palliative care training we could assume that all primary care providers were capable of providing palliative care meeting the Canadian standards. However, the curricula and standards have only been developed in the last [ten] years in Canada.

I am sure that many hospices have developed useful and productive protocols and practices. My concern is how those goals are implemented in hospitals. I do not know where the Lady Minto

Hospital would stand on the spectrum of effective palliative-care services, but my sense was that every doctor and nurse had his or her own opinion as to what palliative care was and its limits.

There may be agreement that the primary treatment goal of palliative care is quality of life. However, it is clear that doctors and nurses may have very different views on what is best for the patient and how far they will go to ease or hasten the inevitable end. I suggest that there is a need for a strong consistent palliative-care model that everyone—doctors, nurses, patients, and family—understand. Evidence in the *Carter* case suggests that guidelines for the practice of palliative sedation are under development.

A Parliamentary Committee prepared an extensive report on Palliative and Compassionate Care on November 17, 2011. It found that while progress has been made, only sixteen to thirty percent of Canadians who need it receive palliative care. It recognized that as our population ages, health services directed toward seniors becomes increasingly more important and our present healthcare system is ill-prepared for this shift. It concluded that a national Palliative Care Strategy is desperately needed.

And so, that is my story, and those are some of my observations and my thoughts. I am mindful that all of you contribute to the betterment of seniors' lives in your different professions. I hope that by personalizing some of the problems that confront our aging population, my storytelling will contribute in some small way to encouraging you to continue your work in bringing about the necessary systemic changes in our aging society.

ATTORNEY AND DIMINISHED-CAPACITY INDIVIDUALS: PERSPECTIVES OVER FRENCH LAW

Michaël Da Lozzo[*]

INTRODUCTION

How to protect a vulnerable person? For several years, societies have tried to find ways to help those who cannot take care of themselves. Since 1838, the law in France has provided legal answers to this question.[1]

Most of the legal provisions aim at protecting vulnerable persons by granting them specific regimes. Recently modified French positive law recently better addresses the actual issues.[2] This modification was also needed because the number of protected adults is constantly increasing: in 2004, 636,877 adults were covered (when only 321,271 were protected in 1990)[3] – not to mention minors.

Attorney's principle. An attorney within a judicial or legal process may represent or assist any person in need, whether for a contentious or non-contentious procedure. What about a vulnerable person? Obviously a vulnerable person's protective status does not prohibit him or her from benefiting from legal advice.

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[1] Law n°7443 of June 30, 1838 on insane persons—this law has been modified by the Act of Parliament n°68-5 of January 3, 1968 on the reform on rights of incapable adults.

[2] Act of Parliament n°2007-308 of March 5, 2007 reforming the adult's protection regimes.

[3] Information from Senat.fr: *Projet de loi portant réforme de la protection juridique des majeurs*, http://www.senat.fr/rap/l06-212/l06-2126.html (accessed May 1, 2014).

Legal issue. Specific provisions are provided for certain issues. For instance, concerning the validity of a contract, which can be declared void in certain circumstances, the French Civil Code places a specific burden on the party dealing with a vulnerable person to make sure a contract is not void.[4] Under French law, those vulnerable individuals are considered to have diminished capacities.

What about a diminished-capacity person's representation or assistance by an attorney? Is there any specific burden in this relationship? Because an attorney's assistance or representation is highly regulated, and because very high ethical standards exist,[5] one could wonder about the treatment of diminished-capacity clients or individuals. Would they be protected in a specific way? Should the attorney take a special level of high care when dealing with them?

Outline. To answer these questions, Part I identifies the attorney's duties to vulnerable persons. Then, Part II analyzes the relationship between the attorney and diminished-capacity individuals/clients.

The scope of this Article is limited to the care or behavior an attorney should adopt with a diminished-capacity person, which may be only an unrepresented individual (if a contract of assistance/representation is not concluded yet with the attorney) or a client.[6]

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[4] For instance: art. 465, 3° French Civil Code: contract concluded with a person under guardianship—should the protected person conclude a contract with a third party, the latter will have the obligation to verify the vulnerable person has the possibility to conclude such contract without being represented by his guardian or the contract may be declared void.

[5] *Infra* pt. I(A)(2) under 'Attorney ethical rules'.

[6] Most of the time when talking about "client", the situation of a person seeing for the first time an attorney—i.e. an "individual" – is implied.

I. IDENTIFICATION OF ATTORNEY DUTIES AND VULNERABLE PERSONS

Before going deep into the core question of this Article, the main attorney obligations and characters must be presented. Section A introduces the duties of an attorney within his or her relationship with an individual during the course of the attorney's profession. Section B provides a clear identification of the persons considered as diminished-capacity individuals under French law.

A. Regulations Applying to Attorneys

To fully understand the duties of attorneys, and the reasons such duties apply to attorneys, a brief description of the legal profession must be made before analyzing its core regulation. Mainly, the conduct of an attorney under French law is guided by ethical rules.

1. The Legal Profession under French Law

Attorneys' roles. Attorneys are judicial auxiliaries who participate in the work of justice.[7] In order to do so, there is a distinction to be made between the judicial and legal role. An attorney may *represent* his or her clients and *assist* those clients before any court. Those two judicial roles are traditional.[8]

Judicial role. The mission of representation consists in a mandate—mandate *ad litem*—, which gives the attorney the duty and obligation to accomplish any procedural act in his or her client's name.[9]

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[7] Henri Ader & André Damien, *Règles de la profession d'avocat,* §04.21 (13th ed., Dalloz 2010); Gérard Cornu, *Vocabulaire juridique*, 113 (9th ed., P.U.F. 2011) "avocat."
[8] Jean-Michel Braunschweig & Jack Demaison, *Profession avocat—Le guide,* 155 (Lamy 2011).
[9] Gérard Cornu, *Vocabulaire juridique*, 894 (9th ed., P.U.F. 2011) "représentation."

The mission of assistance before the courts is based in the legal advice the attorney must give to his clients and which will be presented for their defense,[10] (i.e. development of a legal argumentation before the judge, whether orally or in writing.)[11] Under French law, assistance by an attorney is not always compulsory for a litigant.[12]

It should be noted that both missions are independent from one another: the client can decide for which mission he or she is hiring the attorney.

Legal role. Under an attorney's legal activities, the attorney must give legal advice, assist clients in contractual negotiations, or follow the execution of a contract and draft acts.[13] Moreover, an attorney may also advise, represent, and negotiate on behalf of his or her client in connection with any tax or data protection issues.[14]

An attorney must always, and at all times, respect the ethical rules of the profession, regardless of whether there is a contract between the client and the attorney and notwithstanding the type of mission or power entrusted to the attorney.

2. Attorney Ethical Rules

As mentioned earlier, a high ethical standard applies to attorneys in the course of their profession; they apply to the relationship with clients. Therefore, the relationships must be analyzed to answer the underlying questions of this Article.

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[10] *Id.* at 91, "assistance."
[11] Braunschweig & Demaison, *supra* n. 8, at 156.
[12] *Id*.
[13] Art. 54 to 56 Act of Parliament n°71-1130 of December 31, 1971, reforming some judicial and legal professions (Act of Parliament n°71-1130), Art. 9 of the Decree n°2005-790 of July 12, 2005, regarding attorney deontological rules (Decree n°2005-790) art. 6.2 §2 and art. 7 of the National Attorney Regulations from the National Bar Council (*NAR*).
[14] Art. 8 Decree n°2005-790; art. 6.2.2 *NAR*.

Ethic. What is the definition of "ethic"? The term is often used as a synonym of moral. Both words come from the Latin *ethos* and *mos*, which both designate *custom* and *manners*.[15] While moral is a universal reference to distinguish the good from the bad – i.e., a set of norms and rules (not legal ones) that apply to everybody – ethic gives a supplementary dimension to moral. In ethic, the individual is given a role in the application of moral rules: ethic seeks to question any individual on the manner in which he or she should act to respect moral rules.[16]

Hence, ethical rules are the application of moral rules in one individual's purpose. Regarding the attorney, ethical rules constitute the use of moral values in the performance of an attorney's roles, (i.e., a set of duties and obligations for a proper functioning of the attorney's legal profession). However, at no point under the French legislation governing the legal profession of attorney is the term "ethic" used; "deontology" is preferred.

Deontology. The first legal instrument using this term was the "Act of Parliament n°71-1130 of December 31st 1971, reforming some judicial and legal professions" ("Act of Parliament n°71-1130").[17] The term was later used by the "Decree n°91-1197 of November 27, 1991, organizing the attorney profession" ("Decree n°91-1197"),[18] before being strongly affirmed by the "Decree n°2005-790 of July 12, 2005, regarding rules of deontology applying to the profession of attorney" ("Decree n°2005-79"), which uses the term in its title. But what is "deontology" as opposed to "ethic"?

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[15] Joël Moret-Bailly & Didier Truchet, *Déontologie des juristes* 49 (P.U.F. 2010)

[16] Henri Isaac, *Ethique ou déontologie: quelles différences pour quelles conséquences managériales? L'analyse comparative de 30 codes d'éthique et de déontologie* 2 at *Perspectives en Management Stratégique* (Conference held at Montpellier on May 24–26, 2000).

[17] Art. 53 Act of Parliament n°71-1130 (This article allows the Government to take Decrees over "rules of deontology as well as disciplinary procedures and sanctions.").

[18] Art. 57 Decree n°91-1197 of November 27th 1991 organizing the attorney profession (Decree n°91-1197) – Initially, the only reference was under this article, which obliges attorney students to be trained to rules of deontology.

"Deontology" is a recent term that was created by Jeremy Bentham in 1834, in "Deontology or Science of Morality," which literally means the science of duties.[19] Over time, the use of the term deontology was democratized in the labor area to mean "professional duties." [20] In this sense, deontology aims at structuring the performance of the legal profession and should give concrete solutions if any issue regarding an attorney's behavior arises.

Rules of deontology applying to attorneys are listed under the legal instruments previously enumerated: Act of Parliament n°71-1130, Decree n°91-1197 and Decree n°2005-790. Apart from those legal instruments, there is a National Attorney Regulation (*NAR*)[21] from the National Bar Council,[22] which details certain aspects of the rules of deontology provided under the legal instruments.

Moreover, two European instruments should also be highlighted: the "Charter of Core Principles of the European Legal Profession"[23] and the "Code of Conduct for European Lawyers."[24] It should be noted that none of these texts use the term "ethic."

Essential principles. Under the NAR, some commentaries are provided by the National Bars Council to allow a better interpretation. Under the NAR Commentary n°2007-001, the term "ethic" is used. The first article of this document explains that the Decree n°2005-790 restates the great ethical rules governing the legal profession, which are called, by the profession itself, essential principles.

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[19] Etymology of *deontology*: it comes from the Greek *deon* (*deontos*, *dei*), meaning "it must," and from *logos* meaning "speech, treaty," therefore, the "science of duties."

[20] Isaac, *supra* n. 16.

[21] Text adopted under the conditions provided by art. 21-1 §1 Act of Parliament n°71-1130.

[22] Art. 21-1 and 21-2 Act of Parliament n°71-1130 (The National Bars Council is a public establishment in charge of the attorneys representation, regulation of the legal profession, its formation and the promotion of the attorney profession.).

[23] Of November 24, 2006, Council of Bars and Law Societies of Europe (*CCBE*).

[24] Of October 28, 1988, amended on May 19, 2006, *CCBE*.

Taking into account this explanation, a distinction may be made between deontology and ethic regarding the legal profession: the attorney's deontology shall be considered as a set of rules containing the attorney's essential principles (i.e. ethical rules), which guide all his or her actions[25]—as well as a set of dispositions to render the rules effective.[26]

Hence, rules of deontology would be a translation by human beings of the intangible ethical rules—as opposed to the first ones, the second may not be learned, and they precede the quality of human beings.[27] Therefore, an attorney must learn the rules of deontology of his or her profession but must have the ethical quality required to exercise it.

Composition of the essential principles. The NAR Commentary n°2007-001 stipulates that essential principles of the attorney profession are included in article 1.4 of the NAR.[28] The text provides that "an attorney shall exercise his functions with dignity, conscience, independence, probity and humanity, in the respect of his oath."[29] Moreover, honor, loyalty, disinterest, fraternity, delicacy, moderation, and courtesy shall also be respected in the performance of his profession.[30] Furthermore, an attorney must evince competence, devotion, diligence, and prudence toward his or her clients.[31]

Professional secrecy. As mentioned earlier, essential principles are the moral quality an attorney must evidence in the performance of his or her profession. However, the rules of deontology must

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[25] Art. 1 Decree n°2005-790; art. 1.3 §1 *NAR*.
[26] See Alain Couret, *Droit des affaires: éthique et déontologie* in Hubert De La Bruslerie, *Ethique, déontologie, et gestion de l'entreprise* (Economica 1992).
[27] Pierre Lambert, *Pourquoi Antigone? Liber Amicorum Edouard Jackian* XVII (Bruxelles, Bruylant 2010).
[28] This article is taken over the exact same wording used in article 1 and article 3 of the Decree n°2005-790.
[29] Art. 3 §1 Decree n°2005-790; art. 1.3 §2 *NAR*. For the attorney's oath, see art. 3 §2 *Act of Parliament n°71-1130*: "I swear, as an attorney, to perform my duties with dignity, conscience, independence, probity and humanity."
[30] Art. 3 §2 Decree n°2005-790; art. 1.3 §3 *NAR*.
[31] Art. 3 §3 Decree n°2005-790; art. 1.3 §4 *NAR*.

also be cited here because they impact an attorney's behavior in relation to his or her diminished-capacity client regarding professional secrecy. It is an obligation for those who have received confidential information in the course of their profession not to divulge it.[32]

The concept did not originate in the legal profession but from medical secrecy applying to physicians.[33] Slowly, this obligation has been transferred to attorneys, based on honor and loyalty[34] to protect an attorney's client's statements[35] and the attorney. [36]

Discipline. An attorney must therefore respect all the essential principles as well as the rules of deontology; otherwise the attorney would be exposed to a disciplinary procedure. Should an attorney breach an ethical rule, a disciplinary procedure may start against him – at a client's, barrister's,[37] or a prosecutor's initiative.[38]

After a disciplinary investigation steered by the barrister, disciplinary sanctions may be pronounced.[39] Sanctions can range from a simple warning to a repudiation from the Bar for the most serious breaches.[40]

Criminal offenses. Apart from the essential principles and rules of deontology, it should also be stressed that some rules of the French criminal code may also influence the conduct of the attorney vis-à-vis diminished-capacity clients. In this regard, abuse of weakness

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[32] Cornu, *supra* n. 9, at 939, "secret professionnel."
[33] Ader & Damien, *supra* n. 6, at §36.11. – The medical secrecy originally comes from the Hyppocrate oath and legal professions have taken over this principle at first to protect themselves, then to protect their clients.
[34] *Id.* at §30.27, 30.28 and 37.
[35] *Id*. at §36.32.
[36] *Id*. at §36.71
[37] Cornu, *supra* n. 9, at 123, "bâtonnier"—each Bar is directed by a Barrister elected by his or her peers. The Barrister must settle any litigation between attorneys and investigate any claim received by a third person.
[38] Art. 187 Decree n°91-1197.
[39] Art. 188-197 Decree n°91-1197.
[40] Art. 184 Decree n°91-1197.

(article 223-15-2 French Criminal Code) and respect of professional secrecy (article 226-13 French Criminal Code) are particularly applicable.

Independence of disciplinary and criminal sanctions. Should an attorney breach any rule of deontology (including the essential principles), and should this breach also constitute a criminal offense, the attorney in question may be sued by the attorney's disciplinary order as well as the criminal disciplinary order. Under French law, there is a strict independence of the two proceedings, and one is not obliged to follow the decision of the other.[41] Traditionally, if a criminal procedure were launched against an attorney as well as a disciplinary action, the latter would stay the proceedings until the release of the criminal decision, without being obliged to follow this decision.[42] Therefore, in some cases an attorney may be found innocent at the criminal level but guilty at the disciplinary level.

It should also be mentioned that an attorney may also be sued for compensation for any breach of criminal or disciplinary regulation that causes a prejudice to the attorney's victim (the client or any other third person).[43] As the regulatory context of the legal profession of attorney has been presented, diminished-capacity clients must now be identified.

B. Identification of Diminished-capacity Individuals

Legal capacity. When talking about diminished capacity, one should bear in mind that the terms refer to a reduced legal capacity that each individual is granted by law[44] and may exercise.[45] Under

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[41] Cour de cassation, Criminal Chamber, May 26, 1905.
[42] Cour de cassation, Request Chamber, July 16, 1946.
[43] Art. 1382 French Civil Code: general principle of civil liability; Cour de cassation, 1st Civil Chamber, January 24, 1990; Joël Moret-Bailly, *Règles déontologiques et fautes civiles* in *Recueil Dalloz* n°37 2820 (2002).
[44] Art. 7, 8 & 79-1 French Civil Code (Every person shall have civil rights and shall be able to exercise them. A person may be granted legal capacity only if born alive and viable.).
[45] Art. 414 French Civil Code.

French law, legal capacity is divided between effective enjoyment and exercise of rights.[46] This distinction also exists at the European level in which the European Court of Human Rights has ruled that one may not be deprived of his or her effective enjoyment of rights[47] unless there is a legal restriction.[48]

Incapacities. As there is a distinction between effective enjoyment and exercise of rights, two different incapacities may apply to one individual: special or general incapacities. Only special incapacities may affect the effective enjoyment of rights of one individual, but those are rare.[49] Moreover, they only concern certain types of legal acts.[50]

As for general incapacities, they affect only the exercise of rights of one individual, and, as a principle, they are exceptional:[51] "[every] one has the right to contract, unless he has been declared incapable of it by law."[52] The aim behind those two types of incapacity is different. While general incapacities are drafted to protect an individual, special incapacities are described as being a prohibition, a privation, or a punition.[53]

It should be stressed that under no circumstances may an individual, whether minor or adult, fully lose his or her legal

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[46] Art. 4 Declaration of Human and Civic Rights of August 26th 1789; Art. 7 and 8 French Civil Code; Ingrid Maria, *De l'intérêt de distinguer jouissance et exercice des droits* in *La Semaine Juridique,Edition Générale*, n°23, I-149 (2009).
[47] *Demir and Baykara v. Turkey* [2009] 48 EHRR 54; Ingrid Maria, *De l'intérêt de distinguer jouissance et exercice des droits* in *La Semaine Juridique,Edition Générale*, n°23, I-149 (2009).
[48] Cornu, *supra* n. 9, at 146, "capacité;" Sabrina Delrieu & Vivien Zallweski, *Droit des mineurs et des majeurs protégés* 5 (Ellipses 2010).
[49] Sabrina Delrieu & Vivien Zallweski, *Droit des mineurs et des majeurs protégés* 5 (Ellipses 2010).
[50] *Id*. at 6.
[51] Except in the case of minors who are considered as being naturally incapable of exercising their rights – Ingrid Maria, *De l'intérêt de distinguer jouissance et exercice des droits* in *La Semaine Juridique, Edition Générale*, n°23, I-149 (2009).
[52] Art. 1123 French Civil Code; Art. 34 French Constitution of October 4, 1958 (reinforcing the principle of legal exception toward incapacity; this article grants the Parliament the exclusive competence to enact Act of Parliament regarding civic rights and fundamental freedoms granted to citizens for the exercise of their civil liberties).
[53] Françoise Dekeuwer-Défossez, *Lamy Droit des personnes et de la famille* 236-10 (Lamy Dec. 2012).

capacity; it can only be restricted by a legal disposition.[54] If a person is deemed incapable, that person shall be granted a legal protection regime.

Protection of incapables. Under French law, the protection of incapables works through a representative system. Depending on the individual and the individual's level of incapacity, the law will give a third person, a representative, the right to exercise or help to exercise what one individual is prohibited or restrained from doing as a consequence of his or her incapacity. There is a distinction to be made between minors who are born with incapacities (they may be considered as having natural incapacity)[55] and adults who may become incapable if they suffer from a mental or physical disorder.[56]

II. DIMINISHED-CAPACITY INDIVIDUAL AND ATTORNEY'S BEHAVIOR

How do the ethical rules influence the attorney's relationship with diminished-capacity individuals or clients? Several cases following the timeline of the protection regime must be distinguished, (i.e. (A) the specific behaviors of an attorney when a procedure of placement under protection regime is not yet pronounced, and (B) the specific behaviors of the attorney when his client is under a protection regime).

Absence of specific rules of deontology. Before analyzing each of these situations, one should look more closely at the attorney's rules of deontology. First of all, it must be stressed that there is no specific provision regarding any specific conduct for an attorney about diminished-capacity clients, neither under the Act of

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[54] *Id*. at 236–35.
[55] Ingrid Maria, *De l'intérêt de distinguer jouissance et exercice des droits* in *La Semaine Juridique,Edition Générale*, n°23, I-149 (2009).
[56] Art. 414-1 French Civil Code.

Parliament n°71-1130, the Decree n°91-1197, the Decree n°2005-790 nor under the *NAR*.

Absence of specific rules in the regulation on protection regimes. Except for the provisions allowing the assistance of an attorney during the process of placement under a protection regime, none of the dispositions deal with the specific care an attorney must respect regarding a diminished-capacity individual.

Criminal rules and the essential principles. Regarding the criminal rules,[57] it should be noted that the rules have a general application and concern everybody, with the exception of rules regarding professional secrecy.[58] Hence, any development regarding those rules could affect anyone vis-à-vis the relationship with a diminished-capacity individual.

As for essential principles, seven of the sixteen ethical rules may be involved in the attorney's relationship with a diminished-capacity client: conscience, probity, loyalty, delicacy, diligence, prudence, humanity and courtesy.

A. Individual Not Yet Placed under Protection Regime

Distinction. In such case, there must be a distinction between the case in which an attorney is called specifically to assist a person undergoing the process of placement under a protection regime (2) and the case in which an attorney discovers his or her client may need to be placed under a protection regime (1). It should be noted that both cases can only concern adults because minors are protected by a natural protection regime.[59]

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[57] *Supra* pt. I(A)(2) under 'Criminal offenses'.
[58] Those rules only apply to certain professions (e.g., attorney and physicians). Art. 226-13 French Criminal Code.
[59] *Supra* pt. I(B)(2) under 'Incapacities'.

1. Individual or Client Suspected to Have Diminished Capacity

Suspicion of diminished capacity. The hypothesis is the following: a client comes to see an attorney to solve a legal issue (whether it is covered by the judicial or legal role of the attorney). From the client's behavior or the documents brought to the knowledge of the attorney, the latter suspects the client should be placed under a protection regime.

A distinction must be made at this point. The first situation, hypothesis, is the case in which the possible protective regime would cover the legal issue brought by the client (i.e., restrict the client's capacity over it). A second hypothesis, is the case in which the possible protective regime would not restrict the client's capacity over the issue brought to the attorney. At no point would the attorney risk breaching either the rules of deontology[60] or the law[61] in either hypothesis. In fact, even with a protection in such case, an attorney does not show any supplementary evidence toward his or her client but would just respect the essential principles and all the other rules of deontology.

However, the issue is raised in the first hypothesis if, after the legal representation ended, the client is placed under a protection regime and the medical disorder is evidenced to have started prior the legal representation.

Professional secrecy. In any case, because the suspicion appears from information collected from the attorney's client in the course of the attorney's professional activity, it is covered by professional secrecy.[62] Hence, even in the first hypothesis, the attorney is

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[60] Decree n°2005-790 July 12, 2005; *NAR (Conseil National des Barreaux) [National Attorney Regulations]*.
[61] Act of Parliament n°71-1130 Dec. 31, 1971; Decree n°91-1197 Nov. 27, 1991; Art. 226-13 French Criminal Code.
[62] Court of Appeal, Paris, July 1, 1999.

prohibited from divulging any information, either to a physician, the judge of guardianship, or the prosecutor.

Does this mean the attorney should ignore his or her suspicions? It would be doubtful because even though addressing suspicions could lead to the respect of professional secrecy, it could also breach essential principles. Maybe the first thing to think about would be to find a legal way to avoid a breach of professional secrecy. Accordingly, the attorney would be able to divulge the information. In fact, Article 226-14 of the French Criminal Code provides for legal justification to neutralize the effects of the criminal offense described in Article 226-13 of the same code. Moreover, if this legal justification would work, Article 4 of Decree 2005-790 would also avoid a disciplinary sanction for breach of professional secrecy as a rule of deontology.[63]

Legal justification to professional secrecy. Article 226-14, 1° of the French Criminal Code stipulates that one may not be convicted of breach of professional secrecy if the revelation aims at protecting a minor or a vulnerable person from deprivation or abuse from a third person. The client or individual suspected of lacking capacity could be considered a vulnerable person in the sense of this Article. The distinction between vulnerable person and protected adult comes from the qualification of the situation. On the one hand, the vulnerability is appreciated solely by the judge depending on several criteria; on the other hand, to pronounce a protection regime, the judge must base his or her decision of vulnerability ascertained by a physician.[64] Hence, a protected adult would always be considered a vulnerable person, but the opposite is not true. This first condition of Article 226-14, 1° of the French Criminal Code could therefore be met.

Furthermore, the vulnerable person needs to suffer from deprivation or abuse from a third person. In the first hypothesis above, the lack of capacity comes from the client or individual, not

[63] National Bar Council, NAR Commentary n°2008-001 of January 15, 2008.
[64] Art. 371-1 French Civil Code.

from a third person. This interpretation would probably be the one made by the judge. Hence, there would be no justification for the breach of professional secrecy. In the first hypothesis, an attorney should therefore remain silent over the information covered by professional secrecy and would be unable to divulge them to anyone.

Infringement of essential principles. If the attorney remains silent, such behavior could cause a breach of essential principles, including but not limited to:

i. **Conscience**. *An attorney must serve the client's request seriously*.[65] An attorney ignoring his or her suspicions about the client's mental sanity would not be found to serve the client seriously. Hence, the attorney would be found in breach of the essential principle of conscience if the attorney did not act to protect the client against the client's own mental or physical disorders.

ii. **Probity and loyalty**. *An attorney must not mislead anyone*.[66] By remaining silent about the attorney's concerns about his or her client's capacities, an attorney could mislead not only his or her own client but could also affect a third person involved in the case. Therefore, inaction of the attorney may be considered as breaching probity and loyalty.

iii. **Delicacy**. *An attorney must avoid any conflict of interest*.[67] If an attorney remains silent about his or her client's suspicious capacity, the attorney may be considered as breaching the attorney's delicacy obligation because the attorney could be considered as taking advantage of his or her client. Even if the attorney respects professional secrecy, an attorney could be disciplinarily sued for breach of those essential principles.

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[65] Braunschweig & Demaison, *supra* n. 8, at §436.
[66] *Id.* at §437, 441; Ader & Damien, *supra* n. 33, at §30.25.
[67] Ader & Damien, *supra* n. 33, at § 30.31.

Balancing attorney's duties. If a disciplinary action is launched against the attorney in the first hypothesis above, could the attorney avoid such sanctions by breaching professional secrecy with the justification that otherwise additional essential principles would be breached?

At this point, there is a balance to be made between the essential principles and professional secrecy.

Article 4 of the Decree n°2005-790 provides that an attorney must respect professional secrecy in any situation (with anyone when acting in his legal capacity), with only the exception of self-defense or the existence of a legal justification. At no point, is an exception to professional secrecy provided in to avoid breach of several essential principles.

Moreover, Article 2 of the *NAR* provides that the attorney's professional secrecy has a public-order value. It therefore means that this rule is considered as crucial for the functioning of the State.[68]

Finally, as professional secrecy is also protected by criminal law, this rule of deontology of the legal profession of attorney must therefore prevail over any other rule (i.e., the essential principles previously enumerated). Hence, even if the silence of the attorney regarding his or her client's medical condition would respect professional secrecy but may cause a breach of several essential principles, this does not constitute a justification.[69]

Suggested conduct. Therefore, one should think about the conduct to be adopted by the attorney to avoid any kind of disciplinary

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[68] Cornu, *supra* n. 9, at 714, "ordre public."

