PROTECTING AGING INMATES FROM DISCRIMINATION: AN APPROACH TO REHABILITATIVE DIGNITY

Christopher J. Merken*

INTRODUCTION

Staff misconduct in federal prisons is “widespread, tolerated and routinely covered up or ignored.” 1 Misconduct comes in many forms, and may include serious offenses such as guards sexually assaulting or harassing inmates; 2 guards physically assaulting inmates; 3 and guards overlooking inmate-on-inmate violence; 4 and, less serious misconduct, like a guard accepting a bribe to smuggle contraband into a prison. 5

The dignity of inmates is not generally corrections officers’ top concern, and while pro bono counsel and nonprofits litigate to remedy serious misconduct, some areas of inmate discrimination and dignity-stripping are ignored or overlooked. One such area is age discrimination in federal prisons, which is not

* J.D. Candidate, 2020, Villanova University Charles Widger School of Law; B.A. 2017, University of Delaware. I thank my parents, Laurie Rogers and Gary Merken; my sister Katie Merken; and my girlfriend Sarah Emslie, for their support and encouragement. I also thank Emily Mendoza and the staff of the Denver Law Review for their terrific feedback throughout the writing process. All errors are my own.
1 Timothy Williams, Misconduct in Federal Prisons is Tolerated or Ignored, Congressional Report Says, N.Y. TIMES, Jan. 4, 2019.
3 See, e.g., Press Release, Department of Justice, Office of Public Affairs, Former Louisiana Corrections Officers Sentenced for Roles in a Conspiracy to Cover up Abuse of Inmates (May 15, 2019), https://www.justice.gov/opa/pr/former-louisiana-corrections-officers-sentenced-roles-conspiracy-cover-abuse-inmates (describing two former corrections officers in Louisiana who were sentenced in a conspiracy to cover up physical abuse of inmates, including the impermissible use of a chemical agent on inmates).
prohibited by the Federal Bureau of Prisons’ (BOP) nondiscrimination policy. The policy, last updated in 1999, states that BOP staff “shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief.” This means that these enumerated classifications cannot serve as the basis for administrative decisions, such as decisions regarding access to work, housing, and other prison programs. But the BOP may discriminate on the basis of age, or any other unenumerated classification.

Case law indicates that protections against age discrimination do not exist when a federal agency administers its own funds. Of the cases that address this topic, none have satisfactorily analyzed the Equal Protection Clause argument. Rather, each court has simply said that federal agencies are entitled to administer their own funds however they see fit. Consequently, any prison training program or activity that uses BOP funding—which is arguably most of them—may discriminate against inmates on the basis of age. At bottom, a federal inmate who is discriminated against on the basis of age is left without recourse or protection.

My proposal is twofold. First, amend the BOP discrimination policy to include age as a protected category. Second, apply 42 U.S.C. § 6102—the Age Discrimination Act of 1975—to federal agencies administering their own funds in programs such as vocational training for inmates. Without a shift in policy, federal prisons administering BOP funds have carte blanche to implement arbitrary age cutoffs. This proposal would ultimately protect inmates from arbitrary age discrimination in work training programs, as well as myriad other opportunities (i.e., group therapy, educational programming, etc.).

I. REVISING THE BOP’S NONDISCRIMINATION POLICY

There is no authoritative list of federal agencies, so it is impossible to conduct an agency-by-agency analysis to determine which nondiscrimination policies each agency follows. Although not a generally applicable nondiscrimination policy like the BOP’s (which effectively covers all BOP operations and interactions with inmates), the federal government’s equal opportunity employment policy is exemplary of common nondiscrimination policies. It reads:

---

7 Id.
8 See id.
10 See id.
11 See id.
The United States Government does not discriminate in employment on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. Many major U.S. cities, including Philadelphia, New York City, and Chicago, have similar nondiscrimination policies that include age as a protected category.

A. Background: Age Discrimination and the Constitution

According to the Supreme Court, age is not a suspect class worthy of strict scrutiny review under the Equal Protection Clause. Lower courts have upheld age-barring technical training programs in prisons, stating such barriers could satisfy a rational basis standard of review—even though such barriers have involved irrational, arbitrary standards typically disallowed under rational basis.

In *Marshall v. Federal Bureau of Prisons*, the district court determined that an HVAC training program, a program limited exclusively to young inmates, promoted a laudable goal and satisfied rational basis review. Yet, this conclusion overlooked the fact that the program was available only to inmates between the ages of eighteen and twenty-five.

