When is Age Discrimination a Human Rights Violation?

Gerald L. Neuman* & Abadir M. Ibrahim**

Introduction

Chronological age[1] is a social construct that reflects physical and biological regularities as well as interactions with social structures. Human beings are born, grow and develop, and eventually die, sometimes abruptly and often with a preceding decline. Individuals age differently, but ages correlate with certain statistically likely generalizations, either worldwide or within particular populations. While genetic engineering or technological hybridization may lead to different generalizations at some future date, for now we live in the present.

Legal systems commonly use chronological age as a factor in the design of rules, in light of generalizations perceived as relevant. Legal systems also increasingly regulate the use of chronological age in governmental or social practices. Disapproved age-based conduct is described as "age discrimination," which may involve discrimination against older persons in particular or against other age groups as well.[2] Not all age distinctions amount to age discrimination in legal terms, but rather law provides exceptions and standards of justification and leaves some activities unregulated.

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* J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard Law School. This Article, like the others in this Issue, results from the Human Rights Program's November 2022 Workshop on Discrimination on the Basis of Chronological Age, organized by Professor Neuman and Professor Benyam Dawit Mezmur, in collaboration with the Harvard Human Rights Journal. The authors are grateful for the insights of all the participants in the Workshop and for the contributions of the editors of the Journal and Kai Mueller to the success of this project. And special thanks to Professor Mezmur for being an ideal partner in the undertaking.

** Associate Director of the Human Rights Program, Harvard Law School.

1. "Chronological age" refers to the measurement of time since birth, often measured in years, which are a cultural construct with an astronomical basis. Chronological age may be distinguished from other time-related concepts including biological age and psychological age. *See* Richard A. Settersen, Jr. & Bethany Godlewski, *Concepts and Theories of Age and Aging*, *in* Handbook of Theories of Aging 9, 10 (Vern L. Bengtson & Richard A. Settersen, Jr. eds., 3d ed. 2016).

2. In this Article, "age discrimination" refers to actions or policies that unjustifiably favor or disfavor persons of any specific age, or persons within a restricted range of ages ($x>A$, $x<B$, or $C<x<D$), in comparison with people substantially younger than them, in comparison with people substantially older than them, or in comparison with both. The Article will not consider other conceivable forms of "age discrimination," such as discrimination against people born in odd-numbered years, or people born in a disfavored zodiacal year, or relative age effects within a cohort. Nor will it consider the issue of justice to future generations.

Age discrimination has received attention in international human rights law, which seeks to universalize norms at the global or regional level. That raises the question of how much uniformity and how much room for variation there should be in the implementation of a concept of discrimination that potentially covers the full range of the human lifespan across many societies. This question prompted the workshop that led to the present Issue of the Harvard Human Rights Journal, and it provides the focus for this Article.

Age discrimination law originated in employment law, primarily for the protection of middle-aged and older workers, before expanding unevenly in three dimensions: from employment to other fields of private and public action, from older workers to age in general, and from direct to indirect discrimination (roughly speaking, from intentional discrimination to actions with discriminatory effect). Some of these expansions have been incomplete, leaving sectors, ages, or types of discrimination uncovered, for good or bad reasons. Some of these expansions have been inadvertent or unconsidered.

Consistent with their origin, some "age discrimination" statutes protect only individuals within a specified range of ages, such as those over forty years old. A norm may also provide asymmetric protection for individuals. For example, the norm may protect individuals only against discrimination that favors persons younger than them, or (if the protected group is young) only against discrimination that favors persons older than them. Limitations of this kind presume a particular pattern of discrimination—either within a sector or in society generally—and aim to prevent it, rather than to prevent "age discrimination" in the abstract. Instead, an age-discrimination norm may be written generally and interpreted literally. Or, like major human rights treaties, it may not mention age at all, but may be written broadly—for example, by referring to "status" discrimination[3]—and interpreted as including age without limitation.

This Article first describes some of the positive law frameworks on age discrimination at the national and international levels. Section I looks at examples from the United States, whereas Section II looks at existing human rights treaties. Stepping back from positive law, Section III(A) discusses the normative purpose or purposes served by antidiscrimination rules. Section III(B) then examines four complementary reasons for questioning a generalized prohibition of direct discrimination on the basis of chronological age as a human right, and proposes instead a more selective

3. *See* International Covenant on Civil and Political Rights Arts. 2(1), 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights Art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; [European] Convention for the Protection of Human Rights and Fundamental Freedoms Art. 14, Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR]; African Charter on Human and Peoples' Rights Art. 2, Jun. 27, 1981, 21 I.L.M. 58 [hereinafter ACHPR]; *cf.* American Convention on Human Rights Art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36 [hereinafter ACHR] (using the term "social condition").

approach. Finally, Section IV shows that the argument for selectivity applies even more strongly to indirect discrimination.

I. U.S. Law of Age Discrimination

This Section gives a general overview of U.S. laws on age discrimination. It offers them not as the ideal, but rather to illustrate domestic practice, and in light of the significant role that the United States has played in the diffusion of age discrimination law and the concept of "ageism."[4]

In the United States, statutory regulation of age discrimination is usually sector-specific and often asymmetrical. The federal Age Discrimination in Employment Act ("ADEA")[5] came later than the Civil Rights Act of 1964, which contains a prohibition of employment discrimination on the basis of race, color, religion, sex, or national origin ("Title VII").[6] The ADEA responded to the well-documented difficulties of older workers in finding or keeping employment. The act protects only individuals over the age of forty and only with regard to employment. Through later amendments, the ADEA largely eliminates mandatory retirement.[7] The Supreme Court has held that the ADEA forbids discrimination that favors people who are younger than forty, as well as discrimination based on age within the protected class but only if the discrimination favors the younger of the two employees.[8] The ADEA includes an exemption from disparate impact liability for practices based on "reasonable factors other than age," which the Supreme Court has described as broader than the corresponding Title VII defense, "consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[9] Neither the prohibition of discrimination in public accommodations in Title II of the Civil Rights Act nor the prohibition of housing discrimination in Title VIII covers discrimination based on age.[10] In 1975, Congress adopted an Age Discrimination Act, narrower in coverage than its name suggests, which prohibits the administrators of programs that receive federal financial assis-