[69] Moreover, even if it would, the justification would only produce effects at the deontological level and the attorney would be liable at the criminal level for the breach of article 226-13 French Criminal Code, as justification by breach of other essential principles is not included in article 226-14 French Criminal Code.

procedure relative to the breach of the essential principles. For an attorney not to be sanctioned by the Bar, the attorney should inform the client of the attorney's suspicions. The attorney must take particular care to respect the essential principles of humanity,[70] delicacy,[71] and courtesy.[72] As it is always delicate to express doubts about someone's mental or physical integrity, those three principles must absolutely be respected by the attorney toward his or her client.

By addressing the client, the attorney expresses his or her doubts and evinces care toward the client. The decision is then up to the client, the attorney being unable to force the client to see a physician or to alert the proper authorities.

If the client is unwilling to follow the recommendation of the attorney, the ethic rules of diligence and prudence should guide the attorney who should then refuse the request brought by the individual. In this way, the professional secrecy is respected and no breach of essential principles is constituted. Hence, the attorney must follow a specific behavior when confronted with a client the attorney suspects to have diminished capacity. It should be noted that in the case in which the client follows the advice of the attorney, the attorney would not be able to assist him for the procedure of placement under protection regime.[73]

2. Placement under Protection Regime

Under the procedure of placement of an adult under a protection regime, there is no obligation of assistance by an attorney.[74] Should a person be assisted, an attorney does not bear

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[70] Braunschweig & Demaison, *supra* n. 8, at §438.
[71] Ader & Damien, *supra* n. 33, at §30.31.
[72] Braunschweig & Demaison, *supra* n. 8, at §446; Ader & Damien, *supra* n. 34, at §30.33.
[73] Art. 7 Decree n°2005-790, July 12, 2005.
[74] Art. 1214 French Civil Procedure Code; Marie-Hélène Isern-Real, *L'espoir apporté par le projet de la loi sur les pratiques futures* in *Barreau de Paris, L'avocat dans la cité: nouveaux enjeux: travaux des commissions ouvertes du barreau de Paris,* 237 (Paris, Conseil national des barreaux,

any specific obligation coming from the essential principles he or she would not have with the assistance of a person in another kind of case.

This choice under the legislation of protected adults may be explained by the preponderant role of the judge of guardianship who has a general obligation of supervision of the protected individuals under its jurisdiction.[75]

Regarding the particular nature of the procedure, the role of the attorney is to ensure that the client will be protected by the proper protection regime regarding the client's medical condition.[76] In any case, it is the up to judge of guardianship to decide on the protection regime to adopt that suits best the individual and the individual's medical disorder.[77]

B. Individuals With Diminished Capacity

In cases in which an attorney represents a client with diminished capacity, there are three different situations that will be further analyzed. First, the behavior of an attorney toward the diminished capacity client; second, the case of the conflict of interest between the client and the client's representative; and third, the attorney's conduct if the client brings to the attorney's knowledge an abuse toward a diminished-capacity individual.

1. Usual Care of an Attorney toward the Diminished-capacity Client

Distinction between minors and protected adults. It must be stressed that the principle is the presence of the representative of

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2006). It shall be noted that during these procedures, an attorney only assists his client; he does not represent him.

[75] Art. 416 French Civil Code; Thierry Verheyde, *Le juge des tutelles, nouveau juge aux affaires familiales?* n°37, 2460 (*Recueil Dalloz* 2010).

[76] Marie-Hélène Isern-Real, *L'espoir apporté par le projet de la loi sur les pratiques futures* in *Barreau de Paris, L'avocat dans la cité: nouveaux enjeux: travaux des commissions ouvertes du barreau de Paris,* 237 (Paris, Conseil national des barreaux, 2006).

[77] Art. 415 & 440 French Civil Code.

the diminished-capacity client. However, because the protection regimes are different, there is a distinction to make between the minor and the protected adult.

Attorney and minors. Because the protection regime allocated to minors is enhanced (it regards patrimonial and extra-patrimonial protection), parents will need to be present if the minor needs the assistance of an attorney. The necessity for the minor to be represented by his parent will depend on the type of case, and the minor's maturity.[78]

If a minor comes alone to an attorney, the latter must evaluate the minor's degree of maturity to determine if a parent should be present. This prudence is mainly imposed by the essential principle of conscience.

Attorney and protected adults. As for the protected adult, the protection regime concerning only patrimonial rights, the principle is the presence of the protected-adult representative in cases in which the adult has had rights to act on his own withdrawn (therefore, depending on the type of protection regime allocated, the presence will be more likely to be required – i.e., in case of guardianship, the guardian will tend to represent the protected adult in all cases).[79]

To know the level of incapacity of an adult, an attorney should always verify the birth certificate of his or her client.[80] In this manner, the attorney will find out what is the level of incapacities and if the presence of the adult representative is compulsory or not.[81]

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[78] Art. 371-1 French Civil Code.
[79] Art. 457-1 French Civil Code.
[80] Art. 444 French Civil Code (if an adult is protected by a protection regime, his or her birth certificate must include this mention).
[81] See Cour de cassation, 1st Civil Chamber, December 9, 2009.

It should be noted that a protected adult without the consent or presence of his or her representative may bring rights or obligations that are deemed to be outside the scope of the protection regime to the attorney. As an exception, the representative (the guardian at least) may be present in such case, but only if the judge of guardianship authorizes him.[82] The French Civil Code provides that it is the representative's obligation to make sure the protected adult under his or her supervision understands the situation.[83] Therefore, an attorney would act as with any other client and ensure that the representative has understood the situation.

2. Role of the Attorney Regarding Conflict of Interests

Definition. In this Section, the conflict of interest should be understood as a conflict of interest between a diminished-capacity client and his legal representative. It can be either the conflict of interest between the minor and the minor's parents or the protected adult and the protected adult's representative. The question arising in such situation regards the behavior an attorney shall adopt if a conflict of interest appears. Two different hypotheses must be taken: when the conflict of interest constitutes a criminal offense (for instance, an abuse of weakness)[84] and when it does not.

Essential principles and conflict of interest. It must be emphasized that the essential principles are designed to guide the attorney in his relationship with the client. However, in such situation, the conflict of interest would arise between the client and the client's representative. Should the essential principles also apply here? The answer shall be given in accordance to the principle of probity, loyalty, and delicacy.

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[82] Art. 475 French Civil Code.
[83] Art. 457-1 French Civil Code.
[84] Art. 223-15-2 French Criminal Code lists the constitutive elements and penalties of abuse of weakness.

In fact, probity obliges the attorney to be honest and not mislead anyone,[85] loyalty forces the attorney to be loyal to his client,[86] and delicacy mandates that the attorney avoid any kind of conflict of interest.[87] Should the attorney remain silent in cases in which he or her suspects a conflict of interest, the attorney could be found to have breached the previous essential principles, and not to have acted in his client's best interest if such conflict of interest were proved.[88]

Hence, the attorney should not remain inactive if he or she suspects a conflict of interest exists between the client and the client's representative to avoid any disciplinary sanction. Therefore, it leads to the question of the scope of the attorney action in such situation.

Professional secrecy and conflict of interest. Similar to the case in which a client is suspected to have diminished capacities, any doubt about a conflict of interest would be protected by the duty of professional secrecy.[89] As opposed to the case in which a client is suspected to have diminished capacities, the attorney's client is protected under a protection regime, and the threat (deprivation or abuse) comes from a third person, the client's representative. In this case, all the circumstances of Article 226-14, 1° of the French Criminal Code are met.[90] Therefore, if an attorney breaks the professional secrecy to reveal a conflict of interest, the attorney would be protected against any conviction of revelation of information protected by professional secrecy.[91] Because a legal justification would apply, the revelation would also be free of any disciplinary pursuit as provided in Article 4 of Decree n°2005-790.

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[85] Braunschweig & Demaison, *supra* n. 9, at § 437; Ader & Damien, *supra* n. 34, at § 30.25.
[86] Braunschweig & Demaison, *supra* n. 9, at § 441.
[87] Ader & Damien, *supra* n. 34, at § 30.31.
[88] It shall be noted that even if the representative has the duty to make sure the individual with diminished capacity under his supervision understands the situation (art. 457-1 French Civil Code), the attorney's client remains the diminished-capacity individual, not his representative.
[89] Court of Appeal, Paris, July 1st, 1999.
[90] *Supra* pt. II(A)(1)(c) under 'Legal justification to professional secrecy'.
[91] Art. 226-13 French Criminal Code.

No obligation of revelation. The next question would be about the legal consequences of the possible application of a legal justification in case of breach of professional secrecy. Does the mere fact that a legal justification exists forces an attorney to break the professional secrecy? Professional secrecy being an absolute principle, the attorney shall evaluate on his or her own, with his conscience, whether he or she should break it.[92]

Absence of obstruction to justice. Article 434-1 of the French Criminal Code punishes remaining silent in spite of having knowledge of a criminal offense. In the case when the conflict of interest constitutes a criminal offense, this article could apply to an attorney and would therefore oblige the attorney to divulgate the information. Hence, the faculty given to an attorney to act in conscience would disappear. However, the protection of the professional secrecy of Article 226-13 of the French Criminal Code is considered as having a higher legal value than obstruction to justice[93], and article 434-1 of the French Criminal Code recognizes professional secrecy as being a legal justification to obstruction to justice. Therefore, even when the conflict of interest constitutes a criminal offense, an attorney is never obliged to reveal a conflict of interest.

Suggested conduct in case of conflict of interest. To avoid any disciplinary procedure, it would be recommended to an attorney, whether the conflict of interest constitutes a criminal offense, or does not, to always disclose his or her knowledge of a conflict of interest to the judge of guardianship as the judge is the authority in charge of the general supervision of any protection regime.[94]

In case of an absence of criminal offense, the judge of guardianship will be able to designate an *ad hoc* representative to

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[92] Cour de cassation, Criminal Chamber, October 6, 1999: an attorney being aware of his client's relationship with his minor daughter is free, on its own conscience, to divulge the facts or not.
[93] Bruno PY, *Secret professionnel*, in *Répertoires Dalloz Droit Pénal et Procédure Pénale* §155 (June 2012).
[94] Art. 388-3 & 416 French Criminal Code.

represent the minor or the protected adult for the specific case.[95] Should the conflict of interest constitute a criminal offense, the judge will be able to dismiss the representative and to designate a new one.[96]

Discipline and respect of professional secrecy. Should the attorney decide to respect professional secrecy and not divulge the conflict of interest in his or her own conscience, it would contradict the attorney's obligations under the essential principles. Hence, either when the conflict of interest constitutes a criminal offense or does not, the attorney could be the object of a disciplinary procedure.

In such case, the disciplinary authority would recognize the respect of professional secrecy, but the question of the breach of the other essential principles would remain. Previously, the rule of deontology on professional secrecy has been recognized as higher than the other essential principles.[97]Therefore, two different issues may therefore be considered.

First, if the attorney can show that he or she has tried to inform the client, as much as possible, of the suspected conflict of interest, this attempt may be constitute the required respect of the essential principles. However, it would probably be better for the attorney to drop the case to fulfill plainly the ethic rule of prudence (as in the suggested conduct for the above hypothesis in which the possible protective regime would cover the legal issue brought by the client).

Second, if the attorney cannot evidence such cares, then a disciplinary procedure could lead to sanctions because the previous essential principles were not respected. It would primarily go

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[95] Art. 376 to 377-3, 388-2 and 389-3 French Civil Code (for minors); art. 455 French Civil Code (for protected adults).
[96] Art. 378 & 396 French Civil Code (for minors).
[97] *Supra* pt. II(A)(1)(e) under 'Balancing attorney's duties'.

against the probity principle as it would discredit not only the attorney on moral issues but also would cause harm to the entire legal profession. In this last case, it is very likely the disciplinary authority would sanction an attorney.

3. Attorney Being Informed of an Abuse over a Minor or Protected Adult

Similar findings to the conflict of interest. The last issue studied in this Article is the case in which a client informs an attorney of an abuse on an individual with diminished capacity. What should be the attorney's conduct?[98] In such case, the findings would be exactly the same as for conflict of interest, with an appropriate variation if the abuse brought to the knowledge of the attorney constitutes a criminal offense or not.

CONCLUSION

Is there any specific burden on an attorney within his or her relationship with a diminished-capacity client? The answer is not crystal clear. Indeed, there is no specific regulation concerning this relationship, either in the rules of deontology of the legal profession or in the regulation about diminished-capacity individuals.

Hence, an attorney should adopt conduct that will mainly be guided by the essential principles of the legal profession and some provisions of criminal law. In any circumstance, an attorney must evidence great prudence and is better off dropping the case to avoid any further conflict. This conduct, even if it does not seem fair, must be balanced by the fact that in France the main burden of care rests on the judge of guardianship who has been designated as the authority of control by the last modification of the legislation on the protection of adult.

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[98] Should the client come to an attorney to get assistance to abuse an individual with diminished capacity, the attorney could become an accomplice of his client and could be subject to criminal prosecution. Art. 121-7 French Criminal Code.

Is the legislation right in this way? As opposed to judges, an attorney has no obligation of representation or assistance – the question would be different if the attorney had the same constraint of denial of justice.[99] But then, would an attorney still remain a judicial auxiliary? Certainly not.

[99] Art. 5 French Civil Code.

TESTAMENTARY AND DECISION-MAKING CAPACITY ASSESSMENT IN AUSTRALIA

Kelly Purser [*]

I. INTRODUCTION

Capacity assessment in the testamentary and decision-making context in Australia falls within the domain of individual states and territories. It is a practical representation of the dualistic nature of autonomy and protection, being characterised by an inherent uncertainty requiring the assessor to evaluate another individual's ability to make, understand, and communicate decisions.[1] Legal professionals are increasingly asked to assess the testamentary and decision-making capacity of individuals.[2] Medical professionals are requested to assist with such determinations.

Miscommunication and misunderstandings exist between the two professions about the role and responsibilities of each when conducting such assessments.[3] The lack of a nationally consistent capacity assessment paradigm is legally, medically, and ethically[4] concerning. This Article considers the general approach to capacity, as well as the legal standards of testamentary and decision-making capacity in Australia. Given the myriad of

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 I would like to thank Ashleigh Millard for her research assistance.

[1] Terry Carney & David Tait, *Guardianship Dilemmas and Care of the Aged,* 13 Sydney L. Rev. 61, 66 (1991).

[2] Jennifer Moye & Daniel C. Marson, *Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research*, 62 Journals of Gerontology, Series B P3, P3 (2007).

[3] Barbara Squires & Felicity Barr, *The Development of Advance Care Directives in New South Wales*, 24 Australasian J. on Aging 30, 34 (2005).

[4] D Aw et al., *Advance Care Planning and the Older Patient*, 105 Q.J. of Med. 225, 226 (2012).

assessment paradigms, an analysis of some of the resources available to evaluate capacity in this context will be undertaken. The role of the legal professional when individuals potentially lack capacity is also discussed.

Concepts of competency and capacity are often used interchangeably, which then result in definitional ambiguity and terminological challenges.[5] For the purposes of this Article, the widely accepted term of "capacity" is used, despite discussion about the use of capacity as a medical construct, and competency as a legal notion.[6] Testamentary capacity considers the ability of an individual to determine what will happen to his or her property after his or her death. The phrase "decision-making capacity" will refer to an individual's ability to make financial or lifestyle and health decisions. Enduring documents are the vehicles through which substitute decision-makers can be appointed in the event that an individual no longer has the legal capacity necessary to make decisions. Enduring powers of attorney are generally used to appoint a substitute financial decision-maker; advance care directives[7] appoint a lifestyle and health substitute decision-maker.

II. CAPACITY ASSESSMENT IN AUSTRALIA

The growing numbers of Australians who have failed to make adequate legal arrangements in the event they lose legal capacity is an issue society, the legislature, and the judiciary will increasingly face. Questions of professional liability will arise as members of society become more informed about their "rights," or, at the very least, become more willing to question their circumstances. Consequently, the necessity of conducting

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[5] Kelly Purser et al., *Competency and Capacity: The Legal and Medical Interface*, 16 J.L. & Med. 789, 789 (2009).

[6] *Id.*

[7] There are a variety of descriptors for advance care directives including advance directives and advance health directives. The term advance care directive will be adopted in this research in accordance with the recent review conducted by The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers' Advisory Council, *A National Framework for Advance* Care Directives 9 (Sept. 2011), *available at* http://www.ahmac.gov.au/cms_documents/AdvanceCareDirectives2011.pdf.

consistent and transparent capacity assessments is, and will continue to, increase in importance. Ensuring a sound political and legislative response to issues raised by an ageing population, including satisfactorily defining and assessing capacity, was the focus of recent national investigation.[8] Reviews were also conducted in three Australian jurisdictions: New South Wales,[9] Queensland,[10] and Victoria.[11] It was generally acknowledged in all the reviews that a best practice approach needs to be developed that includes comprehensive guidelines[12] and a consistent definition of capacity.[13]

The nature of capacity is difficult to establish because types, standards, and assessment approaches vary depending upon the individual assessor, the jurisdiction, the context, and the time of assessment.[14] However, in Australia there are four characteristics that are generally accepted as being necessary for a person to be considered competent or capable: the ability to understand the situation; evaluate the consequences of making the decision; reason through the risks and benefits of the decision; and

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[8] Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (2007). Advance care directives were the subject of a recent review in September 2011 by the Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers' Advisory Board. The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers' Advisory Council, *supra* note 7.

[9] Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-Making for People Lacking Capacity* at xiii (2010).

[10] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No. 67, Volumes 1–4 (2010).

[11] Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney Final Report of the Victorian Law Reform Committee* at iii (2010); Victorian Law Reform Commission, *Guardianship*, Final Report No. 24 (2012).

[12] Queensland Law Reform Commission, *supra* note 10, at 270.

[13] *Id.* at 272.

[14] Nick O'Neill & Carmelle Peisah, Capacity and the Law § 1.2 (2011); *see also Gibbons v. Wright*, 91 CLR 423, 438 (1954).

communicate the decision made.[15] Capacity is either assessed contemporaneously, when the decision is being made, or retrospectively, after a decision has been made.[16] The specific "standard" of capacity required in testamentary and substitute decision-making is examined below.

A. The Presumption of Capacity

A general principle applicable across all Australian jurisdictions is the presumption of capacity, which can be rebutted by satisfactory evidence to the contrary.[17] That is, every adult older than the age of eighteen is presumed as legally capable.[18] In determining if the presumption has been rebutted, the courts are likely to place emphasis on evidence of independent third parties, such as legal or medical professionals or friends and family, who do not stand to gain from rebutting the presumption.[19]

B. Mentally Disabling Conditions

Problems can arise when legal professionals are faced with clients who have mentally disabling conditions that may not be initially obvious or may not become apparent on a relatively superficial exploration. However, a diagnosis of a particular illness, such as Alzheimer's disease, should not automatically render a diagnosis of incapacity. Capacity may fluctuate and incapacity may be reversible with an appropriate treatment plan.[20]

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[15] O'Neill & Peisah, *supra* note 14, at § 1.2; *see also* Ruth Cairns et al., *Reliability of Mental Capacity Assessments in Psychiatric In-Patients*, 187 British J. of Psychiatry 372, 373 (2005); RJ Gurrera et al., *Cognitive Performance Predicts Treatment Decisional Abilities in Mild to Moderate Dementia*, 66 Neurology 1367, 1367 (2006); J.H..T. Karlawish *et al.*, *The Ability of Persons with Alzheimer Disease (AD) to Make a Decision About Taking an AD Treatment*, 64 Neurology 1514, 1514 (2005); Jennifer Moye et al., *Neuropsychological Predictors of Decision-Making Capacity over 9 Months in Mild-to-Moderate Dementia*, 21 J. of Gen. Internal Med. 78 (2006).

[16] O'Neill & Peisah, *supra* note 14, at § 1.4.

[17] *Re Caldwell*, QSC 182, 12 (Mackenzie J) (1999); Law Reform Committee, *supra* note 11, at 109–10.

[18] *Powers of Attorney Act 1998* (Qld) general principle 1, 1st sch; *Guardianship and Administration Act 2000* (Qld) general principle 1, 1st sch.

[19] Jim Cockerill et al., *Legal Requirements and Current Practices, in* Mental Capacity, Powers of Attorney and Advance Health Directives 27, 29 (Berna Collier et al. eds., 2005).

[20] Pēteris Dārziņš et al., Who Can Decide? The Six Step Capacity Assessment Process 4 (2000).

The genesis of disabling conditions can be mental, intellectual, physical or psychological.[21] Moreover, the disabling conditions are not necessarily easy to identify, rendering a need for capacity assessment processes to, ideally, be as unassailable as possible. The indicators of a mentally disabling condition, which legal professionals should be aware of, include acute depression, social withdrawal, lack of motivation, confusion, anxiety, inability to make decisions or pay attention, poor short-term memory retention, acquired brain injury, organic brain injury, intellectual disability, manic depression, delirium, or mental illnesses such as schizophrenia.[22]

Furthermore, neurodegenerative diseases, such as dementia, can also affect capacity, and the existence of a diagnosis of dementia should provide warning signs.[23] Assessing decision-making capacity is challenging at the best of times, let alone when an individual suffers from mild-to-moderate dementia.[24] The term "dementia" describes "the symptoms of a large group of diseases that result in a progressive decline in cognition. These include decline in memory, reasoning, communication skills and the …"[25] ability to perform tasks associated with daily living.[26]

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[21] Rodney Lewis, Elder Law in Australia 353 (2d ed. 2012).
[22] O'Neill & Peisah, *supra* note 14, at § 1.3; Law Society of New South Wales, *Client Capacity Guidelines, Civil and Family Law Matters*, L. Soc'y J. 50 (2003).
[23] Lewis, *supra* n. 21, 421–23; Law Society of New South Wales, *supra* note 22, at 50.
[24] Moye et al., *supra* note 15, at 78.
[25] Alzheimer's Australia, *Dementia: Facing The Epidemic A Vision For a World Class Dementia Care System, Executive Summary* 5 (Sept. 2009), *available at* http://www.alzheimers.org.au/upload/Dementia_Facing_the_epid.emic_Exec_Summary.pdf.
[26] *Id.*

In Australia there are concerns that a "dementia epidemic" is looming.[27] It is projected that:

> [t]he number of Australians with dementia ... will double to 592,000 by 2030 and nearly double again to 1.13 million in 2050 . . . by the 2060s, spending on dementia is set to outstrip that of any other health condition . . . and will represent around 11% of the entire health and residential aged care sector spending . . . dementia is already the largest single cause of disability in older Australians (aged 65 years and older) …[28]

There are currently more than 200,000 individuals who suffer from dementia across Australia.[29] Although the national incidence of dementia is expected to increase fourfold by 2050, it is expected to increase six-fold in Queensland, as Queensland experiences a faster increase in incidences of dementia than other Australian States and Territories.[30] Consequently, as a result of the maturing baby boomer generation, Australian society will see an increase in the effects of ageing, including dementia.[31] Given the increasing prevalence of dementia, there is an unexpected lack of empirical research on the effects of dementia, particularly on financial (which includes the ability to make a will) and decision-making capacity.[32]

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[27] *Id.*
[28] *Id.*
[29] This figure has also been estimated to be 245,400 people but evidence suggests that there are many more individuals with cognitive impairment. Alzheimer's Australia, *Keeping Dementia Front of Mind: Incidence and Prevalence 2009–2010*, at 2 (Final Rep. by Access Economics Pty Limited for Alzheimer's Australia, Aug. 2009).
[30] Press Release, The Honorable Justine Elliott MP, *Queensland Has Fastest Increase in Rate of Dementia in Australia: Minister Visits Queensland Dementia Research Centre* (28 Apr. 2009).
[31] Alzheimer's Australia, *supra* note 29, at 5.
[32] Daniel C Marson et al., *Toward a Neurologic Model of Competency: Cognitive Predictors of Capacity to Consent in Alzheimer's Disease Using Three Different Legal Standards*, 46 Neurology 666, 667–68 (1996).

C. Global, Domain, and Decision-Specific Capacity

There are three categories of competencies recognised in Australia: global, domain-specific, and decision-specific.[33] Global competency was prevalent when capacity assessment first came to the forefront as an issue needing resolution. An individual is either universally capable or incapable; they can either make all or no decisions.[34] This is still a valid paradigm in the case of obvious incapacity, such as a patient in a coma; however, it clearly fails to adequately address any situation that does not fall into either extreme.[35] The concept of global capacity was replaced by domain capacity. That is, individuals may be capable to make some decisions but incapable to make others, depending on the general domain in which the decision falls, for example, financial capacity or capacity to consent or refuse treatment.[36]

However, the concept of decision-specific capacity currently holds favour.[37] This approach builds upon the domain theory, postulating that within the domains there are further, specific capacities that are relevant to the particular decision given the actual circumstances.[38] The standard of capacity required is determined by both the decision to be made and the context in which that decision is to be made.[39]

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[33] Dārziņš et al., *supra* note 20, at 4–5.
[34] *Id.* at 4.
[35] *Id.*
[36] *Id.*
[37] L. Jaime Fitten & Martha S. Waite, *Impact of Medical Hospitalization on Treatment Decision-Making Capacity in the Elderly*, 150 Archives of Internal Med. 1717, 1720 (1990); Jennifer Moye et al., *A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship*, 47 Gerontologist 591, 592 (2007).
[38] Dārziņš et al., *supra* note 20, at 4–6; *see also* Karen Sullivan, *Neuropsychological Assessment of Mental Capacity*, 14 Neuropsychology Rev. 131, 132 (2004).
[39] Ian Kerridge et al., *Ethics and Law for the Health Professions* 247 (3d ed. 2009).