The same district court applied identical reasoning in *Forrester v. Federal Bureau of Prisons*. In *Forrester*, a forty-five-year-old inmate wanted to participate in the HVAC training program. The program was restricted to inmates between the ages of eighteen and twenty-five. Citing the same cases as *Marshall*, the court ended its inquiry upon determining the challenged action—barring

---

19 Marshall, 518 F. Supp. 2d at 196.
20 Id.
22 Id. at *2.
23 Id.
inmates over the age of twenty-five—was rationally related to a legitimate government interest.\textsuperscript{24}

And, in \textit{Sanders v. United States},\textsuperscript{25} the district court sua sponte dismissed the inmate’s pro se age discrimination claim and did not grant him leave to amend.\textsuperscript{26} In \textit{Sanders}, the court discussed the federal prohibition on age discrimination in programs receiving federal funding,\textsuperscript{27} but it relied on unrelated and non-precedential decisions to hold that this policy did not apply to the BOP.\textsuperscript{28} Unfortunately, there was insufficient guidance for the \textit{Sanders} court to follow in addressing the issue of age discrimination in federal prisons.

These three cases—\textit{Marshall}, \textit{Forrester}, and \textit{Sanders}—were brought by pro se litigants. This prevailing theme in inmate age discrimination cases raises the question of whether each inmate could have made a cognizable claim if they had counsel. Notably, inmates’ access to the courts has been continuously restricted.\textsuperscript{29} Pro se litigants may easily find themselves “confused and overwhelmed, if not frustrated and bitter.”\textsuperscript{30} They struggle to “comply[ ] with procedural rules, understand[ ] substantive legal concepts, articulate[ ] relevant factual allegations, and simply know[ ] how to proceed with their action.”\textsuperscript{31} Many inmates “enter prison with literacy and language deficits that disable their ability to properly marshal evidence and advocate on their own behalf.”\textsuperscript{32} These factors, among many others, “prejudice[] all pro se litigants . . . in obvious and subtle ways.”\textsuperscript{33} While this essay does not suggest policy changes to aid inmate litigants, the context in which inmates litigate age discrimination cases is relevant to this discussion.

\textbf{B. Critiques of Cases Involving Age Discrimination and the Constitution}

In \textit{Marshall}, \textit{Forrester}, and \textit{Sanders}, the courts did not apply the standards required of rational basis review. Under rational basis review, the State may not rely upon a classification “whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”\textsuperscript{34}

\begin{thebibliography}{99}
\bibitem{id} Id.
\bibitem{no} No. 17CV1218NLHKMW, 2018 WL 918889 (D.N.J. Feb. 16, 2018)
\bibitem{id at *3} Id. at *3.
\bibitem{42 USC § 6102} 42 U.S.C. § 6102.
\bibitem{Sanders, 2018} Sanders, 2018 WL 918889, at *2.
\bibitem{id at 306} Id.
\bibitem{id at 306} Id. at 306.
\bibitem{Martin} Michael W. Martin, Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis, 80 \textit{Fordham L. Rev.} 1219, 1225 (2011).
\bibitem{id at 1226} Id. at 1226.
\bibitem{id at 1226} City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985); \textit{see also} Reed v. Reed, 404 U.S. 71, 76 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”); Craig v. Boren, 429 U.S. 190, 200 (1976) (invalidating state statute requiring men to be twenty-one and women to

158

\[\text{Volume 97}\]
In *Marshall*, the court ignored the arbitrary nature of the age cutoff, which should have rendered the program unconstitutional under rational basis review. In *Forrester*, the court again failed to consider the arbitrary and irrational nature of the delineation. And in *Sanders*, there was insufficient guidance for the court to follow in addressing the issue of age discrimination in federal prisons. In each case, the court recognized a government interest in training youth offenders but failed to acknowledge why this government interest disappears when an offender turns twenty-six.

Classifying inmates between eighteen and twenty-five as “youth offenders” is an arbitrary, irrational distinction. Is a twenty-six-year-old inmate any less of a “youth” offender than a twenty-five-year-old inmate? What if the inmate was eighteen when he committed his offense but at the age of thirty, with his prison release date in sight, decides to apply for the HVAC training program? What if the program is full and an inmate tries, unsuccessfully, for years to gain entry, only to “age out” when she is no longer considered a “youth” offender? Labeling inmates between eighteen and twenty-five as “youth” offenders and treating them differently in terms of access to programs and services is arbitrary and should fail even rational basis review.