D. The Functional, Status and Outcome Approaches

The functional, status, and outcome approaches[40] are three ways in which capacity can be assessed in Australia. First, under the functional approach,[41] an individual has impaired legal competency if he or she cannot understand the nature and effect of a decision at the time the decision is made.[42] This approach views capacity as a continuum rather than an endpoint. Therefore, capacity is neither present, nor absent, but is dependent upon the decision that is to be made, at the specific time it is to be made, and in the particular context in which it is to be made.[43] There is a general movement toward the functional approach,[44] and jurisdictions in which there has been relatively recent reform, in Queensland, for example,[45] have primarily adopted a statutory test of decision-making capacity based on the functional approach.[46]

Moreover, the functional approach considers the reasoning processes employed, particularly "the abilities to understand, retain and evaluate the information relevant to the decision (including its likely consequences)" as well as the individual's ability to evaluate information in order to make the decision.[47] This approach is consistent with the principles enunciated in Article 12 of the United Nations Convention on the Rights of People with Disabilities[48] (UNCRPD) and respects that capacity is decision-

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[40] Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity Discussion Paper*, WP No. 64, 106 (2008); Queensland Law Reform Commission, *supra* note 10, 243.
[41] W M I Suto et al., *Capacity to Make Financial Decisions Among People with Mild Intellectual Disabilities*, 49 J. Intell. Disability Res. 199, 200 (2005).
[42] Queensland Law Reform Commission, Shaping Queensland's Guardianship Legislation, *supra* note 40, at 106; Queensland Law Reform Commission, *supra* note 10, at 243.
[43] Queensland Law Reform Commission, Shaping Queensland's Guardianship Legislation, *supra* note 40, at 265.
[44] Queensland Law Reform Commission, *supra* note 10, at 243.
[45] *See also* Mental Capacity Act 2005 (United Kingdom).
[46] The QLRC recommended that the functional approach to defining capacity be retained, recommendation 7-7 in the Queensland Law Reform Commission, *supra* note 10, at xv, 243, 266, and Queensland Law Reform Commission, Shaping Queensland's Guardianship Legislation, *supra* note 40, at 107, 306.
[47] Queensland Law Reform Commission, *supra* note 10, at 265.
[48] *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, (entered into force 3 May 2008).

specific.[49] Unlike the status model, the functional approach is not dependent upon the existence of a particular disability or condition. Consequently, this approach avoids the negative effects that labelling individuals by reference to a disease or condition can cause—such as paternalism, stigmatisation and infringement upon individual autonomy.[50] However, appropriate safeguards for the assessment of capacity need to be established. This is because, if taken literally, the functional approach would require that capacity should be assessed for every decision, an absurdity if capacity has been irretrievably lost.[51]

Conversely, under the status approach an individual is legally incapable when he or she has a particular status, for example, that of a minor. This could be extended to include particular diseases or medical conditions, such as advanced dementia.[52] Unlike the functional approach, where the actual decision and the time the decision is made is taken into account, the status approach is more an all or nothing premise. Consequently, the status approach can be needlessly restrictive.[53]

Some jurisdictions, New South Wales, for example, adopt an amalgamation of the two tests.[54] This hybrid approach usually first determines if a condition or disability exists (the diagnostic or status approach) before assessing the individual's ability to make a specific decision at a particular point in time (the functional

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[49] Queensland Law Reform Commission, *supra* note 10, at 266.
[50] Queensland Law Reform Commission, Shaping Queensland's Guardianship Legislation, *supra* note 40, at 265.
[51] Queensland Law Reform Commission, *supra* note 10, at 266.
[52] Queensland Law Reform Commission, Shaping Queensland's Guardianship Legislation, *supra* note 40, at 106; Queensland Law Reform Commission, *supra* note 10, at 243, 266.
[53] Queensland Law Reform Commission, *supra* note 10, at 266–67.
[54] Queensland Law Reform Commission, Shaping Queensland's Guardianship Legislation, *supra* note 40, at 110.

approach). The use of the status approach as a diagnostic threshold is intended to ensure that before an individual's capacity is questioned, there needs to be a reason validating such an enquiry.[55] However, the recent New South Wales inquiry recommended that the status approach should be expressly rejected, noting that an individual should not be considered incapable merely because of a condition or disability.[56]

The third approach, the outcome approach, considers the decision from an objective standard and whether the decision is in the individual's best interests. A person will be legally incapable when his or her decision does not reflect the decision that other individuals think is correct.[57] The outcome approach assesses capacity according to the morals and values of the assessor(s).[58] Thus, if an individual's decision is deemed capricious or improvident, he or she can be deemed to lack legal capacity.[59] This approach is widely rejected.[60]

III. THE STANDARDS OF LEGAL CAPACITY

The approach to determining capacity in Australia is based in a miscellany of common law and statutory provisions, with each jurisdiction adopting a different approach. This Part will examine the legal standards applicable to testamentary and decision-making capacity. First, however, it is necessary to note the general common law test for establishing capacity. Formulated in the case of *Gibbons v Wright*[61] Dixon CJ, Kitto, and Taylor JJ stated "[t]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to

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[55] Queensland Law Reform Commission, *supra* note 10, at 267.
[56] Recommendation 1 in the Standing Committee on Social Issues, *supra* note 9, at xx.
[57] Queensland Law Reform Commission, Shaping Queensland's Guardianship Legislation, *supra* note 40, at 106; Queensland Law Reform Commission, *supra* note 10, at 243.
[58] Queensland Law Reform Commission, *supra* note 10, at 268.
[59] *Id.*
[60] See for example, *Guardianship and Administration Act 2000* (Qld) s 5(b).
[61] (1954) 91 CLR 423, 438.

understand the nature of that transaction when it is explained."[62] That is, there are two aspects necessary to establish decision-specific capacity:[63]

First, mental capacity should be assessed in the context of the particular transaction. Second, the individual must have the capacity to understand the nature of that transaction once it has been explained to them.[64] This test, as a starting point for assessing capacity, continues to be relied upon throughout Australia.[65]

A. Testamentary Capacity

The context-specific test in Australia for testamentary capacity was established in the 1870[66] English decision of *Banks v Goodfellow*.[67] By way of brief introduction, *Banks* states that to have testamentary capacity, a testator must be able to understand the nature and extent of his or her property,[68] the potential beneficiaries who have a moral claim upon the testator, the effect of making a will, and that "no disorder of the mind" has affected the contents of the will.[69] It is unnecessary for the testator to understand all of the clauses in the will. However, he or she should, at least, understand that he is executing a will and the practical effect of the central clauses.[70] Where there is doubt

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[62] *Id.*
[63] *Dalle-Molle v. Manos* & Anor.. No. SCCIV-02-874 SASC 102 [19] (2004).
[64] *Id.*
[65] For example: *Stone v. Registrar of Titles*, WASC 21 [151] (2012); *Szozda v. Szozda*, NSWSC 804 [27] (2010); *Ghosn v. Principle Focus Pty Ltd (No 2),* VSC 574 [69] (2008); *Dalle-Molle v. Manos*, SASC 102 [18] (2004).
[66] Charles Rowland & Gary Tamsitt, Hutley's Australian Wills Precedents 6 (7th ed., 2009).
[67] (1870) LR 5 QB 549.
[68] Harvey D. Posener & Robin Jacoby, Oxford Textbook of Old Age Psychiatry 753, 754 (2008) (discussing testamentary capacity).
[69] *See also Boughton v. Knight*, LR 3 P & D 64, 65 (1873) (Sir James Hannen).
[70] *Re Curtis; Ex Parte Clark* [2009] WASC 254 [11].

regarding testamentary capacity, the propounder of the will assumes the burden of proving,[71] on the balance of probabilities, that the requisite capacity to make the will was apparent at the relevant time.[72] Age alone is insufficient to prove a lack of testamentary capacity.[73]

Courts in various Australian jurisdictions continue to apply the *Banks* test.[74] Of interest is the weight afforded to evidence from medical professionals about testamentary capacity. For instance, in *Tobin v Ezekiel*,[75] a recent decision from New South Wales, the testator's doctor of more than twenty years gave evidence that while the testator was physically ill, she was "mentally well and normal."[76] Brereton J concluded that this evidence was significant because the doctor was experienced with older people and had observed the testator at the relevant time. It should be noted that contemporaneous evidence can outweigh the evidence of others, despite medical qualifications, who have not contemporaneously observed the testator at the relevant time.[77] In fact, medical evidence is not necessarily conclusive as to the existence of testamentary capacity and should be considered in conjunction with all available evidence.[78]

The issue of the weight of different forms of evidence also raises questions about whether a solicitor's evidence about an individual's capacity can, or should, be (when appropriate) favoured over evidence provided by that individual's medical

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[71] *Bailey v. Bailey*, 34 CLR 558, 570 (1924); *Kantor v. Vosahlo*, SCA 235 [3] (2004); *Nicholson v. Knaggs*, VSC 64 [87] (2009).
[72] *Kantor v. Vosahlo*, VSCA 235 [22] (2004).
[73] *In The Will of Edward Victor Macfarlane Deceased* [2012] QSC 20; *Bailey v. Bailey*, 34 CLR 558, 560 (1924).
[74] *E.g., Coppola & Anor v. Nobile & Anor (No 2)*, SASC 129 (2012); *In The Will of Edward Victor Macfarlane Deceased*, QSC 20 [10] (2012); *In the Matter of Dimitra Giofches*, VSC 553 [22] (2011); *Tobin v Ezekiel*, NSWSC 81 [23] (2011); *Re Curtis; Ex Parte Clark*, WASC 254 [10] (2009).
[75] [2011] NSWSC 81.
[76] *Tobin v. Ezekiel*, NSWSC 81 [31] (2011).
[77] *Id.*at 32.
[78] *Fradgley v. Pocklington (No 2)*, QSC 355 [30] (2011).

practitioner. For instance, in *Middlebrook v Middlebrook*[79] the evidence of the solicitor that a client was able to provide clear instructions to make a will two days before the client died of cancer was preferred to the evidence given by the medical staff caring for the testator. This was despite the doctor stating that the testator was under the influence of drugs and sedatives. The current position in Australia is that all evidence pertaining to an individual's testamentary capacity, irrespective of whether it is from a medical professional or not, should be weighed in light of the specific facts of the case, bearing in mind the overarching presumption of capacity.

Furthermore, the medical profession has raised concerns about the assessment of testamentary capacity.[80] The ability of the *Banks* test to take into account the nuances of all potentially mentally disabling conditions, as well as the transitory nature of capacity, is being questioned.[81] The legal test focuses on cognition or knowingness whereas conation and affect can be just as relevant to a medical professional,[82] a distinction a legal professional would not necessarily make. Peisah also comments that in *Banks* psychosis was at issue, which is different from dementia because there are different markers to establish capacity.[83] Admittedly, recent cases acknowledge some developments since the *Banks* decision.

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[79] 36 ALJR 216 (1962).
[80] Glenise Berry, *Testamentary Capacity & Undue Influence, Testamentary Capacity—Medical Aspects* 1 (Paper presented at the Queensland Law Society Succession Law Conference, Brisbane, 27 Oct. 2006) 1; Kenneth I. Shulman et al., *Psychiatric Issues in Retrospective Challenges of Testamentary Capacity*, 20 Int'l J. of Geriatric Psychiatry 63, 63 (2005).
[81] Kenneth Shulman et al., *Assessment of Testamentary Capacity and Vulnerability to Undue Influence*, 164 Am. J. Psychiatry 722, 725 (2007).
[82] Ken Mackie, Principles of Australian Succession Law 41 (2d ed. 2013).
[83] Carmelle Peisah, *Reflections on Changes in Defining Testamentary Capacity*, 17 Int'l Psychogeriatrics 709, 709 (2005).

However, this is not especially apparent from the legal commentary in Australia.[84] Peisah has suggested that a more complex definition of capacity has been developed for clinicians based upon the New South Wales decision of *Read v Carmody*.[85] That is, to ensure that a form of cognitive decline is not affecting testamentary dispositions, testators should be able to demonstrate an awareness of the complex issues that can arise in conjunction with executing a will, including the identification of potential beneficiaries. Additionally, testators should also be able to provide reasons for the demonstrated testamentary intentions or any changes to them.[86] Literature and case law does not document how widely, if at all, this amended formulation is being implemented by legal or medical professionals, in Australia.

Practical concerns also exist regarding a modern testator's ability to understand the nature and extent of his or her financial assets and resources in accordance with the *Banks* test.[87] The increase in personal wealth means that it is not uncommon for complicated estate planning mechanisms to be utilised to ensure wealth preservation. Consequently, an individual's ability to understand the nature and extent of his or her property is then arguable.

1. Testamentary Capacity and Dementia

An individual may have dementia, be unsure about the date and their location, and yet still meet the *Banks* test.[88] As stated, the existence of a neurodegenerative disease does not automatically result in testamentary incapacity.[89] A legal professional's duty is to prepare the will on the client's instructions and then let the court

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[84] *Id.* at 709.
[85] NSWCA, 23 July 1998, unreported.
[86] Peisah, *supra* note 83, at 711.
[87] As referred to in *Kerr v. Badran*, NSWSC 735, [49] (2004) (Windeyer J); see also Tim Whitney, *Testamentary Capacity and Undue Influence*, (Paper presented at the Queensland Law Society Succession Law Conference, Brisbane, 27 October 2006) 2.
[88] Posener & Jacoby, *supra* note 68, at 755.
[89] Michael L Perlin et al., Competence in the Law: From Legal Theory to Clinical Application 224 (2008).

decide whether it is a valid testamentary instrument. Nevertheless, the effects of the increasing prevalence of dementia on testamentary capacity must be acknowledged. There is currently no method of assessment to measure the types and degrees of dementia against legal notions of capacity.[90] Identifying the form of dementia can assist in the assessment process because education and treatment plans may be able to be implemented that will facilitate legal capacity and promote individual autonomy.[91]

A. Enduring Documents

This Section will examine the medley of common law and legislative provisions relevant to capacity assessment in the context of substitute decision-making. Compounding the confusion surrounding what constitutes the satisfactory assessment of capacity is the relatively scarce case law clearly establishing assessment protocols.[92] It should be noted that the standard for the mental capacity necessary to make an advance care directive is generally reflective of that for an enduring power of attorney, with the donor's understanding being central.[93]

B. The Legislative Approach

A general overview of the legislative requirements establishing the capacity necessary to make an enduring power of attorney is included in the following table:

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[90] Berry, *supra* note 80, at 2.
[91] O'Neill & Peisah, *supra* note 14, at 3.
[92] Cockerill at al., *supra* note 19, at 41.
[93] Berna Collier & Chris Coyne, An Overview of the Relevant Legal Principles: Mental Capacity, Powers of Attorney and Advance Health Directives 1, 18 (2005).

State/Territory	Legal Requirements
New South Wales	The common law test applies (capacity definition). A prescribed person needs to explain the effect of signing the document to the principal (before execution) and the principal appeared to understand the effect of signing (*Powers of Attorney Act 2003* s 19).
Queensland	The common law test does not apply. Capacity is defined in legislation. The principal needs to understand the nature and effect of the document (*Powers of Attorney Act 1998* s 41). Subsection (2) sets out what this should include.
Victoria	The common law test applies (capacity definition). The donor needs to understand the nature and effect of the document (*Instruments Act 1958* s 118). Subsection (2) sets out what this should include.
South Australia	The common law test applies (capacity definition). At least one witness must be authorised to take affidavits (*Powers of Attorney and Agency Act 1984* s 6).
Western Australia	The common law test applies (capacity definition). Two witnesses are required (*Guardianship and Administration Act 1990* s 104).

Tasmania	The common law test does not apply. Capacity is defined in the legislation. The donor needs to understand the nature and effect of the document (*Powers of Attorney Act 2000* s 30). Subsection (3) sets out what this should include.
Australian Capital Territory	The common law test does not apply. Capacity is defined in the legislation. The person needs to be able to make decisions about their own affairs and understand the nature and effect of those decisions (*Powers of Attorney Act 2006* ss 9, 17, 22). Section 17 sets out what this should include.[94]
Northern Territory	The common law test applies (capacity definition). Up to two witnesses are required (*Powers of Attorney Act* ss 6, 14).

It is evident that the states and territories adopt varied positions with respect to defining and assessing capacity. Queensland, Tasmania, and the Australian Capital Territory adopt a statutory definition, which differs from the common law test adopted in New South Wales, Victoria, South Australia, Western Australia, and the Northern Territory.[95] The Queensland legislation, along with that in the Australian Capital Territory,

[94] Powers of Attorney Act 2006 s 19(2)(a) requires two witnesses; s 22(1) sets out the witnessing requirements and that the document must be voluntarily signed.
[95] Cockerill et al., *supra* note 19, 31; Standing Committee on Legal and Constitutional Affairs, *supra* note 8, at 88.

contains some of the widest statutory powers in Australia.[96] Specifically, both jurisdictions provide a nonexhaustive list of what is required in order to satisfy the requirement that the donor understands the nature and effect of the document.[97]

2. The Common Law Approach

Two main approaches have emerged under the common law in defining and assessing capacity within the substitute decision-making context. These are contained in the cases of *Re K*[98] and *Ranclaud v Cabban*[99] respectively.[100] *Re K*[101] held that the principal or donor of the power needs to understand:

> [f]irst . . . that the attorney will be able to assume complete authority over the donor's affairs. Secondly ... that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.[102]

Moreover, in *Ranclaud*[103] Young J stated that when determining whether an individual was capable of giving a power of attorney, the court should consider whether the individual understood that they were authorising someone to look after their affairs. The court should also check that they understood the types of decisions the attorney could make without needing to have

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[96] Standing Committee on Legal and Constitutional Affairs, *supra* note 8, at 74.
[97] Powers of Attorney Act 1998 (Qld) s 41(2); Powers of Attorney Act 2006 (ACT) s 9(1); Cockerill et al., *supra* note 19, at 33.
[98] 1 Ch. 310 (1988).
[99] NSW ConvR ¶55-385 (1988).
[100] Cockerill, Collier & Maxwell, *supra* note 19, at 42–43; Queensland Law Reform Commission, *supra* note 10, at 323.
[101] 1 Ch 310 (1988).
[102] *Re K*, 1 Ch 310, 316 (1988).
[103] NSW ConvR 55-385 (1988).

reference to the principal and what he or she wanted.[104] That is, while *Re K*[105] requires that the principal understand the nature and effect of the act of making the document, *Ranclaud* requires not only that the principal understand that he or she is authorising the attorney to act on his or her behalf and the effect of that decision, but also that the attorney can exercise his or her power without further reference to the principal.

The *Ranclaud* reasoning was recently affirmed by the Victorian Supreme Court in *Ghosn v Principle Focus Party. Ltd*.[106] In *Ghosn*, Forrest J noted, at the very least, the nature and extent of assets, potential decisions to be made for the donor, and the attorney's ability to act for the principal should be assessed.[107] Forrest J concluded that the test in *Ranclaud* should be adopted because it is consistent with *Re K* and not contradictory to *Gibbons*.[108] Consequently, it appears that when read together, the principles enunciated in *Ranclaud* and *Gibbons* represent the common law requirements with respect to the legal capacity necessary to make an enduring power of attorney.[109] That is, the nature and extent of the estate should be considered, as should the decisions the attorney may need to make on behalf of the principal. Thought should also be had for the attorney's ability to make those decisions without further reference to the principal.[110]

Additionally, there is the notion that an individual should not be deemed incapable of managing his or her own affairs unless he or she is unable to deal with the ordinary routine affairs of man

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[104] *Ranclaud v. Cabban,* NSW ConvR ¶55-385, 57-548 (1988).
[105] 1 Ch. 310 (1988).
[106] VSC 574, [78] (2008). Standing Committee on Social Issues, *supra* note 9, at 7.
[107] *Ghosn v. Principle Focus Pty Ltd*, VSC 574 [76] (2008).
[108] *Id.*
[109] Cockerill et al., *supra* note 19, at 45.
[110] *Id.* at 44.

in a reasonably competent way.[111] Courts will consider if, because of lack of capacity, there is a genuine risk that the individual may be disadvantaged in the management of their affairs or that their assets may be "dissipated or lost."[112] The phrase "ordinary routine affairs of man" is more complicated than simply, for example, going to the bank to withdraw money.[113] Skills required seem to fall somewhere between managing housekeeping money and conducting complex financial affairs, depending on the decision to be made and the circumstances in which it is to be made.[114]

An ability to plan for the future, including providing for oneself and one's family by generating income and managing capital, is necessary to sustain capacity.[115] Also relevant is whether the individual has sought appropriate advice and whether the person is able to identify anyone who may be trying to unfairly influence them or seize control of their assets.[116] There has been no satisfactory judicial, or legislative, definition of what amounts to being "incapable of dealing, in a reasonably competent fashion" with those affairs.

3. The Necessity of a Legislative Approach to Defining Capacity

There has been discussion throughout Australia about the necessity to include a statutory definition of capacity in each state and territory. The New South Wales Standing Committee recently recommended that a statutory definition be included in New South Wales, one of the jurisdictions currently adhering to the common law definition.[117] Any legislative definition will need to

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[111] *PY v. RJS*, 2 NSWLR 700 (1982).
[112] *Id.* at 702 (Powell J); Standing Committee on Social Issues, *supra* note 9, at 25.
[113] Standing Committee on Social Issues, *supra* note 9, at 26.
[114] *Id.*
[115] *Id.*
[116] *Re GHI (a protected person)*, NSWSC 581 [119] (2005) (Campbell J); New South Wales Law Society, *When a Client's Capacity Is in Doubt—A Practical Guide for Lawyers* 11–12 (2009); Standing Committee on Social Issues, *supra* note 9, at 26.
[117] Standing Committee on Social Issues, *supra* note 9, at 35.

acknowledge the decision and time-specific nature of capacity.[118] Further, the definition should include, but not be restricted to investigating, an individual's ability to understand and retain information pertinent to the decision, use that information to make the decision, consider the effects of making or not-making the decision, and be able to communicate the decision.[119]

However, the need for a consistent approach to substitute decision-making capacity assessment in all Australian jurisdictions is clear.[120] The legal tests as they stand vary, are uncertain, and can contain inconsistencies. This lack of clarity leads to confusion in tests' application.[121] This is especially evident when the medical profession is frequently asked to participate in capacity assessments with, at times, little to no guidance from the legal profession as to what the legal standards actually are.

A. Guardianship

The guardianship system in Australia is one of protection for those individuals who, by reason of disability, are incapable of managing their own affairs—whether financial and/or personal/health related.[122] Generally, for a guardianship order to be made, there needs to be evidence of impaired decision-making capacity because of a disability or some other reason, which renders the individual partially or totally incapable of managing his

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[118] *Id.*
[119] *Id.* at 34–35.
[120] For the New South Wales example, *see* Standing Committee on Social Issues, *supra* note 9, at 27, 33–34.
[121] *Id.* at 27–28.
[122] Lewis, *supra* note 21, at 353. Different jurisdictions may have different provisions for the provision of special or major health care that requires consent from a tribunal or court. Ben Fogarty, *Guardianship and Administration Law Across Australia* 17 (2009), *available at* http://www.idrs.org.au/pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf.

or her own person. And, the individual in question is then in need of a guardian.[123] There is guardianship legislation in each Australian state and territory;[124] although differences do exist between the regimes, they are generally similar in intent and aim,[125] evidencing a pro-autonomy philosophy.[126]

The guardianship regime, broadly speaking, provides for the control, management and/or substitute decision-making exercised by third parties, or government authorities such as the public guardian, adult guardian or public advocate.[127] Any proposed guardian must be older than eighteen years of age, generally compatible with the individual, not exercising any undue influence over the individual, not have a conflict arising because of the role, and be willing and able to act.[128] Any support provided must always be in the best interests of the individual.[129] Guardianship orders are tailored towards the specific needs of the individual[130] and can be limited, specifying the extent and functions. A plenary guardian gives the guardian full custody. Meanwhile, a temporary guardian generally lasts twenty-one to thirty days in circumstances where the tribunal or court is not certain whether to make a final order. Lastly, a continuing guardian is an option, under which an order is made for a period of time generally exceeding one year.[131]

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[123] Fogarty, *supra* note 122, at 15. Again, this is a general overview and each State and Territory may have variations on this requirement.
[124] ACT: Guardianship and Management of Property Act 1991; NSW: Guardianship Act 1986; QLD: *Guardianship and Administration Act 2000*; SA: Guardianship and Administration Act 1993; NT: Adult Guardianship Act; Tasmania: Guardianship and Administration Act 1995; Vic: Guardianship and Administration Act 1986; WA: Guardianship and Administration Act 1990.
[125] A detailed examination of the different guardianship regimes in place in Australia is outside the scope of this article. For a general overview, see: Lewis, *supra* note 21, Fogarty, *supra* note 122. For the recent reviews conducted throughout Australia on the guardianship legislation see, for example: Queensland Law Reform Commission, Shaping Queensland's Guardianship Legislation, *supra* note 40; Queensland Law Reform Commission, *supra* note 10; Victorian Law Reform Commission, *supra* note 11. See also Standing Committee on Social Issues, *supra* note 9.
[126] Fogarty, *supra* note 122, at 2.
[127] *Id.* at 13.
[128] *Id.* at 16.
[129] *Id.* at 2.
[130] *Id.* at 13.
[131] *Id.* at 13–14.

B. Evidence of Legal Incapacity

Consideration must be given to the evidence necessary to prove lack of legal capacity, medical certificates, for example,[132] Advance care directives in Queensland must include a doctor's certificate certifying that the donor had the requisite capacity to make the directive.[133] Nevertheless, no similar requirement exists for powers of attorney or even for a medical certificate for either document in the other states and territories. It is tempting to state that a medical certificate should be a legislative prerequisite to the loss of capacity. However, there may be circumstances when seeking a medical opinion is not warranted, when it is not possible to obtain a medical opinion, or when obtaining a medical opinion is unaffordable.[134]

Additionally, making a medical certificate a requirement may confuse and further complicate the role of the medical professional in assessing capacity.[135] It also potentially elevates the opinion of the medical professional to a determination as to the existence of legal capacity.[136] It is questionable whether it would be appropriate for a medical professional to adopt this role because the task of assessing capacity requires knowledge and skill in the execution of legal documents.[137] Rather, it is preferable for a medical opinion to be sought if there is an issue about an individual's capacity.[138]

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[132] Powers of Attorney Act 1998 (Qld) s 33(5).
[133] *Id.* at s 44(6).
[134] See, for example, Queensland Law Reform Commission, *supra* note 10, at 353; Law Reform Committee, Parliament of Victoria, *supra* note 11, at 124.
[135] Queensland Law Reform Commission, *supra* note 10, at 353.
[136] *Id.* at 345–346.
[137] *Id.* at 353.
[138] *Id.*

IV. SOME RESOURCES FOR ASSESSING CAPACITY

Legal and medical scholars acknowledge that there are no universally accepted, standardised, or objective criteria for assessing capacity.[139] That is, there is no "gold standard."[140] The Australian Standing Committee on Legal and Constitutional Affairs (Australian Standing Committee) recommended a nationally consistent capacity assessment process be developed and implemented,[141] utilising the skills of both legal and medical professionals.[142] Admittedly, the Australian Standing Committee was focusing on enduring powers of attorney. However, the same concern applies to testamentary capacity and advance care directives.

In response to the dilemmas posed by attempting to assess capacity, clinical assessment models increasingly developed since the 1990s.[143] Each model has its own ideology, mechanisms, and procedures that can include a multitude of assessment machinery—ranging from formal tests and semi-structured interviews to observing the individual in question. Generally, the clinical tests can be divided into two main categories: general ability tests that test cognitive skills and purpose-built assessment tools.[144] In response to the popularity of the concept of specific capacities, task-specific assessment models were introduced.[145] These models, however, are plagued with problems, such as how to measure capacity, as well as how to apply the assessment in different contexts which then require different levels of decision-making capacity.[146] The prolonged use of capacity determination methods that are not standardised are of questionable veracity.[147]

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[139] Kerridge et al., *supra* note 39, at 244; Sullivan, *supra* note 38, at 135.
[140] Cairns et al., *supra* note 15, at 377.
[141] Standing Committee on Legal and Constitutional Affairs, *supra* note 8, at xviii.
[142] *Id.* at 89, 90.
[143] Sullivan, *supra* note 38, at 137.
[144] *Id.* at135.
[145] *Id.* at 137.
[146] Kerridge et al., *supra* note 39, at 246; Dārziņš et al., *supra* note 20, at 7.
[147] Dārziņš et al., *supra* note 20, at 139.

Proposed legal criteria for determining capacity are as varied as the clinical models that attempt to assess it. This can cause confusion and uncertainty both within and between the legal and medical professions when assessing testamentary and decision-making capacity.[148] This Section will examine two of the most commonly used models in the Australian testamentary and decision-making context.[149]

A. The New South Wales Attorney General's Capacity Assessment Toolkit

The Attorney General's Department of New South Wales has produced a "Capacity Toolkit"[150] (the Toolkit) that "aims to assist people in correctly identifying whether an individual has the competency to make his or her own decisions."[151] The Toolkit is intended as a guide only.[152] However, it may add to problems surrounding capacity assessment rather than redressing them.

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[148] James M Lai & Jason Karlawish, *Assessing the Capacity to Make Everyday Decisions: A Guide for Clinicians and an Agenda for Future Research*, 15 Am. J. Psychiatry 101, 103 (2007).

[149] The handbooks prepared by the American Bar Association (ABA) Commission on Law and Aging and the American Psychological Association for lawyers, judges and psychologists are of significance as is the British Medical Association and the Law Society guide for doctors and lawyers when assessing mental capacity. See the ABA Commission on Law and Aging/American Psychological Association Assessment of Capacity in Older Adults Project Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005); ABA Commission on Law and Aging, American Psychological Association and National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* (2006); ABA Commission on Law and Aging/American Psychological Association Assessment of Capacity in Older Adults Project Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008); British Medical Association and the Law Society, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (3d ed. 2011).

[150] Attorney General's Department of New South Wales, *Capacity Toolkit* (2008).

[151] *Id.* at 6.

[152] *Id.* at 13.

The Toolkit defines capacity as the ability to understand facts, appreciate the main choices, evaluate the consequences of a decision, comprehend the effect of the consequences, and effectively communicate a decision.[153] Here, capacity is decision-specific[154] and can be regained, increased, or lost.[155] Capacity can be affected by the type of decision being made, the timing of the decision, the nature of the decision, and how complicated the decision is.[156] Also relevant is how much information the individual has to make the decision, as is the level and effectiveness of communication between the decision-maker and the person assessing whether the decision-maker is capable.[157] Circumstances in which the decision is made, the individual's experience, the individual's health, and the existence of an individual's stressing factors must also be considered.[158]

Furthermore, the Toolkit outlines six assessment principles. First is the presumption of capacity. Second is the decision and time specific nature of capacity. Third is that capacity is not affected by appearances. Outlined fourth is that assessment should focus on an individual's ability to make a decision, not the decision itself. Fifth is respect for an individual's privacy. And, finally, substitute decision-making should be an avenue of last resort.[159]

The Toolkit also outlines triggers that would indicate when capacity should be assessed. These have been categorised as conduct and circumstantial triggers. The identified conduct triggers include: making decisions that place the individual at serious risk of harm or mistreatment; making decisions that are out of character and that may result in harm or mistreatment; no longer understanding issues that have been understood previously; being confused about dates, times and places; noticeably forgetting

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[153] *Id.* at 18.
[154] *Id.* at 19.
[155] *Id.* at 23.
[156] *Id.* at 21–22.
[157] *Id.*
[158] *Id.*
[159] *Id.* at 27.

things; losing the ability to communicate, interact socially and/or express emotions; sudden changes in personality; and deteriorating ability to read and write or determine distance or direction.[160]

Moreover, the recognised circumstantial triggers include: change in the way individuals maintain themselves or their home, which places them, or their health, at substantial risk; not meeting financial obligations, such as paying bills; making extravagant purchases or sudden and excessive displays of generosity when this is unusual for the individual; being diagnosed with a mentally disabling condition which can affect their capacity; or, they have lacked the capacity required to make decisions previously.[161]

The Toolkit is very thorough in outlining and explaining the key capacity assessment principles and triggers. As discussed below, among most Australian jurisdictions, it is the most used reference tool in capacity assessment. Arguably, however, it is too simplistic. It is not intended to establish a definitive capacity assessment process. Because of its straightforward language, there is a danger that it will be adopted at face value, potentially oversimplifying legal capacity assessment.

B. The Six-Step Capacity Assessment Model

Another assessment method developed by Dārziņš, Molloy, and Strang is the six-step capacity assessment process,[162] originally utilised when assessing capacity to prepare advance care directives, and then subsequently utilised to assess financial and personal decision-making capacity.[163] It is valuable to determine if,

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[160] *Id.* at 50–51.
[161] *Id.* at 51–52.
[162] Dārziņš et al., *supra* note 20.
[163] *Id.* at 10.

and how, this process compares to the Toolkit. However, Dārziņš, Molloy, and Strang note that the six-step capacity assessment process should not be treated as the veritable "gold standard" but rather used with other tests to reach a reliable and satisfactory determination.[164]

As the name implies, the capacity assessment process has six steps. Step one requires the existence of a valid trigger. Under step two, the individual in question will be engaged in the assessment process. Step three sees information being gathered that gives context, choices, and consequences. Step four calls for the education of the individual who is to be assessed about the assessment process as well as the context, choices, and consequences, while step five is the assessment. Finally, step six makes provision for any actions resulting from the assessment process.[165]

Although the descriptions vary, triggers identified here are not dissimilar to those within the Toolkit. As with the Toolkit, the first trigger within this model is whether an individual has demonstrated behaviour that has placed either him or herself or others at risk. However, unlike here, the Toolkit trigger does not take into account whether harm could be caused to others. The second trigger, that an individual is known or suspected to have impaired decision-making, is reflective of the Toolkit's second trigger, making a decision that is out of character.

The rest of the triggers noted by Dārziņš, Molloy, and Strang, although similar to the triggers contained in the Toolkit, do not match.[166] The triggers described in the Toolkit are much more detailed. Dārziņš, Molloy, and Strang have also not made the

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[164] *Id.* at 7.
[165] *Id.* at 12.
[166] Dārziņš' triggers include: ". . . whether people have made choices that others believe are not consistent with their values previously held when they were apparently capable; all previous attempts to solve the problem have failed and … [competency] assessments which may confirm a lack of decision making ability are the last resort; [and] appointment of substitute decision makers, if indicated, will solve the problems." *Id.* at 13.

distinction between conduct and circumstantial triggers. This raises the question of whether the fewer triggers identified by Dārziņš, Molloy, and Strang are more effective for a streamlined, but consistent, assessment process. Alternatively, the detailed Toolkit triggers seem to offer more certainty.[167] The lack of recognition and adoption of any assessment model by both the legal and medical professions in Australia is a problem. That these resources are modified by individuals to suit their own skill set results in inconsistent, and potentially unsatisfactory, application.

V. THE LEGAL PROFESSIONAL'S ROLE AND OBLIGATIONS

It is difficult to determine how legal practitioners will not only be able to recognise the symptoms of cognitive impairment but also determine if an individual lacks legal capacity.[168] Furthermore, the suspicion of a legal professional that a client may lack capacity can give rise to an ethical dilemma, especially if the client rejects the legal professional's concerns or refuses to undergo any assessment process.[169] This is particularly prevalent given the prominence of individual autonomy in modern society. A legal professional is to act upon their instructions, not in what they view to be the client's best interests.[170]

In Australia, the decision that an individual lacks capacity is ultimately a decision for the court to make, but not all cases need judicial intervention or determination. In practice, legal

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[167] Attorney General's Department of New South Wales, *supra* note 150, at 61.
[168] This is specifically noted in the 2012 South Australian Guidelines. *See* Law Society of South Australia, *Statement of Principles with Guidelines* 13 (2012), *available at* http://www.lawsocietysa.asn.au/PDF/ClientCapacityGuId.elines.pdf.
[169] *Id.* at 10.
[170] *Id.*

professionals generally have budgetary constraints, which can restrict the amount of time spent with clients. Estates are now increasingly worth one million dollars, or more, given the value of superannuation and property—thus making them more litigable, especially given that society is becoming more litigious in nature.[171] A combination of these factors means the work of solicitors, when preparing wills and decision-making documents, will increasingly be scrutinised.

It has been suggested that the assessment of capacity goes beyond a legal requirement to an actual duty.[172] Traditionally, however, courts have been reluctant to impose a duty of care on legal professionals when they assess capacity in this context.[173] The solicitor is generally constrained by the client's instructions unless it is obvious that the client lacks the requisite mental capacity to give instructions or unless other exceptional circumstances exist.[174] However, with testamentary and decision-making capacity assessment growing in complexity, it is possible that issues surrounding practitioner liability and the assessment process itself will increase.

The decision of *Legal Services Commissioner v Ford*[175] shows that Australian courts will hold solicitors professionally liable for failing to adequately assess their client's capacity. In *Ford*, a solicitor was asked to prepare a will and an enduring power of attorney for an elderly widow in a nursing home. The effect was to amend the client's previous will, which was in favour of her children, to benefit a friend who was facilitating the arrangements. The court accepted evidence that a nurse had informed the solicitor of the client's impaired mental health and

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[171] Josette B. Jourdan & Lewis Glickman, *Reasons for Requests for Evaluation of Competency in a Municipal General Hospital*, 32 Psychosomatics 413, 415 (1991).
[172] Brian Herd, *Guardianship & Powers of Attorney (Queensland) Square Pegs in Round Holes – Lawyers Assessing Capacity* 4 (Paper presented at LAAMS Seminar, Brisbane, 1998).
[173] *Worby v. Rosser*, PNLR 140 (2000).
[174] *Fradgley v. Pocklington (No 2)* QSC 355 [28] (2011); *Public Trustee v. Till*, 2 NZLR 508, [26] (2001).
[175] LPT 12 (2008).

memory loss.[176] Further, the enduring power of attorney was incomplete, indicating that the solicitor had not adequately discussed each clause of the document with the client, as required by the relevant legislation.[177]

Ford demonstrates that legal professionals need to be aware of circumstances that may give rise to capacity assessment issues. The court held the solicitor to have participated in unsatisfactory professional conduct by failing to "conduct appropriate inquiries" that a reasonable person would have made when assessing a client's capacity to make an enduring power of attorney and will.[178] Fryberg J also concluded that the solicitor had failed to act in accordance with the Queensland Law Society's guidelines for witnessing powers of attorney by ignoring the indicators of impaired capacity identified in the guidelines, such as memory loss,[179] which was "readily apparent" in this case.[180]

A. Professional Standards and Guidelines

All Australian states and territories have general ethical standards, duties (honesty, personal integrity, candour and frankness),[181] and standards of conduct in the form of professional conduct legislation, rules, decided case law, and tribunal decisions. Professional liability can be found in contract for breach of retainer in tort law for a negligence action or in equity for a breach of fiduciary obligation.[182] There are also guidelines, the most

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[176] *Legal Services Comm'r v. Ford*, LPT 12, 15, 40 (2008).
[177] *Powers of Attorney Act 1998* (Qld) s 41(2).
[178] *Legal Services Comm'r v. Ford*, Qld LPT 12, 22 (2008).
[179] *Id.* at 18–19.
[180] *Id.* at 21.
[181] Law Society of South Australia, *supra* note 168, at 17.
[182] Tina Cockburn & Barbara Hamilton, *Acting for Elders in Estate-Planning and Will-Making Civil and Professional Liability Issues*, 96 Precedent 19, 20 (2010).

comprehensive example of which are those produced by the New South Wales Law Society (New South Wales guidelines).[183]

The New South Wales guidelines state that if a legal professional becomes aware that there may be concerns about an individual's legal capacity to execute a document, then it is the responsibility of the legal professional to investigate the document before it is executed.[184] The guidelines refer to the Guidelines for Assessing Competence for Granting an Enduring Power of Attorney as containing the level of legal capacity required to make an enduring power of attorney, including questioning the individual.[185]

However, little practical guidance is provided on actually assessing capacity in the Guidelines for Assessing Competence for an Enduring Power of Attorney. These guidelines contain the tests in *Gibbons*[186] and *Ranclaud*.[187] They also suggest that questions should be open and not allow simple yes or no responses. The legal professional should be aware that assessment may be occurring at a vulnerable time for the individual and that if capacity is in doubt, issues of capacity should be referred to an "appropriate medical professional" after obtaining the client's authority to do so. The "appropriate medical professional" should then be asked for a report detailing how long the individual has been their patient, how often they have seen the patient, the date of the most recent consultation, a brief synopsis of the individual's health, and whether the individual has the capacity to validly execute a power of attorney.[188] Unfortunately, no guidance is given suggesting who an appropriate medical professional is or in what context their advice should be sought. The New South Wales guidelines state

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[183] New South Wales Law Society, *Guidelines for Solicitors Preparing an Enduring Power of Attorney* 3 (2003), *available at* http://www.lawsociety.com.au/uploads/filelibrary/1076364307703_0.20172457268152505.pdf.
[184] *Id.*
[185] *Id.* at 3(a).
[186] 91 CLR 423, 438 (1954).
[187] NSW ConvR 55–385, 57–548 (1988).
[188] New South Wales Law Society, *supra* note 183, annexure A.

that the "appropriate medical professional" is to give his or her opinion as to whether the individual has the capacity to execute the document.

If the medical professional believes the individual lacks capacity, then this diagnosis should be discussed with the individual. The legal professional should refer to the Law Society's Client Capacity Guidelines (September 2003) for further guidance, even if the individual contests the determination. The New South Wales guidelines are silent on the situation in which the legal and medical professionals reach different conclusions as to capacity. This reiterates the definitional problems associated with what capacity actually is, both legally and medically, as well as the lack of a consistent and transparent assessment process to determine this.

Moreover, the New South Wales guidelines do not state what information should be given to the medical professional aside from noting that the individual needs to understand the effect of making the enduring power of attorney and be given a copy of the guidelines for assessing capacity for granting an enduring power of attorney.[189] Cost issues are also raised, specifically, how medical professionals are to recover the costs of participating in capacity assessments. This is an ongoing issue for which there does not appear to be a satisfactory answer. The New South Wales guidelines stand alone without reference to any of the other assessment models or guidelines that exist, for example, the six-step capacity assessment model.[190] They predate the Toolkit[191] and have not been updated to reference it.

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[189] *Id.* at 3(d).
[190] Dārziņš et al., *supra* note 20.
[191] Attorney General's Department of New South Wales, *supra* note 150.

The Office of the Adult Guardian in Queensland has also produced "Capacity Guidelines for Witnesses of Enduring Powers of Attorney."[192] With the exception of South Australia, which is in the process of developing its own guidelines,[193] the law societies in the other Australian states and territories do not currently have official guidelines. Instead, these jurisdictions tend to rely on the guidelines produced by government departments, and upon those used in New South Wales and Queensland. For example, the Honorary Justice Office in Victoria has a brief section on assessing capacity in their "Guidelines for Authorised Witnesses,"[194] which outline what the donor should be able to understand at the time of making a power of attorney. Further, if there is any doubt regarding the donor's capacity, the witness should make appropriate inquiries, including contacting the donor's medical professional, with the donor's consent.[195] The Victorian Law Society recommends that solicitors, who are dealing with donors suffering with long-term intellectual impairment, first consider obtaining a medical opinion concerning the individual's capacity. In addition, the Society recommends taking instructions with care.[196] It also refers to the Seniors Rights Victoria Committee. This Committee advises that solicitors should consider the New South Wales and Queensland guidelines because of Victoria's "lack of clear guidelines and law for assessing capacity."[197]

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[192] Office of the Adult Guardian, Dep't of Justice & Attorney-General, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* (2005), *available at* http://www.justice.qld.govau/__data/ assets/pdf_file/0009/7569/capacityguId.elines.pdf.

[193] Law Society of South Australia, *supra* note 168. Prior to this, the New South Wales Capacity Toolkit was used. The South Australian guidelines are similar to those in New South Wales. G Di Stefano, *Does Your Client Have the Capacity, RiskWatch* (2010), *available at* http://www.lawsocietysa.asn.au/PDF/RWMarch2010.pdf.

[194] Honorary Justice Office, Dep't of Justice, *Guidelines for Authorised Witnesses* 15 (2011), *available at* http://www.justice.vic.govau/resources/528732a1-ab45-4560-b156acd61586fbb0/ guId.elines_for_authorised_witnesses_october_2011.pdf .

[195] *Id.*

[196] Law Institute of Victoria, *Client Capacity,* http://www.livasn.au/For-Lawyers/Ethics/Common-Ethical-Dilemmas/Client-Capacity (last visited Aug. 13, 2014).

[197] Seniors Rights Victoria, *Capacity*, http://www.seniorsrights.org.au/assetsforcare/capacity/ (last visited Aug. 13, 2014).

Interestingly, noted in the *Ford* decision, the solicitor in question regarded the (Queensland) guidelines "as a somewhat new-fangled invention" with everything he did achieving the aims of the guidelines, irrespective of their existence.[198] The question thus arises as to whether there is an obligation on legal professionals to follow the guidelines. It is arguable that the test employed is generally that of what a "reasonable solicitor" would do in similar circumstances, without specific reference to the guidelines.[199]

However, it seems this position could be changing, and for the better. Best practise is evolving to conform to the guidelines, with recent cases noting the desirability of acting in accordance with the relevant guidelines.[200] Again, although not determinative, legal professionals have to be aware of factors, such as age and general circumstances (including previous diagnoses of dementia) that could give rise to capacity issues.[201] Although the courts and legislature have attempted to define capacity, to varying degrees of success, the numerous guidelines in existence result in unpredictable guidance on how to actually assess capacity. This understandably creates inconsistency of process within, and between, the different professions, professional groups and individual practitioners.[202]

Nevertheless, some common propositions emerge. Generally, if presented with a client who may lack capacity, a legal

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[198] *Id.* at 18.
[199] Cockburn and Hamilton, *supra* note 182, at 22.
[200] *Legal Services Comm'r v. de Brenni*, QCAT 340, [6] (2011); *Legal Services Comm'r v. Comino*, QCAT 387, [8] (2011).
[201] *Legal Services Comm'r v. de Brenni*, QCAT 340, [9] (2011).
[202] Malcolm Parker, *Patient Competence and Professional Incompetence: Disagreements in Capacity Assessments in One Australian Jurisdiction, and Their Educational Implications,* 16 J.L. & Med. 25, 27 (2008).

professional should not make assumptions about the individual's capacity, or lack thereof, especially given the presumption of capacity at law.[203] Cognitive impairment, such as dementia, a mental illness or other disability, as well as eccentricity or capriciousness, are not to be equated with legal incapacity.[204] It must be recognised that a legal professional is not a diagnostician, and he or she cannot impose his or her own view of the client's best interests.[205] The basic principles with respect to capacity outlined above, particularly the decision-specific and fluctuating nature, must be taken into account in any assessment. When actually taking instructions, every effort must be made to establish effective communication with the client, which will facilitate individual autonomy.[206] This should include making individuals feel comfortable and educating them about the process in which they are taking part. A legal professional also needs to be cautious of third-party involvement, especially since cognitive impairment can be linked with undue influence or conflicts of interest.

VI. CONCLUSION

The assessment of capacity in the testamentary and decision-making context is increasing in importance as the Australian society ages. The recent state and federal government reviews[207] are indicative of this. A national testamentary and decision-making capacity assessment model does not currently exist in Australia, as is evidenced by the above discussion of the varying standards and models of assessment. Each state and territory has its own approach, which is often a medley of statute and common law. This has practical implications for how legal (and medical) professionals assess capacity.

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[203] Law Society of South Australia, *supra* note 168, at 13.
[204] *Id.* at 14.
[205] *Id.*
[206] *Id.* at 16.
[207] Standing Committee on Social Issues, *supra* note 9; Queensland Law Reform Commission, *supra* note 10; Law Reform Committee, *supra* note 11; Standing Committee on Legal and Constitutional Affairs, *supra* note 8.

Processes adopted are tailored to the skill set of the individual practitioners involved in the assessment. This results in ad hoc and inconsistent assessments dependent upon the skill of the assessor(s). This is unacceptable when capacity and autonomy are so closely interconnected. The evaluation and comparison of existing capacity assessment models is a difficult task because of the differences in the specific capacity to be assessed, the paradigm chosen, and its contextual application. What is apparent is that imposing an unyielding capacity assessment tool is undesirable, if not impossible.[208] The development of a satisfactory assessment paradigm is needed in Australia. This will require an interdisciplinary approach reflecting an understanding of both the relevant legal principles and the mentally disabling conditions that can affect capacity.[209]

[208] Dārziņš et al., *supra* note 20, at 138.
[209] O'Neill & Peisah, *supra* note 14, at § 1.1.

PROTECTING OUR ELDERS FROM AGEISM: EXAMINING AND REMEDYING THE SUPREME COURT'S FAILURE TO DO SO

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"Ageism is as odious as racism and sexism."[1]

I. INTRODUCTION

Imagine Chuck, a fifty-seven-year-old employee of a manufacturing company who is terminated during a cost-cutting procedure. He knows his employer incorrectly believed him to be less energetic and productive than his younger colleagues even though he did his job well and to the satisfaction of his employer for decades. In addition, he knew because of his seniority that he made more money than those younger colleagues. Chuck also overheard his employer state that the older employees were less likely to acquire skills because of their old age and that they should obviously be the "first to go."[2]

Moreover, finally, imagine Carol, a sixty-year-old grandmother visiting her primary-care physician after she believed she twisted her knee after playing with her grandchildren. Her doctor performs essentially an ordinary physical and remarks, "Well, honestly, what do you expect at your age?" and tells her she should expect those sorts of pains and sends her on her way.

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[1] 123 Cong. Rec. 27120 (1977) (statement of Claude D. Pepper).

[2] This fictional story is modeled after the articulated reasons for terminations and demotions within *Sperling v. Hoffman La-Roche Inc.*, 924 F. Supp. 1346, 1403–1411 (D.N.J 1996).

Unfortunately, Carol's pain persists for weeks and when she sees a different doctor it is discovered she has developed Chondromalacia patellae,[3] the softening of the tissue of the kneecap—otherwise known as "runner's knee."[4] The condition is often found in young, active people.[5]

Each of these situations highlights the common and unfortunate prejudices, stereotypes, and discrimination toward the elderly in this country. Despite the history and prevalence of ageism and age discrimination, the Supreme Court's jurisprudence through the Age Discrimination in Employment (ADEA) fails to protect older Americans. While the Court acknowledges and protects against racism and sexism under an equal protection analysis, ageism receives little attention. As such, the Court should treat ADEA cases with greater scrutiny.

This Article does not argue that age should be rendered a suspect class under the Fourteenth Amendment. However, the factors the Court uses to determine classes to receive heightened scrutiny[6] apply directly to age through ageism. In this way, the Court should acknowledge the pervasiveness of ageism and treat ADEA cases with more scrutiny. In turn, the Court would then respect Congress' intent in eradicating ageist stereotyping and age discrimination in employment[7]—and the Court would further protect older Americans. Given the flood of Baby Boomers

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[3] Medline Plus, *Anterior Knee Pain*, National Institutes of Health, http://www.nlm.nih.gov/medlineplus/ency/article/000452.htm (accessed Apr. 5, 2013).

[4] *Id*. The site refers to Chondromalacia patellae as Anterior knee pain, which is commonly called "runner's knee." *Id*.

[5] *Id*. Anterior knee pain is more common in healthy young adults and runners, jumpers, skiers, and bicyclists. *Id*.

[6] *See generally*, *Windsor v. U.S.*, 699 F.3d 169, 181 (2012) (highlighting the Court typically examines four factors when rendering a class suspect: (1) whether the class has been subjected to a history of purposeful discrimination; (2) whether the class has a defining characteristic that bears an ability to perform or contribute to society; (3) whether the class shows immutable characteristics; and (4) whether the class is politically powerless). Age meets three of the four factors. *See also infra* Pt. III(C) (arguing age meets the first three factors).

[7] *See Hazen Paper v. Biggins*, 507 U.S., 609-611 (describing the ADEA was enacted over the concern older workers were being deprived of employment based on inaccurate stereotyping translating into discrimination).

throughout the United States,[8] the Court has even more reason to examine ADEA claims with greater protection for older Americans.

Accordingly, because the suspect class factors apply to the elderly, the Court should examine ADEA claims with greater scrutiny. First, the elderly have faced a history of purposeful, unequal treatment through ageism. This history of unequal treatment mirrors the Court's reasoning in creating race and sex suspect classes. Second, chronological age bears no relation on one's ability to perform functions or contribute to society. Third, age is an immutable characteristic, as one cannot automatically change his or her age.[9] The areas of healthcare and employment provide the clearest evidence of ageism—and why the Court's perpetuating ageism is ripe for examination.

First, as evidence of ageism in everyday life, our healthcare services demonstrate ageism through disparities in treatment between young and elderly patients.[10] Evidence of ageism in healthcare gives weight to the Court examining ADEA claims with greater scrutiny. Second, the Court's jurisprudence under the ADEA[11] perpetuates ageism by both refusing to allow a disparate treatment, mixed-motive framework[12] in employment decisions

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[8] According to the U.S. Census, issued in May 2010, by 2050, there will be 88.5 million Americans aged 65 or older. Grayson K. Vincent & Victoria A. Velkoff, *The Next Four Decades The Older Population in the United States: 2010–2050*, http://www.census.gov/prod/2010pubs/p25-1138.pdf, (accessed Apr. 6, 2013).

[9] The omission of the fourth factor must be noted. See *Windsor*, 699 F.3d 169 (explaining the fourth factor in determining a suspect class is whether the group is politically powerful). However, the Windsor court also highlights the fourth factor is relevant, but is neither necessary nor sufficient in determining a suspect class. *Id*. at 181.

[10] Phoebe Weaver Williams, *Age Discrimination in Delivery of Health Care Services to Our Elders*, 11 Marq. Elder's Advisor 1, 13–25 (2009) (highlighting the treatment of elderly patients in healthcare settings demonstrates unequal treatment and thus discrimination).

[11] 29 U.S.C.A § 623 (West 2012).

[12] *Gross v. FBL Fin. Serv., Inc*., 577 U.S. 167, 175 (2009); *see also*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding disparate treatment, mixed-motive frameworks applicable for sex discrimination cases).

and by allowing employers to make employment decisions based on "Reasonable Factors Other Than Age" (RFOA).[13] Therefore, because equal protection jurisprudence has relied on the finding of a history of purposeful, unequal treatment to create suspect classes,[14] and ageism is prevalent in both employment and healthcare, the Supreme Court should examine ADEA cases through an equal protection, "suspect classification" lens to respect the intent of the ADEA.

Accordingly, Part II of this Article explores the history of judicial scrutiny under the Equal Protection Clause and how the Court examines discrimination claims through a three-tiered scrutiny analysis: strict scrutiny, intermediate scrutiny, and rational-basis review.. Furthermore, Part II defines "ageism"[15] and its effects on the elderly. Part III demonstrates how the Court's ADEA jurisprudence perpetuates ageism. Finally, Part IV concludes that the Court should acknowledge age as meeting three of its four factors in granting greater protection and thus examine ADEA cases with greater scrutiny.

II. HISTORICAL BACKGROUND

This Part will highlight the evolution of judicial review under Equal Protection discrimination claims. Section A will first provide general background information concerning the Equal Protection Clause and the three-tiered test for judicial scrutiny—strict scrutiny, intermediate scrutiny, and rational-basis review. Section A will then explain the Court's history in creating—and not creating—suspect classes warranting heightened judicial

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[13] 29 U.S.C.A § 623(f)(1).

[14] *See generally*, *Windsor v. U.S.*, 699 F.3d 169, 181 (2012); *see also*, *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (articulating three factors demonstrating suspectness: class as saddled with disabilities, subjected to history of purposeful discrimination, or relegated to position of political powerlessness); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 155 (1938) (footnote four asserting a more searching judicial inquiry may be necessary when a statute is directed at discrete, insular minorities).

[15] Robert N. Butler, *Why Survive? Being Old in America*, 11–12 (Harper Torchbooks 1975) (defining ageism as the process of systemic stereotyping of and discrimination against people because they are old); *see also* Robert N. Butler, *The Longevity Revolution: The Benefits and Challenges of Living a Long Life*, 40-41(PublicAffairs 2008) (noting the definition of ageism).

scrutiny through race, sex, and age. Next, Section B will explore the ADEA's application of disparate treatment and mixed-motive theories as well as disparate impact theory and an employer's defense of Reasonable Factors Other than Age (RFOA). Finally, Section C will define "ageism," note its prevalence, and describe its detrimental effect upon our elderly population.

A. Equal Protection and Judicial Scrutiny Generally

In order to argue that the Court should treat ADEA cases through a "suspect classification" lens, one must analyze the Equal Protection Clause. The Clause within the Fourteenth Amendment provides that "no State shall deny individuals equal protection under the law."[16] Over time, the Supreme Court has extended its equal protection analysis to include suspect classifications warranting heightened judicial scrutiny.[17] This Section, then, will provide the necessary background on the Equal Protection Clause, the tests for judicial scrutiny, and e the Court's evolution of Equal Protection claims and suspect classifications.