### C. Examples of the Age Discrimination Act in Other Contexts

Federal courts have “routinely held that the [Age Discrimination Act of 1975] does not apply to federal agencies administering their own funds.” For example, in *Maloney v. Social Sec. Admin.*, the Second Circuit considered whether the Age Discrimination Act applied to the Social Security Administration. The court reasoned that no provision of the Age Discrimination Act suggests that a federal agency comes within the Act’s reach. It relied heavily on the interpretation of Title VI of the Civil Rights Act of 1964 in another Second Circuit case, where that court held “Title VI does not apply to programs directly administered by the federal government.” Finding the language of the Age Discrimination Act “functionally identical” to Title VI, the Second Circuit held that the Act “does not apply to a federal agency implementing a federal program.” The U.S. District Court for the District of North Dakota has also adopted this interpretation.
In another case, *Cottrell v. Vilsack*, the U.S. District Court for the District of Columbia analyzed age discrimination against a farmer under the Production Flexibility Contract program and the Conservation Reserve Program. The court held that allegations of age discrimination in federal programs “simply does not apply to programs, like those at issue here, that are conducted directly by a federal agency using its own budget.”

And, in *Bolden v. United States*, the U.S. District Court for the Northern District of Illinois applied the reasoning in *Maloney* to evaluate conduct undertaken by the Internal Revenue Service, Department of the Treasury, and Social Security Administration. There, the district court simply stated: “the [Age Discrimination] Act does not apply to federal agencies implementing federal programs.” But the district court conducted no analysis of that statement, it simply agreed with a circuit court to which it owed no deference. Taking this statement at face value, without further analyzing whether the Second Circuit was correct in *Maloney*, does a disservice to the litigants and fails to recognize that the Second Circuit might have been wrong in its analysis.

District courts should conduct the rigorous constitutional analysis such a discriminatory program demands. And when the court conducts that analysis, it should be clear that such a discriminatory program is arbitrary and fails rational basis review.

D. Analysis of the Age Discrimination Act

The few cases discussing age discrimination in federal prisons focus their analyses primarily on a comparison between the Age Discrimination Act and Title VI of the Civil Rights Act. But the Age Discrimination Act should stand on its own, and be analyzed on its own. Further, that analysis should result in the application of the Act to federal agencies administering their own funds.

Importantly, a section of the Age Discrimination Act, 42 U.S.C. § 6103, discusses actions that are excluded from the Act. If Congress intended to exclude federal agencies from compliance with section 6102, it had the ability—in section 6103(b)—to do so. It did not. If courts read the statute to exclude the federal government from compliance with the Age Discrimination Act, where the federal government expressly did not exclude itself, that reading would fundamentally

---

44 See id. at 84.
45 Id. at 91.
47 Id.
48 Id. at *5 (citing *Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 75–76 (2d Cir. 2008)).
49 See supra notes 18–19 and accompanying text.
50 See supra notes 38–42 and accompanying text.
51 It should be uncontroversial to propose a court analyze a statute on its own merits, and not simply adopt part and parcel analysis of a different statute. Title VI had different remedial intentions than the Age Discrimination Act, and courts should not read the two statutes as identical.
weaken the remedial power of the statute to protect individuals from age discrimination.

II.  JOB TRAINING, REHABILITATION, AND INMATE DIGNITY

A.  Rehabilitation as a Goal of Punishment

Many first-year law students learn the five major goals of punishment: (1) deterrence; (2) retribution; (3) rehabilitation; (4) incapacitation; or (5) societal condemnation of the conduct. Rehabilitation as a theory of punishment enjoyed its heyday in the late nineteenth and twentieth centuries, but its appeal has since waned. One commentator attributes this decline to "the practical complexity, coupled with the extreme moral complexity, of refashioning human character to cabin or obliterate criminal instincts."

But "rehabilitation improves the lives of inmates, helping them to succeed upon reentering society" and vocational training programs in particular can "increase job market success following incarceration and reduce the chance that former inmates will end up behind bars in the future." Rehabilitation does not just benefit individual inmates who may avoid recidivism due to prison job training programs, it also benefits society at large by making the former inmate less likely to commit crimes that would harm society. And, rehabilitation reduces the personal and societal costs—beyond economic ones—that come from incarcerating repeat offenders.