1. Equal Protection and the Tests for Judicial Scrutiny

The Equal Protection Clause within the Fourteenth Amendment prohibits discrimination under the law.[18] Moreover, equal protection requires the government to treat all persons alike and forbids the government from enacting legislation that treats

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[16] U.S. Const. Amend. XIV, § 1. The pertinent clause reads, " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id*.

[17] *Infra* at n. 68, 70 (demonstrating, over time, the Supreme Court has held race and sex to be suspect classes, while refusing to hold disability and age suspect classes).

[18] *Id*. While evidence of ageism does not necessarily reveal the government treats older people differently, acknowledging the use of an equal protection, suspect classification analysis to age will demonstrate age should be more of a concern to the Court.

one group of individuals differently from another.[19] Beginning in 1938 with footnote four in *United States v. Carolene Products*,[20] the Court has asserted legislative actions discriminating against "insular minorities"[21] may warrant heightened judicial scrutiny to determine whether the legislative action violates the Equal Protection Clause.[22] Specifically, "prejudice against discrete and insular minorities may be a special condition . . . and which may call for a correspondingly more searching judicial inquiry."[23]

In determining a suspect class, the Supreme Court has proffered four factors, any of which can determine a suspect class.[24] The first factor is whether the group has been "historically subjected to discrimination,"[25] or has faced purposeful, unequal treatment.[26] The second is whether the class has a specific characteristic that "frequently bears [a] relation to ability to perform or contribute to society."[27] Third, the Court looks to whether the group shows "obvious, immutable, or distinguishing characteristics that define them as a discrete group."[28] Finally, the last factor examines whether the class is "a minority or politically

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[19] *Windsor v. United States*, 833 F. Supp. 2d 394, 400 (2012) (articulating equal protection requires the government to treat all similarly situated persons alike).

[20] *Carolene*, 304 U.S. 144 at 155. Only footnote four is of importance with respect to an equal protection analysis, as the court emphasizes the use of a "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment." *Id.*

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Windsor v. United States*, 699 F.3d at 181 (noting the immutability and political powerless factors are "not strictly necessary factors to identify a suspect class").

[25] *Id*. *See also Rodriguez*, 411 U.S. at 28 (describing a history of purposeful unequal treatment is one factor defining a suspect class).

[26] *See Rodriguez*, 411 U.S. 1 at 28 (noting the class at issue did not demonstrate any of the indicators of suspectness, arguing "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

[27] *Windsor*, 699 F.3d at 181; *see also City of Cleburne, Tex. v. Cleburne Learning Ctr.*, 473 U.S. 432, 442–445 (holding disability, particularly mental retardation, bears a relation to ability to perform or contribute, as "those who are mentally retarded have a reduced ability to cope with and function in the everyday world).

[28] *Windsor*, 699 F.3d at 181; *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (explaining that sex, like race, is an immutable characteristic due to the mere accident of birth, and thus imposing "special disabilities" on a person because of her sex renders her unequal to others).

powerless."[29] Both the immutability and political powerlessness factors are relevant, but not necessary factors in creating a new suspect class.[30] To that end, the Court has applied strict judicial scrutiny to cases involving race and national origin,[31] intermediate scrutiny to sex,[32] and rational-basis review to all other situations where laws draw distinctions between groups. [33]

Thus, since *Carolene*[34] and over the decades, the Court has examined equal protection claims through a three-tier judicial scrutiny analysis to determine whether a discriminatory law violates equal protection.[35] The higher the level of scrutiny, the stricter the Court reviews the law.[36] The Court applies strict scrutiny—the highest level of judicial scrutiny—to laws affecting a "fundamental right" or a suspect class.[37] To pass strict scrutiny—or to sustain the classification—the government must illustrate it has a "*compelling* governmental interest" in the need for different treatment and that it has "narrowly tailored" its classification to

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[29] *Windsor*, 699 F.3d at 181; *see also Frontiero*, 411 U.S. at 686 (explaining women still face discrimination in the political arena).
[30] *see generally Windsor*, 699 F.3d at 181 (noting the immutability and political powerless factors are "not strictly necessary factors to identify a suspect class").
[31] *See Korematsu v. United States.*, 323 U.S. 214, 216 (1944) (explaining at the outset, "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967) (noting distinctions based solely on race are at odds with equality and free people).
[32] *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (noting the burden on a party to uphold a statute that draws classifications based on sex is subject to showing "an exceedingly persuasive justification).
[33] *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (holding age is not a suspect class); *see also Vance v. Bradley*, 440 U.S. 93, 111 (1979) (rely on Murgia to hold rational-basis review is the proper standard of review for age); *see generally Cleburne*, 473 U.S. at 442–445 (holding disability is not a suspect class).
[34] *Carolene*, 304 U.S. 144 at 155.
[35] *Windsor,* 699 F.3d at 181.
[36] William A. Kaplin, *American Constitutional Law: An Overview, Analysis, and Integration*, ch. 3 (Carolina Academic Press 2004).
[37] *Id*.; *see also*, Charles A. Shanor, *American Constitutional Law: Structure and Reconstruction*, ch. IX (asserting the Court applies strict scrutiny only when dealing with a suspect class or a fundamental right).

fulfill the compelling interest.[38] The Court has consistently applied strict scrutiny to racial and national origin classifications.[39]

The Court has applied "middle-tier" scrutiny to sex classifications, often called "intermediate scrutiny."[40] To pass intermediate scrutiny, the government must demonstrate an "important" or "substantial";[41] rather than a compelling—governmental interest in creating the classification which is "closely related" to the classification.[42] Recently, the Second Circuit Court of Appeals held that homosexuals compose a class to be reviewed with heightened scrutiny.[43]

If the government neither treats a suspect class differently nor infringes upon a fundamental right, rational-basis scrutiny is applied.[44] As the lowest level of judicial scrutiny, rational-basis scrutiny requires only the governmental classification or deferential treatment is "reasonably related to some legitimate governmental interest."[45] The Court has held consistently if a law does not target a suspect class, the law will automatically receive rational-basis review.[46] Consequently, the Court has applied strict judicial scrutiny to cases involving race and national origin,[47] intermediate scrutiny to sex,[48] and rational-basis review to all other

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[38] *Windsor*, 699 F.3d at 196.
[39] *Id.*; *see Korematsu*, 323 U.S. at 216 (holding racial distinctions are always subject to strict scrutiny); see also
[40] Shanor, *supra* n. 38, at 623.
[41] *Windsor*, 699 F.3d at 196; *see also*, Shanor, *supra* n. 38 at 623 (asserting sex classifications receive "intermediate" scrutiny).
[42] Shanor, *supra* n. 38 at 623.
[43] *Windsor*, 699 F.3d at 185 (holding that after an analysis of all four factors relating to creating a suspect class, homosexuals meet all four factors and distinctions based upon homosexuality are to be reviewed with heightened scrutiny).
[44] Shanor, *supra* n. 38 at 623.
[45] Shanor, *supra* n. 38, at 623–624
[46] *Romer v. Evans*, 517 U.S. 620, 631 (1996).
[47] *See Korematsu,* 323 U.S. at 216 (race is to be reviewed with strict scrutiny); *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (explaining in its analysis that all racial classifications are to be analyzed under strict scrutiny).
[48] *Hogan*, 458 U.S. at 724; *see also*, *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (establishing sex classifications subject to judicial review); *see also Frontiero*, 411 U.S. at 684–689 (establishing sex classifications are subject to heightened judicial review).

situations where laws draw distinctions between groups,[49] including age.

2. Race

There is no question that the United States's historic treatment of African Americans has been highly purposeful, discriminatory, and inhumane.[50] African Americans have been slaves and therefore not citizens,[51] have experienced arbitrary barriers and restrictions on the most fundamental of human rights,[52] and have been denied basic human dignity and respect for centuries.[53] Consequently, the Supreme Court has held that race is a suspect class under an Equal Protection analysis and that all racial classifications and distinctions are to be treated with the strictest judicial scrutiny[54] because such classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility*."[55]

Because the Supreme Court was concerned about continuing racial discrimination and prejudice;[56] if a law or application of a law is to make any type of racial classification or distinction, the distinction must be shown to be necessary to the

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[49] *Murgia*, 427 U.S. at 313 (holding age is not a suspect class); *Vance*, 440 U.S. at 111 (1979) (holding age is not a suspect class); *Cleburne*, 473 U.S. at 442–445 (holding disability is not a suspect class).

[50] *See e.g.*, *Dred Scott v. Sanford*, 60 U.S. 393, 395–396 (ruling African Americans were not citizens and therefore did not hold the same rights as white citizens); *see also Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (holding separate-but-equal doctrine constitutional).

[51] *See Dred Scott*, 60 U.S. at 395–396 (holding African Americans are not citizens).

[52] *See Plessy*, 163 U.S. at 540 (asserting, incorrectly of course, that the white race is superior).

[53] *See Frontiero*, 411 U.S. at 685 (explaining slaves, like women, could not serve on juries, sue in their own names, or hold office).

[54] *Korematsu,* 323 U.S. at 216; *see also*, *Grutter*, 539 U.S. at 326 (2003) (explaining, "All government racial classifications must be analyzed by reviewing court under strict scrutiny").

[55] *Johnson v. California*, 543 U.S. 499, 507 (2005).

[56] *Brown v. Board of Education*, 347 U.S. 483, 493–495 (1954). The Court in *Brown* stressed the separate-but-equal doctrine is interpreted as denoting inferiority among the African American race, holding separate-but-equal cannot thrive in public schools. *Id*. at 494.

accomplishment of some permissible state objective.[57] In other words, racial classifications are constitutional *only* if they are narrowly tailored to further *compelling* governmental interests,[58] thus giving way to strict scrutiny.

For example, in *Loving v. Virginia*,[59] the Supreme Court struck down Texas's miscegenation statutes intended to prevent marriages between persons of different races.[60] The Court reasoned the statute aimed only to restrict the rights of citizens because of race.[61] The Court said a law that makes a person's skin color the test of whether he has committed a crime cannot possibly be a valid legislative purpose under the equal protection clause[62]—as the equal protection clause does not allow such invidious classifications.[63]

Quoting an earlier case concerning race, the Court mentioned its consistent holdings that racial classifications are at odds with notions of equality, "[d]istinctions between citizens solely because of their ancestry . . . odious to a free people whose institutions are founded upon the doctrine of equality."[64] In addition, given the Court's previous holding that race is always subject to the strictest judicial review,[65] the Court ruled the law based on race was unconstitutional. Thus, because the Court acknowledged African Americans as subjected to a history of purposeful unequal treatment and relegated to such a position of political powerlessness, circumstances at odds with the "doctrine

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[57] *Loving*, 388 U.S. at 11. In *Loving*, the Court held the miscegenation statute intended to prevent marriages between persons of different race did not accomplish a permissible state objective, as the Court noted that it could not think of any permissible state objective that allows distinctions between race. *Id*.
[58] *Grutter*, 539 U.S. at 326 (stating "such classifications [classifications based on race] are constitutional only if they are narrowly tailored to further compelling governmental interests").
[59] *Loving*, 388 U.S. at 11. The Court struck the statute down because it failed to find the miscegenation statute a permissible state objective. *Id*.
[60] *Id*. at 12.
[61] *Id*. at 11.
[62] *Id*.
[63] *Id*. at 12; *see also Grutter*, 539 U.S. at 326 (noting strict scrutiny is applied to race scrutiny to "smoke out illegitimate uses of race").
[64] *Loving*, 388 U.S. at 11, (quoting *Hirabayashi v. United States*, 323 U.S. 214, 216 (1944)).
[65] *Korematsu*, 323 U.S. at 216.

of equality,"[66] the Court created race a suspect class to be reviewed with strict scrutiny.[67]

3. Sex

Other than race, sex is the only other classification the Supreme Court has held requires heightened judicial scrutiny.[68] While perhaps not as invidious and devastating as our country's treatment of African Americans, women have been subjected to debilitating stereotypes and have been historically treated as subordinate to men.[69] Perhaps most telling of sex stereotyping and unequal treatment is Justice Bradley's concurring opinion in *Bradwell v. Illinois*[70], as he wrote, "Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the noble and benign office of wife and mother." [71] The Court in the majority opinion refused to allow women to practice law because women were believed to be naturally subordinate to men and thus unfit for a professional career because of her sex.[72]

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[66] *Id*.; *see also Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (explaining that "[a]ll government racial classifications must be analyzed by reviewing court under strict scrutiny").
[67] *See* e.g., *Korematsu*, 323 U.S. at 216 (holding race is to be treated with strict scrutiny); *see also Grutter*, 539 U.S. at 308 (arguing all classifications based on race are to be analyzed with strict scrutiny); *see also Loving*, 388 U.S. at 11–12 (noting racial classifications are at odds with notions of equality).
[68] *See generally*, *Reed,* 404 U.S. at 76-77 (holding sex is a suspect class); *Frontiero,* 411 U.S. at 684–689 (holding sex is a suspect class requiring heightened review); *Murgia*, 427 U.S. at 313 (holding age is not a suspect class); *Cleburne*, 473 U.S. at 442–445 (holding disability is not a suspect class); *see also Windsor*, 699 F.3d at 196 (arguing classifications based on sexual orientation should be subject to heightened scrutiny).
[69] *See Bradwell v. People of St. of Ill.*, 83 U.S. 130, 141 (1872) (holding women cannot practice law because a woman's sex renders her incapable).
[70] *Id*. .
[71] *Id*.
[72] *Id*. at 139.

However, the Court began to acknowledge sex classifications as arbitrary and unfit in our legal system.[73] Consequently, in *Reed v. Reed*[74], the Court held an Idaho estate administration statute that acted to arbitrarily prefer males to females as estate administrators violated the Equal Protection Clause.[75] The Court noted the Equal Protection Clause forbids legislation that treats people differently based on criteria unrelated to the legislation's objective,[76] as there is relation between a woman's sex to her ability to practice law. Here, the Court held the mandatory preference of males over females as exactly the kind of legislative choice forbidden by the Equal Protection Clause because the estate administration clause provided a mandatory preference of males over females "without regard to individual qualifications as potential estate administrators."[77] Thus, sex classifications became subject to judicial scrutiny[78]

Perhaps the most important case concerning sex is *Frontiero v. Richardson*,[79] in which the Court held sex classifications, like racial classifications, are inherently suspect and thus were to receive close judicial scrutiny.[80] Moreover, the Court also analyzed the history of sex discrimination and stereotyping,[81] thereby engaging in the necessary analysis required in factor one[82] for determining new suspect classes.[83]

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[73] *Reed*, 404 U.S. at 75–76. Here, the Court determined a legislative choice over one sex or another is the type of action forbidden by the Fourteenth Amendment. *Id*.
[74] 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 225 (1971).
[75] *Id*. at 76–77 (the Court notes of the legislative choice, "whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex").
[76] *Id*. at 75–76. Here, the Court held the statute, acting to prefer males over females, treats members of one sex differently from a member of another. *Id*.
[77] *Id*. at 75.
[78] *Id*. at 76. By arguing the statute bears no rational relationship to a state objective, because it focuses solely on sex, the Court is requiring a heightened judicial inquiry—heightened scrutiny. *Id*. at 76–77.
[79] 411 U.S. 677 (1973).
[80] *Id*. at 682.
[81] *Id*. at 684–687.
[82] *Windsor*, 699 F.3d at 181. The first factor in creating a new suspect class is whether the class has experienced a history of discrimination. *Id*.
[83] *See Windsor*, 699 F.3d. at 181 (explaining Supreme Court jurisprudence indicates a new suspect class is created if the class has experienced a history of discrimination, if the class' characteristics

To begin its analysis, the Court acknowledged the unfortunate history of sex discrimination in the United States.[84] Actually quoting Justice Bradley's depiction of the proper role of women,[85] the Court stated women were put into a cage through "romantic paternalism."[86] Because of these inaccurate notions concerning the nature of women, women became the victim of "gross, stereotyped distinctions,"[87] placing women in a subordinate position closely mirroring the position of African Americans.[88] Analogizing[89] the history of women to the history of African Americans, the Court explained neither women nor African Americans could serve on juries or hold political office, and women were allowed to neither hold property nor serve as legal guardians of their own children.[90] What's more, although African American males received the right to vote in 1870, women could not vote until 1920.[91] Moreover, while the Court further acknowledged the position of women has increased significantly during the 20th century, women still faced inaccurate stereotypes and discrimination throughout all facets of life.[92]

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bear a relation to ability to contribute or perform in society, whether the class demonstrates an immutable characteristic, and whether the class is politically powerless).

[84] *Frontiero*, 411 U.S. at 684. The Court emphasized this country's long history of sex discrimination, primarily discrimination in which places females in a "cage" rather than on a pedestal. *Id*.

[85] *Id*. at 684. Referring to historic sex discrimination as "romantic paternalism," the Court notes Justice Bradley's depiction of the role of women was firmly rooted in our society for over 100 years. *Id*.

[86] *Id*.

[87] *Id*. at 685.

[88] *Id*. Since race is a classification to be reviewed with strict scrutiny, by mirroring the discrimination of women to the discrimination of race, the Court is in a better position to argue sex be treated with heightened scrutiny. *Id*.

[89] *See generally*, Rhonda M. Reaves, *One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. Rich. L. Rev. 839, 846 (noting an argument by analogy is "the process of comparing items to adduce a relevant similarity"). Reaves also notes a fundamental principle of legal reasoning is analogy, for by comparing two items with similar properties, one can infer the items share a further property. *Id*.

[90] *Frontiero*, 411 U.S. at 685.

[91] *Id*. at 685.

[92] *Id*.

Moreover, after highlighting the unfortunate plight of women, the Court analogized to its precedent surround race and held sex has virtually no bearing on individual capabilities, mirroring Windsor's articulation of factor two.[93] The Court analogized—sex to race. The Court held that sex classifications, like race and national origin distinctions, are inherently suspect because such classifications are inherently invidious—and thereby are subject to strict judicial scrutiny.[94] Therefore, the Court's acknowledgment of historic purposeful, unequal treatment and discrimination towards women influenced its decision to create sex a suspect class, reviewed with heightened scrutiny.

Finally, the Court engaged in an analysis of factor three of its determining new suspect classes, recognizing both sex and race are immutable characteristics, "determined solely by the accident of birth."[95] Thus, as a suspect class, sex was to receive heightened scrutiny.

However, it was not until 1996, in *United States v. Virginia*,[96] where sex classifications were held to receive "intermediate" scrutiny.[97] Here, Justice Ginsberg, writing for the majority, determined that the Virginia Military Institute did not show an "exceedingly persuasive justification" for excluding all women from citizen-soldier training.[98] Throughout the opinion, Justice Ginsberg stated the "exceedingly persuasive justification" language rather than "strict,"[99] leading many scholars to argue this

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[93] *Id*. at 686. *See also*, *Windsor*, 699 F.3d. at 181 (articulating factor two in determining a new suspect class is whether the class has a defining characteristic that bears a relation to ability to perform or contribute to society).
[94] *Frontiero,* 411 U.S at 687–688.
[95] *Id*. at 686.
[96] 518 U.S. 515 (1996).
[97] *Id*. at 534; *see also*, Ronald D. Rotunda, John E. Nowak, *Treatise on Constitutional Law-Substance & Procedure*, 4 Treatise on Const. L. § 18.20, 2 (4th ed., West 2012) (noting *Virginia* set the minimum standard of review for sex cases is intermediate scrutiny because the majority opinion asserted the government must offer "exceedingly persuasive proof the differential treatment of women was necessary).
[98] *Virginia*, 518 U.S. at 533–534.
[99] *Id*. at 531–561.

"exceedingly persuasive justification" rather than "compelling" translates into intermediate scrutiny—the middle level between rational-basis review and strict scrutiny.[100]

Obviously, Supreme Court jurisprudence related to sex includes recognition of the purposeful, unequal treatment and discrimination of women throughout history.[101] As a result, because the Court's analysis in determining new suspect classes includes a finding of purposeful unequal treatment and whether the classification has any bearing on ability to function or contribute to society, sex became a suspect class under an Equal Protection Clause analysis.[102] The Court has never reasoned or held that sex discrimination is as odious as racial discrimination and thus the Court is has been only willing to review sex with heightened scrutiny as opposed to strict scrutiny.[103]

4. Age

Age is not a suspect classification and thus is to be analyzed with rational-basis review.[104] Despite the Court's acknowledgement of the prevalence of age discrimination and

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[100] *See* Ronald D. Rotunda and John E. Nowak at 2.
[101] *See Frontiero*, 411 U.S. at 685-688 (articulating women face gross, stereotyped distinctions translating into sex discrimination); *Virginia*, 518 U.S. at 533-534 (noting the Court has closely inspected sex classifications as closing a door to opportunity for women, as sex classifications may no longer be used to "perpetuate the legal, social, and economic inferiority of women).
[102] *See Frontiero,* 411 U.S. at 685 (articulating a clear analysis of the history of purposeful unequal treatment for both African Americans and women, noting the treatment of women resembles the treatment of African Americans in certain respects).
[103] *See generally*, *Reed*, 404 U.S. at 76 (holding sex classifications must bear a substantial relation to the objection of the legislation, thereby subject to judicial review); *see also*, *Frontiero*, 411 U.S. at 688 (holding sex classifications are subject to strict judicial review); *Virginia*, 518 U.S. at 533–534 (holding sex classifications are to be reviewed to show whether the justification is "exceedingly persuasive").
[104] *Murgia*, 427 U.S. at 312–314; *see also Vance*, 440 U.S. at 108–112 (relying on *Murgia* to hold age is not a suspect class).

prejudices, [105] the Court has refused to treat age as a suspect class.[106]

In *Massachusetts Board of Retirement v. Murgia*,[107] the Court held age is not a suspect class.[108] Massachusetts State Police mandatorily retired the Appellee upon his fiftieth birthday, arguing that the state's police's interest in maintaining a competent and physically fit force at all times.[109] However, despite his pristine health and ability to pass a physical examination four months prior to his fiftieth birthday, physicians on behalf of the State Police testified how the risk of physical failure and the inability to perform stress functions increases with age.[110]

Given these facts, the Court immediately stated strict scrutiny was not the proper test for determining mandatory retirement provisions under the Equal Protection Clause.[111] Mirroring the test for determining suspect classifications,[112] the Court reasoned that the elderly have not experienced a "history of purposeful unequal treatment or have been subjected to unique

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[105] *See Hazen Paper v. Biggins*, 507 U.S., 609–611 (describing the ADEA was enacted over the concern older workers were being deprived of employment based on inaccurate stereotyping translating into discrimination). *See also Murgia*, 427 U.S. 307, 317 (Marshal, J., dissenting) (arguing the elderly constitute a class "subject to repeated and arbitrary discrimination in employment" and thus legislation denying them benefits must show a "reasonable substantial interest" that is "closely tailored" to that interest); *see also*, U.S. Dept. of Labor, *The Older American Worker: Age Discrimination in Employment*, Sec. Labr. Rpt. to Cong. 5–9 (June 30, 1965) (reporting employers arbitrarily discriminate older workers through presuming older people are less able and less competent than younger workers).

[106] *Murgia*, 427 U.S. at 312–314; *see also*, *Vance*, 440 U.S. at 108-112 (relying on *Murgia* to hold mandatory retirement age is subject to rational-basis review only).

[107] 427 U.S. 307 (1976)

[108] *Id.* at 313. The Court quickly dismissed an argument that the mandatory retirement provision should be treated with strict scrutiny, as the statute deals neither with a fundamental right nor harms a disadvantage group. Id. at 313–313.

[109] *Id*. at 308. The Court noted the primary function of Massachusetts' police force is to protect the people, further noting that the type of job can be "arduous." *Id*. at 310.

[110] *Id*. at 311 ("The testimony clearly established that the risk of physical failure, particularly in the cardiovascular system, increases with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group").

[111] *Id*. at 312–313 (stating that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Mandatory retirement at age 50 under the Massachusetts statute involves neither situation").

[112] *See Windsor*, 699 F.3d. at 181 (articulating four factors the Court examines when determining new suspect classes).

disabilities on the basis of stereotypes not truly indicative of their abilities."[113] Thus, age distinctions and legislative measures treating the elderly differently are not inherently suspect and will not be reviewed with strict, or even intermediate judicial scrutiny.[114] Instead, the Court held that all age classifications are to be reviewed with rational-basis review, requiring only that the age classification bear a reasonable relation to a governmental interest.[115]

However, for our purposes, the most important aspect of this case is Justice Marshall's dissent.[116] Justice Marshall opined the classification of older workers warrants judicial attention.[117] Citing the Labor Department's report on Age Discrimination in Employment,[118] Justice Marshall notes that the older worker finds himself disadvantaged and faced with arbitrary age limits regardless of job potential.[119] Arguing because the elderly are "undoubtedly discriminated against,"[120] Justice Marshall maintained the State Police must show a reasonably *substantial* interest that is *closely* tailored to achieving that interest,[121] an inquiry that resembles the Court's reasoning and language for holding sex as heightened judicial scrutiny in *Reed*.[122]

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[113] *Murgia,* 427 U.S. at 313.
[114] *Id*. at 313
[115] *Id*. at 311, 315–316.
[116] *Id*. at 317.
[117] *Id*. at 324 (Marshall, J., dissenting). Justice Marshall, first, reminds the Court of its precedent concerning the right to work and argues employment is a fundamental right. *Id*. at 317.
[118] *Id*. at 324 (Marshall, J., dissenting).
[119] *Id*. at 324 (Marshall, J., dissenting). Justice Marshall seems to be mocking the majority opinion here, as he reminds the majority that it has conceded the elderly have not been without discrimination, but the majority opinion fails to render age a suspect class. *Id*. at 317–318.
[120] *Id.* at 325 (Marshall, J., dissenting). While Justice Marshall states the elderly are, in fact, discriminated against, he argues the discrimination is not as severe as that of the nationals history of race and sex; however, he does admit that when a statute does discriminate against the elderly, the statute must be shown to be a substantial interest closely tailored. *Id*.
[121] *Id.* at 325 (Marshall, J., dissenting).
[122] *Id.* at 325 (Marshall, J., dissenting). *See also*, *Reed*, 404 U.S. at 76 (holding classifications, including sex classifications, must be reasonable and substantially related to the object of the legislation).

Only three years later, the Court again held age classifications warrant only rational-basis review.[123] In *Vance v. Bradley*,[124] the Court reasoned that the mandatory retirement of Foreign Service employees at 60 years old was rationally related to the legitimate objective of employing competent and able Civil Service positions overseas, as age means a decrease in physical disabilities.[125]

Relying on *Murgia*, the Supreme Court held the mandatory retirement provision did not violate Equal Protection. The Court stated the mandatory retirement provision was rationally related to Congress' legitimate goal in maintaining the competence of the Foreign Service, thereby applying rational-basis review.[126] Furthermore, the Court asserted that the appellees failed to demonstrate how Congress' has no reasonable basis for believing at age sixty, or before, many persons "begin something of a decline in mental and physical reliability."[127]

Nevertheless, Justice Marshalls' dissent in *Bradley* reiterated his earlier dissent in *Murgia*.[128] Justice Marshall noted the elderly are discriminated against based on inaccurate generalizations concerning their work capabilities, such as the notion that advanced age means decreased physical vigor. Justice Marshall also noted the Court has refuse to accept "overbroad generalizations" about the characteristics of a particular class.[129] Instead of assuming such generalizations—like the inaccurate stereotype concerning age and physical decline[130]; Justice Marshall

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[123] *Vance*, 440 U.S. at 108–109.
[124] *Id*.
[125] *Id*. at 111. This rationale closely resembles the Massachusetts argument in maintaining a mandatory retirement age for police officers: protecting people requires those doing the protecting be without physical disabilities. *See Murgia*, 427 U.S. at 311.
[126] *Id.* at 108–109.
[127] *Id*. at 111.
[128] *Id*. at 112-124 (Marshall, J., dissenting).
[129] *Id*. at 121 (Marshall, J., dissenting).
[130] *Id*. at 121 (Marshall, J., dissenting).

believes a more substantial relationship must be shown, thereby mirroring intermediate scrutiny.[131]

Therefore, while the majorities in both *Murgia* and *Bradley* held age is not a suspect class and thus only be reviewed with rational-basis review,[132] Justice Marshall's dissent in both cases[133] highlight the prevalence of age discrimination and the Court's reliance on such a history of unequal treatment and discrimination in order to create a new suspect class. However, the Court appears to have ignored existing evidence of historic purposeful, unequal treatment towards the elderly, and consistently holds age is not a suspect class.[134]

B. Ageism

Dr. Robert N. Butler, the first director of the National Institute on Aging,[135] coined the term "ageism" in 1968. [136] Modeled after "racism" and "sexism," ageism is the "systematic stereotyping of and discrimination against people *because they are old*, just as racism and sexism accomplish this with skin color and gender."[137] Dr. Butler recognized old people as being "categorized as senile, rigid in thought and manner, old-fashioned in morality

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[131] *See* Shanor, *supra* n. 38 at 623 (asserting sex classifications receive "intermediate" scrutiny).
[132] *See Murgia*, 427 U.S. at 312–314 (holding strict scrutiny is not the proper test for age classifications, as age is not a suspect class); *Vance*, 440 U.S. at 108-112 (relying on *Murgia* to hold mandatory retirement age is subject to rational-basis review only).
[133] *See Murgia*, 427 U.S. at 317-326 (Marshall, J., dissenting); *see also Vance*, 440 U.S. at 112-124 (Marshall, J., dissenting).
[134] *See Murgia*, 427 U.S. at 313-314 (noting that while the elderly are discriminated against, the elderly have not experienced a history of discrimination); *see also*, *supra* n. 104, Sec. Labr. Rpt. to Cong. 5-9 (reporting older workers are discriminated in employment).
[135] Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DePaul L. Rev. 453, 456 (1997) (noting Dr. Butler as the first director of the National Institute on Aging and the person who coined the term "ageism").
[136] Dr. Robert Butler, *The Longevity Revolution*: *The Benefits and Challenges of Living a Long Life*, 40–41(PublicAffairs 2008).
[137] *Id*. at 40. If ageism can be analogized to racism and sexism, the Court is in a better position to treat age discrimination cases with heightened scrutiny. *See* Reaves, *supra* n. 88 (highlighting the use of analogy allows one to infer items share a further similarity).

and skills."[138] Moreover, the human language is filled with phrases such as "dirty old man" and "greedy geezer," and when our minds think of "old people" many think smelly, cranky, slow, and useless.[139]

Much scholarship on ageism highlights society's obsession with youth, especially within the United States.[140] According to Dr. Butler, ageism takes form mainly in inaccurate stereotypes and myths, stemming from the fear of growing old, becoming vulnerable, and approaching death.[141] The fear of growing old leads to narcissism and avoidance.[142] This seems to make sense initially, as many people—young and old—will attempt to hide their ages and birth dates in an effort to forget they are growing older.

At least in the United States, old age can mean one is several steps closer to possibly living in poverty, relying on Social Security, facing unemployment, feeling ill, and living in substandard housing.[143] Thus, the fear of becoming old, resulting in avoidance, can lead to ignoring the social and economic problems facing the elderly.[144] Ageism thus allows one to "avoid, for a time at least, reminders of the personal reality of our own aging and death."[145]

In addition to the fear of growing old and vulnerable, ageism takes its form predominantly through myths and stereotypes about aging.[146] Even though many people perceive older people as slow, depressed, unable to adapt, an unable to

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[138] Whitton, *supra* n. 134, at 456 (highlighting Dr. Butler analogized the stereotyping of the elderly to situations involving racism and sexism, thus coining the term "ageism")
[139] Butler, *supra* 182 at 40. *See also*, The Anti-Ageism Taskforce at the International Longevity Center, *Ageism in America*, 3 (International Longevity Center, 2006) (noting the human language is full of negative references to older people).
[140] *Butler, supra* n. 135, at 40, 43.
[141] *Id*.
[142] *Id*. at 44
[143] Butler, *supra* n. 10, at 13.
[144] *Id*. at 12.
[145] *Id*.
[146] *Id*. at 6

learn, Dr. Butler notes chronological age is a poor indicator of mental health, physical fitness, and emotional status.[147] Elderly people remain productive, active, creative, and contributive throughout the aging process.[148] It is only with disease and incapacitation can we trace old age to unproductivity and inactivity.[149] Nevertheless, younger people perceive old age as dictating unproductivity and inactivity.[150]

Moreover, the use of age stereotyping and the avoidance of the old persist in our healthcare practices. During Dr. Butler's internship as a medical student, he observed that discriminatory treatment toward elderly patients, noting that older patients were labeled as problematic[151] or "train-wrecks"[152] and were subsequently transferred to a city hospital "as quickly as they could get rid of them."[153]

The Anti-Ageism Taskforce at the International Longevity Center[154] published a list of ageist terms unique to the medical arena,[155] highlighting the prevalence of age stereotyping in healthcare. For example, practitioners who seem to resent elderly patients often name them "GOMERS" or "Get Out of My Emergency Room."[156] Even more degrading terms suggest a lack of respect and distaste for elderly patients, as evidenced through

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[147] *Id*. at 7–8.
[148] *Id*. at 8
[149] *Id*.
[150] *Id*.
[151] Williams, *supra* n. 10, at 13.Williams also notes Dr. Butler's definition of ageism is essentially another form of bigotry. *Id*.
[152] *Id*. at 14. Williams notes elderly patients are termed "train-wrecks" because elderly medical problems are often complex, requiring healthcare practitioners to devote additional time. *Id*.
[153] *Id*. at 14. Williams argues the persons who use these terms "harbors animus towards a patient simply because she or he is old. *Id.* at 16.
[154] Anti-Ageism Taskforce, *supra* n. 138, at 22.
[155] *Id.* at 22. A few of the ageist names prevalent in the medical field are "ancient," "blubbering idiot," "fossil," "hag," "miserly old man," and "one foot in the grave." *Id*.
[156] Williams, *supra* n. 10, at 15. These terms demonstrates, the author argues, healthcare practitioners devaluing elderly patients as humans.

"SPOS"—Semi-Human Piece of Shit.[157] Furthermore, disabled elderly patients waiting to be transferred to a nursing home or hospice are often labeled "bed-blockers,"[158] as they are taking away a bed from another patient.[159]

For example, one of the most common forms stereotyping older patients concerns automatically diagnosing medical problems as a natural consequence of aging.[160] A physician examines an elderly patient and responds by concluding the pain or problem is "just age."[161] The doctor may respond with, "What do you expect of someone your age?"[162] Furthermore, the term "senile" is often popularly directed toward older people, as "'senility is a popularized layman's term used by doctors and the public alike to categorize the behavior of the old."[163] However, senility results from brain damage—younger people can receive brain damage just as frequently as older people.[164] Dr. Butler puts it best, "It is all too easy to blame age and brain damage when accounting for the mental problems and emotional concerns of later life."[165]

Studies also suggest ageist stereotyping may also result in the elderly not receiving the medical treatment they are looking for.[166] According to studies, many elderly patients would have accepted certain medical treatments that doctors did not relay to them during diagnosis.[167]

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[157] *Id*.
[158] *Id*. at 16.
[159] *Id*. Williams notes such derogatory terms suggest healthcare practitioners resent treating and devalue elderly patients. *Id*.
[160] *Id*. at 19.
[161] *Id*.; *see also* Monique Williams, *Invisible, Unequal and Forgotten: Health Disparities in the Elderly*, 21 Notre Dame. J.L. Ethics & Pub. Pol'y 441, 444 (noting ageism is highly prevalent in healthcare, as complaints highlight a physician or nurse attribute ailments as attributable to old age).
[162] *Id*. at 19; *see also,* Monique Williams, *supra* n. 160, at 444 (highlighting the assumption of ailments as just old age).
[163] Butler, *supra* n. 15, at 9.
[164] *Id*.
[165] *Id*.
[166] Williams, *supra* n. 10, at 18 (suggesting physicians assume that the elderly do not want to undergo extensive treatment, such as chemotherapy, and therefore patients will not receive such care).
[167] *Id*. Williams notes that while older patients do reject certain treatment, studies indicate elderly patients would have undergone treatment had the treatment been offered. *Id*.

Studies have shown that older cancer patients are just as likely as younger cancer patients actually want to undergo chemotherapy.[168] Moreover, often the reason elderly patients make any medical decision at all is through the doctor's advice.[169] Thus, if doctors are utilizing the stereotype that the ailment is "just age,"[170] or if the doctor assumes that the 97 year old women would not want to undergo treatment, elderly patients will not receive the treatment they would otherwise receive because they follow the doctor's advice.

Elderly patients are also underrepresented in healthcare clinical trials and testing.[171] This underrepresentation, arguably, stems from the reality that the elderly are often misdiagnosed through the stereotyping of "it's just your age."[172] For example, depression is often undiagnosed and untreated in the elderly; yet, depression is one of the most common diseases.[173] In clinical trials in 2005 concerning depression, only nine of fifty studies included elderly patients over fifty-five and only five of those fifty trials included patients over seventy years old.[174] Some physicians attribute ageist stereotypes concerning depression in the elderly:

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[168] *Id.* Williams highlights, "When surveyed, older cancer patients were just as likely as their younger counterparts to want chemotherapy." *Id*.
[169] *Id.* "Furthermore, older patients have indicated that the primary determinant of their decisions regarding chemotherapy is their physician's advice. Thus, even if the elderly choose not to receive therapy, these decisions may be influenced by their physicians' attitudes toward treatment." *Id*.
[170] *Id.* at 19. Williams quotes Dr. Stephen L. Phillips, "[i]t's not fair to anyone to write the problem off or define the problem as just age. There has to be something underlying it." *Id*.
[171] *See* Williams, *supra* n. 10, at 23 (stating the underrepresentation is significant in trials that examine drugs and medical treatments). *See also,* Monique Williams, *supra* n. 160 at 447–448 (highlighting older adults are remain underrepresented in clinical research, and mandates for representation of women and minorities in clinical research failed to address the underrepresentation of the elderly).
[172] Monique Williams, *supra* n. 160, at 447.
[173] *Id*. at 447.
[174] *Id*. at 448.

depression in the elderly is "transient and reasonable" as well as "understandable."[175]

C. The Age Discrimination in Employment Act

The Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment based on race and sex.[176] Title VII purposely omitted an age protection, even though Congress considered amendments concerning age.[177] However, Congress requested the Secretary of Labor to inquire about age discrimination in employment.[178] Entitled *The Older American Worker: Age Discrimination in Employment*, the report found evidence of arbitrary age discrimination in employment.[179] Specifically, the report noted the most common form of age discrimination stems from an employer's preference for younger workers—that is, "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications."[180] Various explanations given by employers for their consideration of age in employment decisions included physical capability, the ability to hire younger workers for less money, lack of skills or experience, limited work expectancy, and lack of adaptability.[181]

Consequently, Congress passed the ADEA in 1967.[182] The ADEA prohibits an employer from making employment decisions

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[175] *Id.* at 459.
[176] 7 U.S.C. § 2000e-2.
[177] Victor J. Suane Jr., *Age and Race: The Court's Search for Equality through the ADEA*, 33 S.U. L. Rev. 399, 400 (2006) (noting Congress considered placing age in Title VII, but instead requested the Secretary of Labor to study the factors contributing to age discrimination in employment).
[178] *Id*.
[179] *Id*.; *see also supra* n. 104, Sec. Labr. Rpt. to Cong. 5–9 (reporting older workers are discriminated in employment).
[180] *Supra* n. 104, at 6.
[181] *Id*. at 8
[182] 29 U.S.C. § 623. The relative language in the statute reads, "It shall be unlawful for an employer… 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." *Id.*

because of age.[183] The ADEA was passed to eradicate the inaccurate stereotyping of older workers.[184] Even though ADEA language essentially mirrors Title VII, it was passed as a separate statutory scheme. [185] Because of its similar language, the Supreme Court has modeled ADEA precedent after Title VII precedent to include disparate treatment and impact theories.[186] Consequently, this section will explain the Court's application of disparate treatment within the ADEA to lack a mixed-motive framework. Next, this section will also highlight the Court's application of disparate impact theory and the ADEA's Reasonable Factors other than Age[187] defense.

1. ADEA Disparate Treatment Theory: Lack of a Mixed-Motive Framework

Like Title VII, the Supreme Court has recognized disparate treatment analyses under the ADEA. Defined by the Supreme Court in *Teamsters v. United States*,[188] disparate treatment occurs when an employer simply treats some people less favorably *because of* race, sex, national origin, or religion.[189] The Court has explained that disparate treatment is exactly the type of treatment the ADEA was intended to eradicate: the treating of older workers

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[183] *Id*.; *see also Hazen*, 507 U.S. at 610 (explaining Congress' enacting the ADEA was based on its concern that older workers were being deprived employment based on stereotyping).
[184] *Hazen*, 507 U.S. at 610 ("…Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes").
[185] *Supra* n. 135, at 401.
[186] *Id*. at 402.
[187] 29 U.S.C. § 623(f)(1). The RFOA defense provides that an otherwise unlawful action under the ADEA is lawful if the employer takes any action "…where the differentiation is based on a reasonable factor other than age." *Id*.
[188] *Intl. Broth. of Teamsters v. United States*, 431 U.S. 324, 335 (1977) (setting the stage for disparate treatment cases under Title VII).
[189] *Id*.

less favorably *because of* age.[190] Thus, a disparate treatment analysis applies to ADEA claims as well.[191]

Furthermore, the Court has recognized that a form of unlawful disparate treatment includes an instance where an employer makes an employment decision based off a combination of illegitimate and legitimate reasons, demonstrating the unlawful reason was *a* motivating factor.[192] Title VII language reads: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice*."[193] For example, in *Price Waterhouse v. Hopkins*, the Court held an employer discriminated against an employee because of sex—even though the employer articulated other legitimate reasons for the employment actions.[194]

An important disparate treatment ADEA case applying mixed-motive theory is *Sperling v. La-Roche*.[195] The District Court analyzed the employee's several age discrimination claims—highlighting a mixture of both legitimate and illegitimate reasons for the employment actions. Four of the claims demonstrated age stereotyping and age discrimination, to which the District Court found as meritorious claims under the ADEA.[196]

The first of the legitimate claims was that La-Roche terminated employees because of high salary. Noting the Supreme Court's holding in *Hazen Paper*, the court held that because age and salary are analytically distinct—meaning one can think of age

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[190] *Hazen*, 507 U.S. at 609.
[191] *Id*.
[192] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 214 (1989).
[193] 42 U.S.C § 2000e-2(m).
[194] *Price Waterhouse*, 490 U.S. at 258. In *Price*, the Court acknowledged the employee was considered an "outstanding professional," with a "strong character, independence and integrity," while also acknowledging the employer treated the employee negatively because she was a woman—describing her as "macho," and stating she needed to take courses at a charm school. *Id*.
[195] *Sperling*, 924 F.Supp. 1346 (1996).
[196] *Id*. at 1404–1411. In *Sperling*, the Court found the employer, although having articulated several non-age related reasons for the employment action, still engaged in ageism by relying on ageist stereotyping. *Id*.

and salary separately—high salary is not an unlawful reason under the ADEA.[197] The next two claims concerned the plaintiff's contention that their terminations were because of "ample retirement benefits" and their "proximity to retirement."[198] The court replied to both complaints with the same reasoning as the high salary—firing an employee because of retirement benefits and/or proximity to retirement has nothing to do with inaccurate ageist stereotyping the ADEA is to eradicate.[199]

Now comes the evidence of age stereotyping and ageism. Sperling and the other plaintiffs also claimed the adverse employment action relied on Roche's perception that the employees were less productive and less energetic.[200] Here, the court reasoned this consideration was exactly what the ADEA was intended to eradicate: inaccurate and debilitating ageist stereotyping, specifically that increased age correlates with a decline in productivity and physical abilities.[201] Thus, this particular claim stated a claim of age discrimination under the ADEA.

Moreover, plaintiffs also provided evidence La-Roche terminated some employees because they were perceived to have limited skills and the inability to acquire new skills.[202] Again, the court reasoned the ADEA was enacted to eradicate these

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[197] *Id*. at 1404–1405. *See also Hazen Paper v. Biggins*, 507 U.S. 604, 611 (holding age and factors correlating with age, like seniority, are analytically distinct—an employer can think of one factor while ignoring the other; thus it would be incorrect to claim an employment decision based on seniority is "age based").
[198] *Id*. at 1405–1408.
[199] *Id*.; *see also Hazen*, 507 U.S. at 610-612 (holding the problem of inaccurate, ageist stereotyping disappears when an employment decision is motivated by factors correlating with age, particularly when dealing with pension plans and seniority).
[200] *Id*. at 1408.
[201] *Id*. at 1409; *see also Hazen*, 507 U.S. at 610 (describing Congress' intent in creating the ADEA was "prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes).
[202] *Id*. 1409.

stereotypes from employment decisions.[203] Consequently, the District Court found that Sperling and the other plaintiffs demonstrated ample evidence of an ADEA claim.[204]

However, in 2005 (nine years after *Sperling*), the Supreme Court has held the ADEA does not allow such mixed-motive age discrimination claim.[205] In *Gross v. FBL Financial Services, Inc.*,[206] the Court held that while Title VII claims authorize discrimination claims when an unlawful employment reason was *a* motivating factor out of many factors, the ADEA says nothing about motivating factors.[207] Instead, the ADEA prohibits only employment decisions *because of age*.[208] According to the Court, "because of" means "by reason of: on account of."[209] Such language indicates age must be the sole reason, not *a* reason, the employer acted.[210] Therefore, the ADEA allows only disparate treatment claims demonstrating age was the sole reason, not a reason, for the employment action.

2. *ADEA Disparate Impact Theory: The Reasonable Factor Other Than Age Defense*

Unlike disparate treatment theory, where the employer's motivations are the primary concern,[211] disparate impact concerns the consequences of the employment action.[212] Also defined in

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[203] *Id*. at 1409.
[204] *Id*. at 1413.
[205] *Gross*, 557 U.S. at 173. By not allowing a mixed-motive framework, the Court allows the possibility for ageist stereotyping in the workplace, thereby perpetuating ageism.
[206] 557 U.S. 167 (2009).
[207] *Id*. By not including "motivating factors," age is being treated differently than sex—for in sex cases, a plaintiff claiming sex discrimination can claim sexist stereotyping was a motivating factor in the employment decision; however, in age cases, plaintiffs cannot claim age was a motivating factor. *See Price*, 490 U.S. at 214 (holding an employer discriminated on the basis of sex even when articulating legitimate reasons for the employment action).
[208] *Gross,* 557 U.S. at 176.
[209] *Id*.
[210] *Id*. The Court reasoned the ADEA's use of "because of" language is to mean age was the "reason" that the employer decided to act. *Id*.
[211] *Teamsters*, 431 U.S. 324 at 335, n. 15.
[212] *Id*.

Teamsters, disparate impact theory refers to "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[213] Disparate impact does not require the intent to discriminate.[214] Thus, if a practice disproportionately affects a protected group of workers, the act is said to be violating Title VII.[215]

As the Court is concerned with discriminatory effects resulting from "[i]nstitutional arrangements that indirectly restrict older workers,"[216] the Court has held disparate impact theory is cognizable under the ADEA.[217] However, the ADEA contains statutory language significantly narrowing a disparate impact claim by permitting "any otherwise prohibited action where the differentiation is based on Reasonable Factors Other than Age" (RFOA).[218] Essentially, the RFOA provision allows employees to avoid liability if the employment practice is attributable to a reasonable, nonage factor.[219]

In *Smith v. City of Jackson, Mississippi*,[220] the Court held an employer's pay plan that granted raises to employees with less than a five-year tenure—thus proportionally allocating pay increases to younger workers as opposed to workers with

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[213] *Id*.
[214] Dianne Avery, Maria L. Ontiveros, Roberto L. Corrada, Michael Selmi & Melissa Hart, *Employment Discrimination Law: Cases and Material on Equality in the Workplace*, 217 (The Labor Law Group 2004) (explaining "disparate impact" cases demonstrate a facially neutral practice that acts to discriminate).
[215] *Id*. Since disparate impact is cognizable under Title VII, if an employer's practices result in an "adverse impact" on a protected group, the practice is considered discriminatory and unlawful. *Id*.
[216] *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 232 (2005); *see also*, *supra* n. 104, at 15 (noting business practices within a place of employment sometimes act to restrict the opportunities of older workers).
[217] *Id*. at 233–239; *see also* Avery et al., *supra* n. 212, at 217 (noting courts have developed disparate impact theory throughout the first decade of Title VII enforcement).
[218] *Id*. at 239.
[219] *Id*.
[220] 544 U.S. 228 (2005).

seniority—was a decision based on a reasonable factor other than age.[221] Because the employer's plan was to attract and retain qualified people, provide incentive for performance, and to maintain competitive was reasonable[222] (all articulated reasons having nothing to do with age),[223] the Court held that the pay plan was permitted under the ADEA.[224]

III. AGEISM IN HEALTHCARE AND EMPLOYMENT: MORE REASON TO RESPECT THE INTENT OF THE ADEA

The elderly are undoubtedly stereotyped, prejudiced, and discriminated against. Our elders have faced historic, purposeful treatment through ageism for decades.[225] Ageism is pervasive throughout healthcare and employment. Protecting elders in employment and healthcare becomes all too important given the number of Baby Boomers.[226] Therefore, given three of the Court's four factors in creating new suspect classes apply to the elderly[227]—a history of purposeful unequal treatment, a defining characteristic that bears no relation to ability to perform/contribute, and immutable characteristics—the Court should treat ADEA cases with greater scrutiny.

Accordingly, Section A will illustrate how our healthcare services and practices demonstrate disparities in treatment and services between elderly patients and younger patients. Our healthcare services perpetuate ageism by allowing doctors, and healthcare providers to treat the elderly population differently than

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[221] *Id*. at 241–243.
[222] *Id*. at 230, 241–243.
[223] See *Hazen Paper*, 507 U.S. at 611–613 (holding economic motivations, like pension plans and high salary, are analytically distinct from age and thus cannot be considered an employment decision "based on age").
[224] *Smith*, 544 U.S. at 241–242.
[225] *Infra* Sec. C.
[226] *Supra* n. 15 (noting the population of elderly people in this country by 2050 will be approximately 88.5 million).
[227] *See Windsor*, 699 F.3d 169 at 181 (asserting the four factors the Supreme Court looks to when determining new suspect classes).

the rest of the population.[228] Therefore, because ageism is perpetuated through both employment and healthcare, the Court should logically hold age a suspect class, reviewed with heightened scrutiny.

Most crucially, Section B of this Part will argue, first, that the ADEA fails to protect older workers by indirectly perpetuating ageism. Specifically, because the Court's interpretation of the ADEA does not allow a mixed-motive framework,[229] a lawful employment decision can be based off a combination of both illegitimate age-related *and* legitimate non-age related reasons.[230] Consequently, the Court allows ageism to flourish in the workforce by ignoring the unlawful ageist reason and allowing the employer to avoid liability. Moreover, an employer's ability to show his employment decision was based on "Reasonable Factors Other than Age"[231] allows the employer to cover a possible unlawful ageist employment decision.

Finally, Section C will argue the existence of ageism in both employment and healthcare logically dictates the Court should treat ADEA cases with more scrutiny. The Court should acknowledge both the prevalence of ageism in employment and how age applies to three out of the Court's four factors in determining new suspect classes. Age discrimination claims would then be reviewed with heighted scrutiny, affording due respect for the intent of the ADEA.

A. Ageism Everywhere: Healthcare Treatment and Practices

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[228] *See* Williams, *supra* n. 10 at 14–29 (articulating ageism is prevalent throughout healthcare treatment and practices, leading to age discrimination); *see also* Monique Williams, *supra* n. 160, at 441 (noting ageism is prevalent throughout healthcare).

[229] *Gross*, 557 U.S. 167 at 173.

[230] *Gross*, 557 U.S. 167 at 173–174. The Court notes the ADEA does not allow a plaintiff claiming age discrimination can state a claim by showing age was a motivating factor out of many factors. *Id*.

[231] 29 U.S.C. § 623(f)(1).

Ageism is prevalent in both healthcare treatment and education.[232] The stereotyping older patients as problematic,[233] and senile[234] translate into differential treatment and discriminatory practices. Automatically assuming a medical issue is a natural consequence of chronological age also translates into differential diagnosis and treatment than a younger patient would receive for the same medical issue.[235] Thus, this section will argue our healthcare system perpetuates ageism and age discrimination.

1. Treatment Practices Lead to Discriminatory Practices

By relying on ageist stereotypes and myths, healthcare practitioners end up discriminating elderly patients. Dr. Butler witnessed stereotyping during his medical internship.[236] He recalled elderly patients were treated differently from other patients by being labeled as problematic[237] and "train-wrecks,"[238] and were thus transferred to differently facilities as quickly as possible.[239] As elderly patients are often seen as problematic, practitioners often begin to resent elderly patients, branding them "GOMERS"[240] "SPOS,"[241] and "bed-blockers."[242] Such stereotyping demonstrates the prevalence of age discrimination in healthcare, as health care practitioners who use these terms consider elderly patients different—or unequal—from other patients.[243]

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[232] Supra
[233] Williams, *supra* n. 10, at 13.
[234] Butler, *supra* n. 15 at 9–10.
[235] Williams, *supra* n. 10, at 15; Monique Williams, *supra* n. 160, at 444 (noting that ageism is highly prevalent in healthcare, as complaints highlight a physician or nurse attribute ailments as attributable to old age).
[236] *Id*. at 14.
[237] *Id*. at 13.
[238] *Id*. at 14.
[239] *Id.* at 14.
[240] *Id.* at 15.
[241] *Id.* at 15.
[242] *Id.* at 16.
[243] *Id*. at 17–19 (highlighting ageist stereotypes suggest healthcare providers see elderly patients as less desirable, which may influence age-based decisions).

One does not require a creative imagination to see how this general disdain for elderly patients translates into unequal treatment. Such beliefs illustrate the notion that practitioners see elderly patients as less desirable than younger patients.[244] Labeling an elderly patient a "Semi-Human Piece of Shit," ("SPOS"), suggests practitioners believe elderly patients are less than human and resemble smelly, disgusting bowel movements.[245] Practitioners are labeling elderly patients—not middle-aged patients, not teenaged patients, and not child patients—SPOS, suggesting practitioners do not see other patients as smelly and less than human.[246] Otherwise, practitioners would not attribute SPOS to only elderly patients.

Accordingly, if healthcare practitioners attribute all elderly patients as less than human and resembling disgusting bowel movements, one can argue the practitioners will begin to treat the elderly patients differently than other patients. Similarly, if an elderly patient is a "bed-blocker" because he eliminates a hospital bed from a "non-train wreck" patient—every patient that is not elderly—then this resentment may spill over into how they actually treat the elderly patient. [247]

For example, a nurse, who resents an elderly patient because he is a "bed-blocker," may treat the "bed-blocker" differently in the hospital room. Perhaps the resentful nurse will end her medicine or blood-work rounds with the elderly patient, as she would rather put off the terrible patient until the end. Moreover, perhaps the resentful nurse is rude and unkind to the elderly patient, rarely engaging in conversation. She is treating the elderly patient as less than human.[248]

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[244] *Id.* at 16.
[245] *Id*.
[246] Id.
[247] Id.
[248] *Id*.