Inmate labor, and its rehabilitative results, can be found throughout U.S. history. One scholar who traces the history of inmate labor commented that:

At one time superintendents of labor and industry, prison officials today are more like peacekeepers in a hostile land. Once busy working, prison inmates today sit idle. By almost all accounts, the modern penitentiary is an ominous and forbidding place where violence exists side by side with enervating tedium.

Such commentary suggests the benefits of prison vocational training programs in reducing violence and occupying inmates. While chain gangs and prisoner labor benefitting the state is not of rehabilitative value, there is value in helping inmates

---

54 Id.
55 Id.
57 Id.
59 Id. at 340.
learn a skill that is marketable upon their release.\textsuperscript{60} By promoting this kind of inmate work education, the system can rehabilitate inmates, reduce recidivism, and mitigate idleness and violence inside the prison.\textsuperscript{61}

\textbf{B. Inmate Dignity}

While litigation on behalf of inmates attempts to ameliorate the detrimental effects of incarceration,\textsuperscript{62} inmates unquestionably lose rights when they are convicted and sentenced.\textsuperscript{63} But inmates should not lose their right to dignity. Dignity for convicted and incarcerated individuals is a frequent topic of scholarship. For convicted individuals, the conversation focuses mostly on dignity in sentencing.\textsuperscript{64} For inmates serving their sentence, though, areas of inmate dignity scholarship include: whether to shackle female inmates during labor and childbirth,\textsuperscript{65} whether—and to what extent—female inmates should have access to

\textsuperscript{60} See id. at 341–42 (“The dominant images of prison labor today depict inmates working on chain gangs, which have once again begun to appear on southern and western roads, or dutifully stamping license plates in prison workshops. These images may arouse different reactions, but both are the product of a common history. Moreover, both portray the inmate laboring for the benefit of the state, which is the sole employer and beneficiary of his labor. Things were not always this way. In fact, at one time, prisoners worked for private firms and the goods they produced were offered for sale on the open market for all to buy. The chain gang and the license plate thus reflect a dramatic transformation of the structure of prison labor, from free market to state monopoly. This transformation lies behind the modern prison’s infrastructure of idleness.”)

\textsuperscript{61} Professor Garvey’s article, supra note 58, does not directly support the contention that reducing inmate idleness will reduce inmate violence, but it does suggest such.


menstrual hygiene products;\textsuperscript{66} what constitutes forced prison labor;\textsuperscript{67} whether compassionate releases for elderly inmates are appropriate;\textsuperscript{68} and how to prevent sexual assault and harassment of inmates.\textsuperscript{69}

An underexplored area of inmate dignity is the dignity to work and to prepare for re-entry into society.\textsuperscript{70} While there is significant scholarship about rehabilitation as a goal of incarceration,\textsuperscript{71} scholars have paid little attention to how the rehabilitative effects of prison work training programs can improve the dignity of incarcerated individuals.\textsuperscript{72} There is inherent dignity in working, and thus an inherent lack of dignity when preventing incarcerated individuals from working.\textsuperscript{73}

Prohibiting inmates from working or learning skills like HVAC repair on the arbitrary basis of their age does not benefit the prison, does not enhance the inmate’s dignity, and discriminates in a manner that would be impermissible outside the walls of a prison.

CONCLUSION

My proposal to amend the BOP discrimination policy to include age as a category of discrimination and to eliminate age restrictions in BOP job-training programs would increase the dignity of incarcerated individuals and aid in their rehabilitation. These changes may reduce recidivism and produce productive members of society while conforming to federal employment nondiscrimination policies. Further, a statutory modification prohibiting federal programs from discriminating on the basis of age would protect older inmates from age discrimination in all BOP-funded programming, and result in a fairer and more just prison system for all inmates.


\textsuperscript{68} See, e.g., Jalila Jefferson-Bullock, Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders, 79 OHIO ST. L.J. 937 (2018).


\textsuperscript{70} See Garvey, supra note 58.

\textsuperscript{71} See supra notes 55–60 and accompanying text.

\textsuperscript{72} For an interesting discussion of the application of Title VII to inmates, see Jackson Taylor Kirklin, Note, Title VII Protections for Inmate: A Model Approach for Safeguarding Civil Rights in America’s Prisons, 111 COLUM. L. REV. 1048 (2011). This essay does not address Title VII concerns, however future scholarship should address the intersection between an inmate’s right to work and their Title VII rights.