Moreover, a physician automatically concluding a medical ailment is a natural result of aging can lead to differential treatment and discrimination. [249] A doctor responds to an elderly patient's ordinary check-up with, "Well, honestly, what do you expect of someone your age?"[250] Because the doctor perceives the ailment to be a natural consequence of aging, he then rules out other possibilities, [a]s a result, the problems that would be routinely addressed in younger patients are left untreated by some physicians serving older patients."[251] As a result, the physician overlooks Carol's Chondromalacia patellae by automatically assuming her knee problem is simply arthritis.[252] Arthritis may not be the correct diagnosis.

Accordingly, the doctor omits a deeper analysis and diagnosis, leaving Carol without the proper treatment for Chondromalacia patellae.[253] One could argue a doctor would not have responded by defining the ailment as "just age" if the patient with Carol's symptoms was twenty-three years old, as "'[i]t's not fair to anyone to write the problem off or define the problem as just age. There has to be something underlying it.'"[254] There is something underlying the medical problem that is not chronological age.[255]

Mirroring the inaccurate stereotypes associated with age discrimination in employment (where an employer will correlate chronological age with a decrease in physical abilities or

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[249] *Id.* at 19; *see also* Monique Williams, *supra* n. 160, at 444 (noting the assumption that an ailment is a natural consequence of aging).
[250] *Id.* at 19; *see also* Monique Williams, *supra* n. 160, at 444 (highlighting that doctors and nurses will say that an elderly patient's ailments are attributable to old age).
[251] *Id*.
[252] *Supra* n. 2.
[253] *Supra* n. 4.
[254] Williams, *supra* n. 10, at 19.
[255] *See* Butler, *supra* n. 15, at 7 (arguing chronological age is a poor indicator of physical, mental, and emotional status). Dr. Butler also argues the notion older people are "senile" is an incorrect categorization of the elderly, as old and young people experience a full range of emotions and behaviors. *Id*. at 9.

disability),[256] age stereotyping during a healthcare visit demonstrates unequal treatment. While aging may bring new medical problems such as arthritis, old age does not make people sick—arthritis, actual illnesses, or the disabilities make people sick.[257] Thus, automatically equating chronological age as the reason an elderly patient is sick can result in forgoing a proper diagnosis and treatment, thereby resulting in differential treatment.[258]

Additionally, practitioners who assume an elderly patient does not want to undergo treatment at his or her age engage in ageism. Imagine an elderly patient is diagnosed with breast cancer at seventy-three years old. She has the option to undergo intensive chemotherapy with a mastectomy or live her remaining years without the pain and length of treatment. However, her doctor believes that she probably would not want to undergo such invasive and difficult treatment,[259] so when he articulates her options, his tone and demeanor indicate he believes forgoing treatment is the better option. As a result, because most patients rely heavily on their doctor's advice,[260] she decides to go without chemotherapy. She dies six months later.

Her doctor's belief that she should not undergo chemotherapy because of her age directly translated into his

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[256] *See* Sperling, 924 F.Supp. at 1408–1411 (highlighting how an employer used ageist stereotypes in perceiving older employers as less productive, less energetic, unable to change or adapt, and no longer fitting into the organization).

[257] *See* Butler, *supra* n. 15, at 7(arguing that chronological age is a poor indicator of physical, mental, and emotional status).

[258] *See* Williams, *supra* n. 10, at 19 (arguing healthcare practitioners who automatically presume an ailment is a natural consequence of aging can leave untreated problems that would be routinely addressed in younger patients).

[259] *See id*. at 18 (arguing this is another ageist stereotype that can lead to aged-based decisions).

[260] *See id*. (noting that the primary determinant of an elderly patient's decision regarding chemotherapy is their physician's advice).

communication with her about her options.[261] As a result, she went without treatment and subsequently died. Perhaps she would have had more years with her family had she received chemotherapy. Perhaps her cancer would have been eliminated. Yet, because her doctor relied on the ageist stereotype that older people are less likely to desire treatment[262]—resembling the notion old age means a decrease in competence and performance[263]—she never received the treatment she needed. She did agree with her doctor, but only because his tone and demeanor indicated he believed she should go without.[264] Thus, the doctor in this hypothetical engaged in ageism and treated her differently than he would another patient because of age.[265]

2. *The Underrepresentation of Older Patients in Clinical Trials Leads to Discriminatory Treatment*

The lack of elderly patients in clinical trials suggests ageism exists in healthcare and demonstrates unequal treatment.[266] As previously mentioned, labeling an elderly patient's ailment as "just age," suggests elderly patients cannot reap the benefits of clinical drug trials because new drugs cannot prevent ailments resulting from age. [267] If "senility" results from age and a doctor cannot cure age, then a doctor cannot prevent "senility." [268]

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[261] *Id*. If an elderly patient's primary determinant of whether he receives chemotherapy is the physicians advice, and the physician's demeanor during discussion about options suggests not to do the treatment, then the elderly patient may make a decision based of that demeanor and, as a result, decide not receive treatment. *Id*.

[262] *Id*.

[263] *See generally Hazen Paper*, 507 U.S. at 610 (articulating Congress' concern regarding an employer's ageist stereotyping that productivity and competence decline with old age).

[264] *See generally* Williams, *supra* n. 10, at 18.

[265] *See id*.

[266] *See id*. at 23 (stating the underrepresentation is significant in trials that examine drugs and medical treatments). *See also,* Monique Williams, *supra* n. 160 at 447–448 (suggesting the underrepresentation of elderly patients in clinical research indicates unequal treatment).

[267] *See id*. at 19 (asserting the most common situation of age discrimination in healthcare occurs when a physician attributes an illness to age); *see also*, Butler, *supra* n. 15, at 7 (arguing chronological age is poor indicator of physical, mental, and emotional status).

[268] *See* Monique Williams, *supra* n. 160, at 444 (noting caregivers and physicians subscribe to the myth of "senility" as a normal consequence of aging); *see also* Butler, *supra* n. 15, at 9 (arguing "senility" it a term to categorize behavior of the old; however, old and young people experience a full range of emotions similar to what people label "senility").

Moreover, if elderly patients are not represented in clinical drug trials, then a particular drug may not be tested on an elderly patient and research may not know or understand the consequences of a particular drug on the elderly population.[269]

Consequently, while prescribing the drug to younger patients because younger patients were represented in the clinical trials,[270] doctors could be hesitant to prescribe the drug to an elderly patient. By doing so, doctors and healthcare practitioners are treating an elderly patient differently than the younger patient who will actually be prescribed the drug. The younger patient will receive a drug to prevent "senility," while the elderly patient will not.

As previously mentioned, elderly patients are often not treated for depression despite depression being one of the most common diseases among all populations.[271] Doctors perceive the symptoms of depression—sadness, tiredness, and the inability to cope with daily life—"reasonable and understandable" in elderly people.[272] After all, elderly people are apparently unproductive and less energetic.[273]

Now imagine a brand new drug has been created for depression, a drug far different from other depression drugs on the market today. Researchers and companies are eager to test and try the drug on various voluntary participants. Nevertheless, elderly patients are not invited to participate, as depression—while

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[269] *See generally*, Williams, *supra* n. 10, at 23.
[270] *See id*.
[271] *See* Monique Williams, *supra* n. 160, at 447 (explaining what while depression is prevalent in the elderly, only nine out of fifty depression studies included participants older than fifty-five years old).
[272] *See id*. at 449 (explaining three-fourths of primary care physicians indicate they feel depression in the elderly is "understandable").
[273] *See* e.g., *Sperling*, 924 F.Supp. at 1409 (highlighting Sperling's claim La-Roche terminated employees based off perception of being less productive and energetic).

common in the elderly[274]—is a "reasonable" disease for older persons.[275] Depression is to be expected with age.

The hypothetical drug is then barely tested on elderly patients, and thus research on the drug's side effects and success rate are not attributable to the elderly.[276] The drug is then approved and doctors begin prescribing it. However, the drug is rarely prescribed to older persons for two reasons. First, since depression is to be expected with old age, there is less of an incentive to treat depression apparent in an elderly patient. [277] Second, because the drug was not tested on elderly patients, the doctor does not know or understand the possible consequences of prescribing it to the elderly and thus avoids prescribing it. As a result, unlike younger patients, elderly patients are not prescribed the breakthrough depression drug. Their depression is not treated—and thus our healthcare services treat elderly patients differently than younger patients based on inaccurate stereotypes that certain ailments are simply a product of "just age."[278]

B. Supreme Court ADEA Jurisprudence Perpetuates Ageism

If the Court is truly concerned with the arbitrary stereotyping of older workers as it consistently has held,[279] then the Court's treatment of older workers should reflect its own concerns. Nevertheless, older workers continue to be stereotyped

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[274] *See* e.g., Monique Williams, *supra* n. 160 at 449 (noting the prevalence of depression in the elderly and how many physicians believe "depression is a natural and anticipated consequence of aging and thus does not warrant clinical attention.").
[275] *Id*.
[276] *See generally*, Williams, *supra* n. 10 at 23.
[277] *See* e.g., Monique Williams, *supra* n. 160 at 449 (noting many physicians believe "depression is a natural and anticipated consequence of aging and thus does not warrant clinical attention.").
[278] *See id*.
[279] *See Hazen*, 507 U.S 604 at 610 (noting the very essence of age discrimination is for employer to terminate an older worker because he assumes productivity and competence decline with age, as the ADEA was "prompted by its concern that older workers were being deprived of employment on the basis of inaccurate stereotypes)*; see also*, *Sperling*, 924 F.Supp. 1396 at 1405–1411 (relying on *Hazen* to hold plaintiffs stated claims of age discrimination regarding certain claiming dealing with ageist stereotyping, such as the older workers were perceived as less productive and less energetic).

and thus discriminated in the workplace.[280] The ADEA—enacted to eradicate such stereotyping and discrimination[281]—fails to protect older workers from ageist stereotyping. Specifically, a lack of a disparate treatment, mixed-motive framework allows ageism to persevere in the workplace because employers can unlawfully discriminate workers and claim the action was motivated by legitimate, non-age related reasons; the employer can then escape liability. [282] Moreover, the statutory RFOA defense allows employers to safeguard a use of age discrimination by claiming obviously age-related employment practices are based on RFOA.[283]

Consequently, this section will first highlight how a lack of a disparate treatment, mixed-motive framework allows ageism to persist throughout the workforce. Secondly, this section will then explain how the RFOA defense essentially allows employers to shield use of age discrimination and claim discriminatory practices are both reasonable and not based on age. Accordingly, the ADEA perpetuates ageism.

1. The Lack of a Mixed-Motive Framework Perpetuates Ageism

A lack of a mixed-motive framework perpetuates the stereotyping of older workers by allowing employers to articulate both legitimate and illegitimate ageist motivations for an employment action and avoid liability. By forcing plaintiffs to

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[280] *See Gross*, 557 U.S. at 169–171 (articulating facts a plaintiff brought forth asserting his reassignment was because of his age, given he was replaced by someone about ten years younger); *see also*, *Sperling*, F.Supp. at 1408-1411 (highlighting several age discrimination claims demonstrating ageism); Dianne Avery et al., *supra* n. 171, at 733 (noting that twenty-five percent of all employment discrimination charged filed with the Equal Employment Opportunity Commission during 2008 and 2009 fiscal years were claims of age discrimination).

[281] 29 U.S.C. § 62; *see also Hazen*, 507 U.S. at 610 (claiming the ADEA was prompted over concern of inaccurate stereotyping against older workers).

[282] *Infra* sec. 1.

[283] *Infra* sec. 2.

bring cases only if they can prove age was the only reason for the employment action, [284] the Court ignores a claim of age discrimination if the employer can point to *any* other lawful motivation for the decision. In turn, the Court is shielding an employer from liability—even if the employer unlawfully discriminated.[285] Doing so perpetuates ageism and ignores Congress' intent to eradicate the inaccurate stereotyping of older workers through the ADEA.[286]

Imagine if *Sperling* was decided after *Gross*, where *Gross* held the ADEA does not recognized a mixed-motive framework. *Sperling* is a perfect disparate treatment, mixed-motive case. La-Roche articulated four legitimate motivations/reasons for its terminations: high salary, ample retirement benefits, age-related disabilities, and proximity to retirement.[287] The court held those reasons permissible because they did not relate to inaccurate ageist stereotyping the ADEA is intended to protect.[288] However, La-Roche also articulated four illegitimate motivations/reasons: the perception of older workers being less productive, less creative, having limited skills or unable to acquire new skills, being as over-qualified or over-experienced, and no longer fitting into the organization.[289] The court held the illegitimate reasons were exactly the type of stereotyping the ADEA is to protect. [290] Thus, the employees articulated a claim under the ADEA.

According to Dr. Butler's analysis of ageism, each of La-Roche's illegitimate considerations constitutes ageism through the

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[284] *See Gross*, 557 U.S. at 176 (holding the ordinary meaning of the ADEA's "because of age" requirement means age was the "reason" the employer decided to act).
[285] *Infra*. sec. 1.
[286] *See Hazen*, 507 U.S. at 610 (where the Court reasons Congress' intent in enacting the ADEA was to eradicate the arbitrary discrimination based on age through the use of inaccurate stereotyping.).
[287] *See Sperling*, 924 F.Supp. at 1408–1411 (holding three claims of age discrimination were based on the ageist stereotypes the ADEA is supposed to eradicate); *see also*, *Hazen*, 507 U.S. at 610 (Congress' intent enacting to ADEA was to eradicate ageist stereotyping in employment).
[288] *Sperling*, 924 F.Supp. at 1403–1409.
[289] *Id*. at 1409–1411.
[290] *Id*. at 1411. The court relied on Hazen, noting the inaccurate ageist stereotyping was exactly the kind the ADEA is to eradicate). *See Hazen*, 507 U.S. at 610 (Congress' intent enacting to ADEA was to eradicate ageist stereotyping in employment).

inaccurate stereotyping of older workers.[291] Since chronological age bears no relation to whether a worker is less productive or less creative, chronological age cannot be why a worker may be less desirable.[292] As such, the labeling of an older worker as less productive and less creative because of age is inaccurate stereotyping.[293] La-Roche presumes Sperling's chronological age results in his lack of productivity and thereby makes an employment decision based off the inaccurate assumption. Perhaps La-Roche thought, "I need to reduce my workforce, and since older workers obviously will not be able to 'keep up,' I should get rid of them." In this way, La-Roche engages in ageism and thus discriminates older workers.

When individuals engage in ageist stereotyping, they are equating age—the number of chronological years—with a decrease in physical ability, a lack of mental capability, being unable to adapt, or being disabled or ill.[294] Consequently, then, in *Sperling*, La-Roche equated Sperling's chronological age to whether he could acquire new skills, remain productive, and contribute.[295] However, chronological age bears no relation to a worker's ability to perform or contribute, for chronological age is simply a number.[296] Because it is not chronological age that renders an employer slow or fast, unproductive or unproductive, or even

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[291] *See Butler*, supra n. 15 at 7 (arguing the idea of chronological age is an imprecise indicator of physical, mental, and emotional status).

[292] *Id*. at 8. Dr. Butler also notes in the absence of disease and social adversities, older people remain productive and active in life. *Id*.

[293] *Id*. at 12 (defining the inaccurate stereotyping of people because of age is "ageism").

[294] *See id*. at 7 (noting the "myth of aging" surrounds the notion that chronological age means decrease in physical, mental and emotional status).

[295] *See Sperling*, 924 F.Supp. at 1409–1411 (since La-Roche perceived the older workers as less productive, less energetic, and less able to adapt, he equated chronological age with a decrease in physical and mental status).

[296] *See* Butler, *supra* n. 15 at 7–9 (noting the myths of "aging," the myth of unproductivity, the myth of inflexibility, and the myth of "senility," are all ageist stereotypes—for older people tend to remain productive, engaged, able to adapt and competent throughout life). Additionally, unproductivity can be "more traced more directly to a variety of losses, diseases, or circumstances than to that mysterious process called aging." *Id*. at 8.

lethargic or energetic, it is just as likely La-Roche's younger employees were just as unproductive. The reason for the unproductivity could be a worker's personality, illness, or disability.[297] One could perceive this of a worker at any age. So, numerical age does not determine whether a worker is productive.[298] A disability, an illness, and a personality can determine productivity. However, when La-Roche assumes Sperling is, or will become, less productive and/or less creative because of age, he is correlating age with a decline in competence and productivity,[299] engaging in ageist stereotyping both the ADEA and thus the Court are supposed to protect.

Similarly, a worker is not without skills and unable to learn because of his chronological age.[300] Ageism scholars note older workers are just as likely to acquire new skills or expand learned ones as their younger counterparts.[301] Again, the inability to adapt is not age-specific—adaptability and change can be an issue at any age.[302] Accordingly, when La-Roche automatically assumes Sperling cannot acquire new skills, he is engaging in ageist stereotyping.[303] He correlates age with the inability to learn—an arguably negative employee trait.

Likewise, asserting that an older worker no longer "fits into an organization" because of age may directly relate to society's obsession with youth, especially if the organization

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[297] *See id*. at 8 (since Butler argues unproductivity can be traced to losses, diseases, or other circumstances rather than aging, an employer can attribute unproductivity to any kind of situation, to any kind of worker—not just older workers).
[298] *See id*. at 7 (arguing chronological age is a poor indicator of physical, mental, or emotional status).
[299] *See generally*, *Hazen*, 507 U.S. at 601 (asserting, "it is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age").
[300] *See* Butler, *supra* n. 15, at 7 (arguing chronological age is a poor indicator of physical and mental status).
[301] *Id*. at 8 (stating "the inability to change and adapt has little to do with one's age and more to do with one's lifelong character").
[302] *Id*. If the inability to change and adapt has more to do with lifelong character than with age, the inability to change and adapt can be a problem for any worker, at any age. *Id*.
[303] *See Sperling*, 924 F.Supp. at 1409–1410 (holding consideration of this factor are the stereotypes intended to be eradicated through the ADEA).

wanted to surround itself with young workers.[304] When La-Roche assumes Sperling no longer fits into the organization, he correlates age with the inability to adapt or change—another negative employee trait.[305] He then engages in unlawful ageist stereotyping the ADEA and the Court are supposed to eradicate.

However, despite Congress' concern with ageist stereotyping,[306] the Court fails to protect older workers by refusing to allow a mixed-motive framework under the ADEA.[307] While *Sperling* is, perhaps, a perfect case illustrating ageism, under *Gross*, Sperling and the other plaintiffs could not bring their disparate treatment claims.[308] Since the Court in *Gross* held mixed-motive claims are not cognizable under the ADEA, a plaintiff must show age was the sole motivation/reason for the employment action.[309] Here, La-Roche articulated both lawful motivations and unlawful motivations/reasons.[310] By asserting just one legitimate motivation, age could then never be the sole reason for La-Roche's terminations.

A victim of sex discrimination in employment can find relief under Title VII[311] —even though her employer articulated both sexist and legitimate reasons for the employment

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[304] *Id*. at 1410–1411 (holding such a factor may constitute unlawful age discrimination). *See generally*, Butler supra n. 170, at 43 (asserting the underlying basis of ageism is the fear of growing old and approaching death). If individuals have a fear of growing old, they may not want to be reminded of older people, and thus claim older workers no longer fit into a "younger" company. *Id*.
[305] *Id*. at 1411.
[306] *See Hazen*, 507 U.S. at 610 (noting Congress' concern in creating the ADEA was employment decisions based on the stereotyping of older workers).
[307] *See Gross*, 557 U.S. at 176 (holding mixed-motive framework is not permitted under the ADEA).
[308] *Id.*
[309] *Id*. The majority notes ADEA language "because of age" means age must be the "reason." *Id*. Therefore, the Court is suggesting there cannot be other non-age related "reasons," within an age discrimination claim. *Id*.
[310] *Sperling*, 924 F.Supp. at 1403–1411.
[311] 42 U.S.C. § 20000e-2.

action.[312] There, the Court recognized mixed-motive theory.[313] However, unlike the Court's Title VII interpretation, the Court's interpretation of the ADEA does not allow mixed-motive theory.[314] Unlike Price Waterhouse's defining "because of" to *not* mean "solely because of," Gross held "because of" to mean the "reason," or the only reason the employer decided to act.[315] Thus, under ADEA claims, a plaintiff cannot bring a mixed-motive discrimination claim.

As such, because La-Roche articulated both legitimate and illegitimate reasons,[316] a mixture of considerations, Sperling and the other plaintiffs cannot find relief. However, it is clear Sperling was clearly discriminated based on ageist stereotypes.[317] Thus, because *Gross* eliminated mixed-motive theory under the ADEA, Sperling and the other plaintiffs, although having experienced "the very essence of age discrimination"[318] the ADEA and the Court is concerned with, would likely find no relief under the ADEA. As such, this lack of relief from stereotyping is contrary to Congress' intent to eradicate ageist stereotyping in the workforce.

Consequently, when the Court refuses to apply mixed-motive theory to age cases, the Court is perpetuating ageism throughout the workforce. Ageism will continue to persist if plaintiffs must demonstrate age stereotyping was the sole reason for the employment actions in order to find relief.[319] By articulating just one non-age reason, age could never be the sole

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[312] *Price Waterhouse*, 490 U.S. at 241. The Court held words "because of" sex do not mean "solely because of," and Title VII meant to prohibit cases in which the employer relies on a mixture of legitimate and illegitimate motivations. *Id.*

[313] *Id.* at 258.

[314] *Gross*, 557 U.S. at 167.

[315] *Id.*; *see also*, *Price Waterhouse*, 490 U.S. at 241 (asserting "because of" language does not mean "*solely* because of").

[316] *Sperling*, 924 F.Supp. at 1403–1411.

[317] *See Sperling*, 924 F.Supp. at 1408–1411 (articulating La-Roche relied on ageist stereotypes that older workers are less productive, less energetic, less able to change or adapt, and no longer fitting into the organization).

[318] *Hazen Paper*, 507 U.S. at 610.

[319] *See Gross*, 557 U.S. at 177 (holding plaintiffs must show age was the reason the employer decided to act).

reason La-Roche terminated and demoted older workers.[320] All employers have to do is look to *any* reason other than age and age becomes one of many reason for the action—even if he actually engaged in ageist stereotyping and thus discrimination. Employers doing so avoid liability under the ADEA.

Thus, under a *Gross* analysis, even though Sperling had been stereotyped based on age, Sperling is automatically out-of-luck when La-Roche points to non-age reasons.[321] La-Roche escaped liability even though he engaged in exactly the type of stereotyping the ADEA is supposed to eradicate.[322] Thus, victims of age discrimination in employment are without recourse, as the Court permits employers to engage in ageist stereotyping.

Therefore, ageist comments, stereotyping, and the elements of ageism can persist throughout the workforce without repercussions. Essentially, the Court is telling employees that if your employer has legitimate reasons for your termination or demotion, along with evidence of age discrimination, you will likely find no relief. Equally as troubling, the Court is also telling employers that if your employees can point to age discrimination, you had better come up with a legitimate, non-age reason for your action.

2. The Reasonable Factor Other Than Age Defense Perpetuates Ageism

Allowing employers to defend their actions by arguing an employment plan or decision was based on a "Reasonable Factor Other than Age"[323] (RFOA) demonstrates another example of how

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[320] *Id*. Age can never be the sole reason for a decision if other non-age reasons are present too. *Id*.
[321] *Id*. If *Gross* holds the ADEA does not permit mixed-motive claims, then La-Roche's articulation of his mixture of consideration is permitted. *Id*.
[322] *Id*.
[323] 29 U.S.C. § 623 (f)(1). *See also Smith*, 544 U.S. at 239–240 (holding the RFOA provision within the ADEA supports a disparate impact theory within the ADEA).

ageism perseveres throughout the workforce. If employment practices correlating with age are considered reasonable, older workers will continue to be discriminated.[324] Such economic factors are considered unrelated to age stereotyping.[325] Thus, it is too easy for an employer to cover his use of ageist stereotyping and claim his use of age discrimination relied on a reasonable factor having nothing to do with age.

Imagine a long-standing, hypothetical company must begin to adapt new emerging technologies, or be forced into bankruptcy.[326] The CEO decides to terminate its older workers for fear they cannot adapt to the new technologies.[327] As an added bonus, the employer will save money because the company's most costly workers are older workers, for seniority is highly correlated with age.[328] To do so, the company informs its employees those making over a certain amount of money—through both salary and pension—will be terminated immediately so the company can afford to install new technologies. Obviously, this new pay structure is age related because the pay plan targets high salaries, to which senior, older workers disproportionately receive.[329] Many of the older workers are thus terminated. Consequently, one would argue the company's plan disparately impacts older workers and is thus prohibited under the ADEA under disparate impact theory.[330]

However, Supreme Court jurisprudence under the ADEA has held such pay plans, even though directly and disproportionately impacting older workers are permissible and not

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[324] *Supra* n. 277.
[325] *See Hazen Paper*, 507 U.S. at 611 (reasoning factors often correlating with age, such as pension plans and seniority, are unrelated to the problem of inaccurate ageist stereotyping and are thus permitted because they are not based on age).
[326] This hypothetical company is based, in large part, on the facts of *Hazen Paper*, 507 U.S. at 608–614. Moreover, the hypothetical facts are also based on the economic factors relied up on *Sperling*, 924 F.Supp. at 1403–1408.
[327] *See id*.
[328] *See id*.
[329] *See id*.
[330] *See Griggs v. Duke Power Co*., 401 U.S. 424, 430 (holding disparate impact claims cognizable under Title VII because such employment decisions disparately impact workers belonging to a protected class).

discriminatory.[331] The plans are based on a reasonable factor other than age, unrelated to age stereotyping.[332] Here, the reasonable factor other than age would be cost-savings and high salaries. The company avoids liability because the cost cutting procedure is consistent with the Court's interpretation of a RFOA: it is reasonable because high salary and benefits are distinct from age and therefore cannot be related to ageist stereotyping.[333]

Nevertheless, this type of a defense allows employers to shield their use of age discrimination and ageism. The company can claim its obviously age-related plan did not rely on age.[334] Now imagine the hypothetical CEO has decided to use this "cost-cutting" plan in an effort to terminate older workers. He correlates chronological age with an inability to change and believes older workers cannot adapt to new skills necessary for new technologies.[335] Yet, as mentioned, this presumption is an unlawful ageist stereotype supposedly protected by the ADEA.[336]

Unfortunately, this discriminatory and ageist CEO can simply claim the "real" reason he employed the new play scheme and terminated the older workers is because older workers make more money. He is hiding his use of age discrimination and ageism

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[331] *See Hazen Paper*, 507 U.S. at 611-613 (arguing a decision to fire a older employee because he has nine-years of service and is thus close to receiving his "benefits" is permissible because the reason has nothing to do with ageist stereotyping).
[332] *Id*.
[333] *Id*.
[334] *See generally*, *Hazen Paper*, 507 U.S. at 611–612 (reasoning the stereotype "[o]lder persons are likely to be ___" is absent when an employer's motivation is related to seniority and receiving pension-plans benefits). However, the employer could really be thinking, "[o]lder person are likely to be unproductive, but we should claim seniority is the real reason we need to terminate the older worker." This would be engaging in ageist stereotyping but the employer is proffering a so-called reasonable factor other than age. *Id*.
[335] *See* Butler, *supra* n. 15, at 7 (arguing chronological age is an imprecise indicator of physical, mental, and emotional status).
[336] *See Hazen Paper*, 507 U.S. at 610 (noting Congress' enacting the ADEA was over the concern of inaccurate ageist stereotyping of older workers).

with a reasonable factor other than age defense:[337] economics and the need to cut-costs to prepare for new technologies. Since cost-cutting procedures do not rely on ageist stereotyping, such procedures are considered reasonable factors other than age.[338] Consequently, the company escapes liability even though the employment plan directly and disproportionately affected older workers. Under the Court's precedent regarding *Smith*, these disparately impacted senior employees would be out of luck.[339]

Moreover, the Court consistently holds such employer's economic decisions, while often directly correlating to age and seniority, are not evidence of age discrimination.[340] Thus, any economic employment decision directly correlating with age—whether pension plans,[341] cost-cutting,[342] retirement benefits[343]—impacting older workers is permitted under the ADEA, even if the decision is obviously age-related. [344]

Consequently, the RFOA defense can become a shield for age discrimination, thereby allowing ageism to persevere under the ADEA. An employer can cover his use of age stereotyping and discrimination.[345] Employers can argue their employment decisions, which clearly disproportionately affect older workers and constitute age discrimination, are reasonably related to a

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[337] *See generally*, Judith J. Johnson, *Reasonable Factors Other than Age: The Emerging Specter of Ageist Stereotypes*, 33 Seattle U.L. Rev. 49, 49–50 (arguing the Supreme Court has allowed employers to proffer defenses "that so strongly correlate with age that they can be used as thinly veiled covers for discrimination").

[338] *See e.g.*, *Hazen Paper*, 507 U.S. at 611–612 (holding factors correlating with age, such as pension status, are motivated by factors other than age).

[339] *See Smith* 544 U.S. at 238–240 (holding RFOA defense is cognizable under the ADEA).

[340] *See generally Hazen Paper*, 507 U.S. at 611–612 (holding factors correlating with age, such as pension status, are motivated by factors other than age).

[341] *Id*.

[342] *Id*.; *see also Sperling*, 924 F.Supp. at 1403–1404 (holding an employer's concern over an older worker's high salary is analytically distinct from age, and thus cannot be said to rely on ageist stereotyping).

[343] *Id*.; *see also Sperling*, 924 F.Supp at 1405–1407 (holding an employer's concern over ample retirement benefits does not suggest the employer was relying on inaccurate ageist stereotyping).

[344] *Id*.

[345] *See generally* Johnson *supra* n. 334, at 49–50, 89 (asserting "[i]f obviously age-correlated factors are considered reasonable, older employees can easily be discriminated against based on these stereotypes.").

legitimate goal unrelated to age.[346] Thus, employers, again, avoid liability.[347]

Given the Court's ADEA interpretation of both mixed-motive theory and RFOA defense, victims of age discrimination in employment face serious difficulties finding relief from ageist stereotyping.[348] Victims of ageism are without recourse: both when an employer can articulate age was not the only factor[349] and when the employer articulates a RFOA.[350] The employer can claim even though one motive was age related, other non-age related reasons existed. Second, and related, the employer can hide his age discrimination by arguing the decision was based on a reasonable factor having nothing to do with age,[351] even if his motivation was obviously age-related. As one can see, the employee is in a dire situation: no matter what he does, the Court simply does not protect the employee from the inaccurate stereotypes the ADEA is intended to protect. Ageism perseveres.

C. The Prevalence of Ageism: The Need to Respect the Intent of the ADEA

Our elderly population is discriminated against in employment and healthcare through ageism—the inaccurate stereotyping of older individuals.[352] Healthcare practitioners use

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[346] *Id*.; *see also Smith* 544 U.S. at 240 (holding disparate impact protection is narrower under the ADEA than Title VII).

[347] *Id*. at 89. Johnson also argues because the RFOA defense is largely a shield for ageist stereotypes, older workers are still likely to lose adequate protection under the ADEA. *Id*.

[348] *Id*.

[349] See *Gross*, 557 U.S. at 176–177 (noting ADEA language "because of age" means age must be the "reason"). Therefore, the Court is suggesting there cannot be other non-age related "reasons," within an age discrimination claim. *Id*.

[350] *See Smith*, 544 U.S. at 239 (holding the RFOA provision allows an employer to make an employment decision that is reasonable and unrelated to ageist stereotypes).

[351] *See* Johnson *supra* n. 334 at 49–50, 89 (asserting "[i]f obviously age-correlated factors are considered reasonable, older employees can easily be discriminated against based on these stereotypes.").

[352] *See e.g. Sperling*, 924 F.Supp. at 1408–1411 (noting three motivations/reasons given by the employer for terminating older workers were stereotypical: perceiving older workers as less

and rely on ageist stereotypes when treating, diagnosing, and representing elderly patients in clinical trials.[353] Employers use and rely on the same ageist stereotypes when making employment decisions as well.[354] Despite the prevalence of such ageism, older workers are often without recourse.

The Supreme Court relies on evidence of historic or purposeful discrimination,[355] a relation to ability to perform or contribute to society,[356] immutability characteristics,[357] and political powerlessness in the creation of new suspect classes.[358] While age meets three of the four factors,[359] age is not a suspect class and does not receive heightened judicial scrutiny.[360] Moreover, the Court's ADEA jurisprudence perpetuates ageism. Therefore, logic and analogy[361] indicate the Court should treat ADEA cases with greater scrutiny. Finally, this Section will argue the use of logic and analogy dictate the Court treat ADEA cases with greater scrutiny.

1. Historic and Purposeful Discrimination

Perhaps the most important argument for treating ADEA cases with more scrutiny is the Court's use of the first factor in

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productive, less energetic, unable to learn, and unable to adapt); *see also*, Butler *supra* n. 15, at 7–15 (asserting the elderly are discriminated against through inaccurate stereotyping, particularly through the notion that chronological age is an indicator of physical, mental, and emotional status).

[353] *See e.g.*, Williams, *supra* n. 10, at 13–26 (highlighting older patients experience unequal treatment based on ageist stereotyping in healthcare); Monique Williams, *supra* n. 160 at 443–452 (explaining elderly patients are treated differently in both treatment and clinical research based on ageist stereotyping).

[354] *Id.*; *see also*, *Hazen Paper*, 507 U.S. at 610–611 (holding "[i]t is the very essence of age discrimination for an older worker to be fired because the employer believes that productivity and competence decline with old age").

[355] *Windsor*, 699 F.3d. at 181; *see also*, *Rodriquez*, 411 at 28 (holding one of the traditional indicators of suspectness is whether the class has been subject to a history of purposeful, unequal treatment).

[356] *Windsor*, 699 F.3d. at 181

[357] *Id*.

[358] *Id*.

[359] *Infra* sec. 1, 2, 3.

[360] *Murgia*, 427 U.S. at 312–314; *see also*, *Vance*, 440 U.S. at 108–110 (relying on Murgia to hold mandatory retirement age requirement is rationally related to legitimate state objective).

[361] *See generally*, Reaves, *supra* n. 88, at 846 (asserting "argument by analogy," the process of comparing items to illustrate a relevant similarity, is a fundamental legal principle of reasoning).

establishing a suspect class: a history of discrimination, particularly through evidence of persistent ageist stereotyping. [362] Here, the Court examines whether a class of people has experienced a history of discrimination in order to render the class suspect.[363] Ageism is everywhere. Constantly facing debilitating stereotypes and prejudices in the workplace[364] and healthcare,[365] the elderly experience pervasive discrimination. However, unlike the Court's treatment of race and sex, age is not treated with greater protection.

The Court's acknowledgement of pervasive sex stereotyping rendered sex a suspect class.[366] Responding directly to Justice Bradwell's discriminatory depiction of women as subordinate and fit only for motherhood and housekeeping in *Reed*, the *Frontiero* Court emphasized women were subjected to "gross, inaccurate stereotypes."[367] The Court highlighted the simple fact women faced throughout American history: women could not serve on juries, hold professional office, or vote.[368] The gross stereotypes placed women beneath men in society—translating

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[362] *See id*.
[363] *Id*.
[364] *See e.g. generally*, *Sperling* 924 F.Supp. at 1408–1411 (noting three motivations/reasons given by the employer for terminating older workers were stereotypical: perceiving older workers as less productive, less energetic, unable to learn, and unable to adapt); *see also*, *Hazen Paper*, 507 U.S. at 610 (asserting Congress' enacting the ADEA was over its concern of older workers being deprived employment because of inaccurate, stigmatizing ageist stereotyping).
[365] *See e.g.*, Williams, *supra* n. 10, at 13–26 (highlighting older patients experience unequal treatment based on ageist stereotyping in healthcare); *see also*, Monique Williams, *supra* n. 160, at 443–452 (explaining elderly patients are treated differently in both treatment and clinical research based on ageism).
[366] *See Frontiero*, 411 U.S. at 685–688 (articulating women face gross, stereotyped distinctions translating into sex discrimination); *Virginia*, 518 U.S. at 533–534 (noting the Court has closely inspected sex classifications as closing a door to opportunity for women, as sex classifications may no longer be used to "perpetuate the legal, social, and economic inferiority of women).
[367] *See Frontiero*, 411 U.S. at 686 (arguing "romantic paternalism" placed women beneath men, as the stereotype that a woman's primary destiny was for being a wife and mother prevailed throughout American history).
[368] *Id*.

into discrimination based on sex.[369] As a result, the Court rendered sex a suspect class to be reviewed with heightened scrutiny.[370]

Similarly, the elderly have been subjected to gross, inaccurate stereotyping.[371] Like sex stereotyping, ageist stereotypes facing the elderly place them beneath younger members of society. Even though the ADEA was enacted to eradicate the stereotyping of older workers, ageism preservers throughout the workplace.[372] Employers continue to falsely perceive older workers as unproductive, unable to learn, and unable to adapt[373]—even though research shows older workers are just as productive and able to adapt as younger workers.[374] La-Roche correlated age with a decrease in productivity, energy, adaptability, and learning ability and terminated Sperling and many other older workers.[375] However, research shows age does not render a person less productive and less able to learn—it could be a person's personality, mental capacity, or even laziness.[376] Nevertheless, employers continue ignore other possible factors and

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[369] *Id*.

[370] *See generally*, *Reed*, 404 U.S. at 76 (holding sex classifications must bear a substantial relation to the objection of the legislation, thereby subject to judicial review); *see also*, *Frontiero*, 411 U.S. at 688 (holding sex classifications are subject to strict judicial review); *Virginia*, 518 U.S. at 533–534 (holding sex classifications are to be reviewed to show whether the justification is "exceedingly persuasive").

[371] *See e.g. generally*, *Sperling* 924 F.Supp. at 1408–1411 (noting three motivations/reasons given by the employer for terminating older workers were stereotypical: perceiving older workers as less productive, less energetic, unable to learn, and unable to adapt); *see also*, *Hazen Paper*, 507 U.S. at 610 (asserting Congress' enacting the ADEA was over its concern of older workers being deprived employment because of inaccurate, stigmatizing ageist stereotyping); Williams, *supra* n. 10, at 13–26 (highlighting older patients experience unequal treatment based on ageist stereotyping in healthcare); Monique Williams, *supra* n. 160 at 443-452 (explaining elderly patients are treated differently in both treatment and clinical research based on ageism).

[372] *See e.g. generally*, *Sperling*, 924 F.Supp. at 1408–1411 (noting three motivations/reasons given by the employer for terminating older workers were stereotypical: perceiving older workers as less productive, less energetic, unable to learn, and unable to adapt); *see also*, *Hazen Paper*, 507 U.S. at 610 (noting the Congress' concern with the stereotyping of older workers in enacting the ADEA).

[373] *See Sperling*, 24 F.Supp. at 1408–1410 (highlighting La-Roche's perceptions older workers were less productive, less energetic, and unable to acquire new skills).

[374] *See* Butler, *supra* n. 15, at 7–11 (explaining the "myths" of aging and how older people remain productive throughout life).

[375] *See generally*, *Sperling*, 924 F.Supp. at 1408–1411.

[376] *See e.g.*, Butler *supra* n. 15, at 7 (arguing chronological age is a poor indicator of physical, mental, and emotional status).

automatically attribute chronological age to inabilities and discriminate older workers.[377]

If precedent and legal analogy[378] matter, the Court should acknowledge the pervasiveness of ageism and treat ADEA cases with greater scrutiny. Namely, the first factor in creating a new suspect class applies directly to the elderly.[379] Since at least 1967, elders have experienced a history of discrimination.[380] Moreover, the Court has held the pervasive and debilitating race discrimination and racism render race a suspect class.[381] Likewise, since the Court was extremely concerned with the gross stereotyping of women, rendering women subordinate to men, [382] the Court should render age a suspect class as well. Resembling sex stereotyping, ageist stereotyping render older workers subordinate to younger workers. Given the Court's consistently articulated concern for the arbitrary stereotyping of older workers, like its previous concern regarding sex stereotypes,[383] the Court should logically treat ADEA cases with greater scrutiny.

Moreover, if the Court requires more convincing, it can look to the arbitrary stereotyping of elderly patients throughout the

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[377] *See generally*, *Sperling*, 924 F.Supp. at 1408–1411 (noting older employees complained about La-Roche perceiving them as being unproductive, unenergetic, and having less skills).

[378] *See generally*, Reaves, *supra* n. 88, at 846 (asserting "argument by analogy," the process of comparing items to illustrate a relevant similarity, is a fundamental legal principle of reasoning).

[379] *See Windsor*, 699 F.3d at 181(articulating the Supreme Court's first factor in determining new suspect classes is whether class has experienced a history of discrimination).

[380] *See Hazen Paper*, 507 U.S. at 610 (noting Congress' concern in enacting the ADEA in 1967 was to deal with the inaccurate, stigmatizing ageist stereotyping); *see also generally*, *Sperling*, 924 F.Supp. at 1408-1411 (relying on Hazen Paper to hold plaintiff's stated a claim of age discrimination when employer relied on ageist stereotyping in decision-making).

[381] *See Johnson v. Cal.*, 543 U.S. 499, 507 (2005) (holding racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility)*" *See also*, *Korematsu*, 323 U.S. at 216; *Grutter*, 539 U.S. at 308; *Loving*, 388 U.S. at 11–12 (all holding racial classifications are always to receive strict scrutiny).

[382] *See Hazen Paper*, 507 U.S. at 610 (noting the Congress' concern with the stereotyping of older workers in enacting the ADEA).

[383] *See Frontiero*, 411 U.S. at 684–688 (explaining the gross, stereotyped distinctions between the sexes lead women to be placed beneath men in society).

healthcare industry. Recall the first factor in establishing a suspect class: history of discrimination.[384] The Court found sex discrimination resulted from sexism and sex stereotyping.[385] Like sex stereotyping, older patients are discriminated against younger patients during diagnosis, treatment, and clinical trials because of ageist stereotyping.[386]

For example, resembling the notion that those women who are aggressive should not act "macho"[387] because of sex, the perception that an older patient's ailment is just a natural result of aging—because of age—is ageist stereotyping. [388] Similarly, like sex discrimination based off sex stereotypes that a woman's sex renders her unfit for a professional career,[389] the perception that older patients would not want medical treatment because of old age leads to different treatment and unequal care. [390]

Given the presence of ageist stereotyping translating into age discrimination, the Court's first factor in creating a new suspect class applies directly to the elderly.[391] Since elderly patients have experienced a history of discrimination based on such ageist stereotyping, age must be a suspect class. Like the history of sex stereotyping, the elderly also experience stereotyping. Ageist stereotyping mirrors sex stereotyping, for, like

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[384] *Windsor*, 699 F.3d at 181.
[385] *Frontiero*, 411 U.S. at 688.
[386] *See e.g.*, Williams, *supra* n. 10, at 13–26 (highlighting older patients experience unequal treatment based on ageist stereotyping in healthcare); Monique Williams, *supra* n. 160, at 443–452 (explaining elderly patients are treated differently in both treatment and clinical research based on ageist stereotyping).
[387] *Price Waterhouse*, 490 U.S. at 235.
[388] *See*, Williams, *supra* n. 10, at 20 (arguing healthcare practitioners likely characterize an elderly patient's ailment as natural aging); Williams, *supra* n. 160 at 444 (describing healthcare practitioners engaging in ageist stereotyping when subscribing to the "myth of senility" as a normal result of aging).
[389] *See Frontiero*, 411 U.S. at 684 (describing Justice Bradwell's proclamation that a woman's sex rendered her unfit for a professional career). The Court also mentioned sex bears no relation to ability to contribute or perform in society. *Id*. at 686.
[390] *See e.g.*, Williams, *supra* n. 10, at 13–26 (highlighting older patients experience unequal treatment based on ageist stereotyping in healthcare); *see also*, Monique Williams, *supra* n. 160. at 443–452 (explaining elderly patients are treated differently in both treatment and clinical research based on ageist stereotyping).
[391] *See Windsor*, 699 F.3d at 181 (describing the second factor in determining a new suspect class is whether the class as experienced a history of discrimination).

the position of women, elders are placed beneath older workers and patients. Because the Court has rendered sex a suspect class because of sex stereotyping, the Court must also render age a suspect class.

2. Age Does Not Frequently Bear a Relation to Ability to Contribute or Perform

The second factor in rendering new suspect classes is whether the suspect class "frequently bears a relation to ability to perform or contribute to society."[392] The Court has held a person's sex has no bearing on a relative ability to perform or contribute to society.[393] Similarly, because chronological *age* does not render an elderly person sick, lazy, or unable to work, age bears no relation to any ability to contribute or perform in society. [394]

When individuals engage in ageist stereotyping, they are equating age—the number of years—with a decrease in physical ability, a lack of mental capability, being unable to adapt, or being disabled and/or ill.[395] La-Roche perceived chronological age reduced Sperling and the other employees to unproductive and less likely to acquire skills.[396] However, research indicates that it is not chronological age; rather, it is the illness, the disability, or the person's personality that render him less physically able, less mentally equipped, and less healthy. [397] Nonetheless, both

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[392] *Windsor*, 699 F.3d at 181.
[393] *Frontiero*, 411 U.S. at 686.
[394] *See* Butler, *supra* n. 15, at 7 (describing chronological age is an imprecise indicator of physical, mental, or emotional status); *see also*, Williams, *supra* n. 10, at 17–18 (arguing even well-intentioned physicians may use "chronological age" as a proxy for physical age).
[395] *Id*.
[396] *See Sperling*, 924 F.Supp. at 1408–1409 (holding an employer's motivations that an older worker is less productive and less likely to acquire new skills is a ageist stereotype the ADEA is intended to eradicate).
[397] *See* Butler, *supra* n. 15, at 7 (describing chronological age is an imprecise indicator of physical, mental, or emotional status); *see also*, Williams, *supra* n. 10, at 17–18 (arguing even well-intentioned physicians may use "chronological age" as a proxy for physical age).

employers and healthcare practitioners engage in this ageist stereotyping, leading society to believe an inability to perform or contribute to society is correlated with age.

With respect to sex stereotyping, the Court is concerned with the inaccurate perceptions regarding women and their ability to perform or contribute to society.[398] Justice Bradwell's believed somehow a woman's sex renders her mentally incapable and unable to practice law.[399] The Court refuted this contention and held that such inaccurate notions about a woman's ability to perform or function in society have nothing to do with her sex.[400] Thus, the Court rendered sex a suspect class, in part, because of such discriminatory stereotyping.[401]

Similarly, many employers correlate chronological age with a decrease in productivity, energy, and ability to learn.[402] Somehow, chronological age, rather than another factor like disability, illness, or a lazy personality, renders an older worker lethargic and unproductive. A younger worker can be just as lazy or unproductive as an older person.[403] If a younger worker can be unproductive or lazy, it stands to reason, then, chronological age is not the culprit for laziness. Such stereotyping translates into discrimination.[404] Like sex, chronological age bears no relation to

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[398] *See Frontiero*, 411 U.S. at 684–688 (explaining the gross, stereotyped distinctions between the sexes lead women to be placed beneath men in society); *Virginia*, 518 U.S. at 534 (holding sex classifications cannot be used "to create or perpetuate the legal, social, and economic inferiority of women).

[399] *See e.g. Frontiero*, 411 U.S. at 684 (quoting *Bradwell*, 83 U.S. at 141).

[400] *Id*. at 686.

[401] *Id*. at 687–688.

[402] *See e.g.*, *Sperling*, 924 F.Supp. at 1408–1411 (demonstrating meritorious ADEA claims based on inaccurate ageist stereotyping based on the perceptions that older workers are less productive, less energetic, and unable to adapt); *see also*, *Hazen Paper*, 507 U.S. at 610 (holding the very essence of age discrimination is for an older employee to be terminated because his employer presumes productivity and competence decline with age).

[403] *See* Butler, *supra* n. 15, at 9 (explaining old and young people experience a full range of emotions and that is too easy to blame age when dealing with mental and emotional concerns later in life). Dr. Butler also notes older people remain productive late in life. *Id*. at 8.

[404] *See generally Hazen Paper*, 507 U.S. at 610 (holding Congress' concern in eradicating age discrimination connected with ageist stereotyping).

one's ability to perform or contribute.[405] Consequently, the Court's own precedent and logic, concerning sex not bearing any relation to ability to produce or contribute to society, age must be a suspect class as well.[406]

3. Age Is an Immutable Characteristic

The Court's third factor in creating a new suspect class applicable to age is whether the class demonstrates an immutable characteristic defining the group.[407] Age is an immutable characteristic. Though one's age changes over time, a person can never change his age at any given moment. When someone is fifty years old, he cannot change his age and miraculously become 56. He cannot challenge his age and automatically change it; he must wait to age.

The Court has held race an immutable characteristic because a person is born with a particular race and can never change it.[408] It is essentially irreversible and undeniable. Because a person cannot change an immutable characteristic, like someone's race and/or sex, when a person is discriminated against because of that immutable characteristic, a person is without options or alternatives.[409] Hence, the Court looks to whether a class demonstrates an immutable characteristic that defining the group.

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[405] *See generally* Butler, *supra* n. 15, at 7 (asserting chronological age is an imprecise indicatory for physical, mental, and emotional status). *See also*, *Frontiero*, 411 U.S. at 686 (holding the sex characteristic bears no relation to whether a woman can perform or contribute to society).

[406] *See Frontiero,* 411 U.S. at 686 (holding the sex characteristic bears no relation to whether a woman can perform or contribute to society); *see generally also*, Reaves *supra* n. 88, at 846 (noting legal arguments by analogy, the process of comparing items to demonstrate a similarity, is a fundamental principle of legal reasoning).

[407] *Windsor*, 699 F.3d at 181.

[408] *See Frontiero*, 411 U.S. at 686 (arguing sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth).

[409] *See id*., (arguing the imposition of barriers upon sex, because sex is an immutable characteristic, is at odds with a basic concept of our system that barriers should bear some relationship to individual responsibility).

Like race and sex, age is also an immutable characteristic. Although one's age does change over time, a person who is seventy cannot decide he wants to be forty-one again and change his age. In this way, his age is irreversible. Consequently, when an ageist employer relies on his employee's chronological age of seventy to determine he is automatically unproductive and unable to learn, the seventy year old is without recourse.[410] He cannot turn twenty-three and change his employer's mind.

Similarly, when an ageist doctor relies on his chronological age in assuming he will be a problematic patient and thus quickly transfers him to a different hospital,[411] the seventy-year-old cannot do anything about his age to change the doctor's mind. He is seventy and thus problematic,[412] so he is transferred. Again, he cannot turn twenty-three. Age is then an immutable characteristic that defines the elderly, and the Court's precedent regarding the immutability characteristic dictates age to become a suspect class.[413]

Three out of the four qualifications in the Court's creating a new suspect class directly apply to age. Therefore, the Court should logically treat ADEA cases with more scrutiny. If the Court relies on precedent and legal analogy,[414] then age must be, at least, treated like a suspect class. Like the Court's acknowledgment of sex stereotyping translating into discriminatory treatment, thus dictating sex becoming a suspect class,[415] the Court's acknowledgment and evidence of ageism necessarily dictate

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[410] *See generally*, *Sperling*, 924 F.Supp. at 1408–1411 (highlighting Sperling stated a cause of action under the ADEA by demonstrating La-Roche relied on ageist stereotyping when terminating employees). Because age is immutable, Sperling could not change his age the moment La-Roche engaged in stereotyping and change La-Roche's mind. *Id*.

[411] Williams, *supra* n. 10, at 13.

[412] *Id*.

[413] *See Windsor*, 699 F.3d at 181 (articulating one of the factors in determining a new suspect class is whether the characteristic is immutable).

[414] *See* Reaves *supra* n. 88, at 846 (noting legal arguments by analogy, the process of comparing items to demonstrate a similarity, is a fundamental principle of legal reasoning).

[415] *See Frontiero*, 411 U.S. at 684–688 (holding gross, stereotypes concerning sex translated into sex discrimination and held sex classifications, like race classifications, are suspect and must therefore be reviewed with strict scrutiny).

ADEA cases to be reviewed with more scrutiny. Consequently, the Court would respect the intent of the ADEA to eradicate ageist stereotyping[416] and afford older workers greater protection.

IV. CONCLUSION

Ageism is everywhere—particularly in the healthcare and employment. The elderly are constantly discriminated through gross, inaccurate ageist stereotyping.[417] Healthcare practitioners engage in ageism whenever rely on such inaccurate stereotyping to make healthcare decisions. Moreover, older workers experience the same ageism when employers automatically correlate chronological age with a decrease in productivity, energy, and ability acquire new skills.[418]

Unfortunately, the Court's jurisprudence concerning the ADEA[419]—the federal statute enacted to remove ageist stereotyping from the workforce[420]—fails to protect older workers. The Court's interpretation of the ADEA to exclude a disparate treatment, mixed-motive framework perpetuates ageism.[421] An employer can avoid liability simply by articulating a non-age

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[416] *See Hazen*, 507 U.S. at 610 (explaining Congress enacting the ADEA over its concern of ageist stereotyping).

[417] *See e.g.*, *Sperling*, 924 F.Supp. at 1408–1411 (noting three motivations/reasons given by the employer for terminating older workers were stereotypical: perceiving older workers as less productive, less energetic, unable to learn, and unable to adapt); Williams, *supra* n. 13, at 13–26 (highlighting older patients experience unequal treatment based on ageist stereotyping in healthcare); *see also*, Monique Williams, *supra* n. 207 at 443-452 (explaining elderly patients are treated differently in both treatment and clinical research based on ageist stereotyping). *See also*, Butler *supra* n. 8, at 7–15 (asserting the elderly are discriminated against through inaccurate stereotyping, particularly through the notion that chronological age is an indicator of physical, mental and emotional status).

[418] *See generally*, *Sperling*, 924 F.Supp. at 1408–1411 (noting La-Roche engaged relied on ageist stereotyping when presuming older workers are less productive, less energetic, and unable to acquire new skills).

[419] 29 U.S.C. §623.

[420] *See Hazen*, 507 U.S. at 610 (explaining Congress enacting the ADEA over its concern older workers were being denied employment based on ageist stereotyping).

[421] *See Gross*, 577 U.S. at 175.

related motivation/reason for the employment action—even if the employer also engaged in ageism.[422] Moreover, the RFOA defense allows employers to shield use of ageism because an employer can claim an obviously age-related practice is reasonable and unrelated to age.[423]

As a result, the Court's ADEA jurisprudence perpetuates ageism and age discrimination. The Court has undercut Congress' attempt to eradicate the inaccurate stereotyping of older workers.[424] As a possible remedy, the Court should treat ADEA cases with more scrutiny, thereby affording respect to the intent of the ADEA to eradicate ageist stereotyping and discrimination. To do so, the Court should acknowledge age meets three of its four factors in granting heightened protection.[425]

First, the elderly have experienced historic discrimination through ageism, particularly through employment and healthcare. Second, age bears no relation to ability to perform or contribute to society, as chronological age is a poor indicator of abilities. Lastly, age is an immutable characteristic—one cannot automatically change one's age. At any specific moment in time, one's age is irreversible. Consequently, Supreme Court precedent should better respect the intent to eradicate age stereotyping under the ADEA and treat age with greater scrutiny.

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[422] *Supra* Pt. III(B)(1–2).
[423] *Supra* Pt. III(B)(1–2).
[424] *See supra* Pt. III(B)(1–2) (demonstrating the lack of a mixed-motive framework and the RFOA allow ageism to persevere throughout the ADEA).
[425] *Windsor*, 699 F.3d. at 181.