4. The term "ageism," modeled on racism, was coined by Dr. Robert Butler in 1969. *See* World Health Org., Global Report on Ageism xix (Mar. 18, 2021), https://apps.who.int/iris/rest/bitstreams/1336324/retrieve [https://perma.cc/M6BN-GWTL]; Robert N. Butler, *Age-Ism: Another Form of Bigotry*, 9 Gerontologist 243 (1969). One of the present authors had the good luck to meet Dr. Butler in the 1970s.

5. 29 U.S.C. § 621 *et seq.*

6. 42 U.S.C. § 2000e–2.

7. *See* Howard C. Eglit, Age Discrimination § 4.16 (2d ed. 2022); Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158, 167–68 (1989).

8. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 590–92 (2004).

9. *See* Smith v. City of Jackson, 544 U.S. 228, 240–41 (2005); Meacham v. Knolls Atomic Power Lab'y, 554 U.S. 84, 102 (2008).

10. 42 U.S.C. § 2000a (prohibiting discrimination on grounds of race, color, religion or national origin in places of public accommodations); 42 U.S.C § 3604 (Title VIII) (prohibiting discrimination in sale or rental of dwellings on grounds of race, color, religion, sex, familial status or national origin).

tance from discriminating on the basis of age with regard to their beneficiaries.[11] This Age Discrimination Act does not apply to programs directly administered by the federal government, and it does not prohibit programs that statutorily establish age criteria for benefits.[12] It also does not prevent subsidized programs from "reasonably tak[ing] into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program," or from basing decisions on a "reasonable factor other than age."[13] Unlike the ADEA, this statute is not limited to a determined category of older persons, but the courts have not yet fully settled whether it prohibits "reverse age discrimination" in the sense of discrimination that favors someone older than the alleged victim.[14]

The Labor Department report that paved the way for the ADEA noted that twenty states had already enacted statutes regulating aspects of age discrimination in employment. Most of these statutes specifically protected workers over the age of forty, although some also protected younger workers.[15] Today, nearly all states have laws prohibiting age discrimination by employers; roughly half of these are limited to people forty or older.[16] Often, age has been included in a general antidiscrimination law that also covers other sectors such as housing, places of public accommodation, and credit, either across the board or for specific sectors.[17] In some instances the forty-year age limit from the employment context carries over to another sector.[18] A minority of states have added age to their public accommodations statutes.[19]

The U.S. Supreme Court does not regard age discrimination as a substantial issue of constitutional equality. Instead, the Court evaluates age discrimination of all kinds under the rational basis test, the highly deferential

11. 42 U.S.C. §§ 6101–07. *See* Teneille R. Brown et al., *Should We Discriminate Among Discriminations?*, 14 St. Louis U. J. Health L. & Pol'y 359, 379–80 (2021). The statute regulates access to benefits of the subsidized program, not employment by the program. 42 U.S.C. § 6103(c).

12. 42 U.S.C. § 6107(4) (defining "program or activity"); § 6103(b)(2) (excluding statutory benefit criteria from being violations).

13. 42 U.S.C. § 6103(b)(1) (excluding use of these factors from being violations); *see* Stoner v. Young Concert Artists, Inc., 626 F. App'x 293, 295–96 (2d Cir. 2015) (discussing the permitted use of age as a proxy).

14. Long v. Fulton Cnty. Sch. Dist., 807 F. Supp. 2d 1274, 1284–85 (N.D. Ga. 2011).

15. U.S. Dep't of Labor, The Older American Worker, Age Discrimination in Employment: Report of the Secretary of Labor, Research Materials 116 (1965).

16. *See, e.g.*, Iris Hentze & Rebecca Tyus, *Discrimination and Harassment in the Workplace*, Nat'l Conf. of State Legislatures (Aug. 12, 2021), https://www.ncsl.org/labor-and-employment/discrimination-and-harassment-in-the-workplace [https://perma.cc/N8JH-BLGD].

17. *See* Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 Geo. Mason L. Rev. 545, 560–61 & nn.114–15 (2013).

18. *See, e.g.*, Ohio Rev. Code Ann. §§ 4112.01(A)(14) (West 2021), 4112.02(A), (G) (West 2023) (making definition of age as forty or older apply both to employment discrimination and discrimination in public accommodations).

19. *See State Public Accommodation Laws*, Nat'l Conf. of State Legislatures (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/VFZ2-NWQ3]. In California, age was added by judicial construction. *See* Candelore v. Tinder, Inc., 228 Cal. Rptr. 3d 336, 341–42 (2018).

standard of review that it applies to the vast host of ordinary distinctions drawn by legislation. In *Massachusetts Board of Retirement v. Murgia*, the Court observed that "the aged" had not been subjected to a history of discrimination comparable to groups that needed stronger judicial safeguards, and that "old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span."[20] The Court has upheld ADEA provisions regulating state employment as a matter of federal authority over commerce and has held that Congress cannot rely on its special power to enforce the equal protection clause as a basis for enacting remedies against states that violate the ADEA.[21]

II. Human Rights Treaties and Age Discrimination

International human rights treaties both at the global and regional levels vary in their antidiscrimination provisions. Some treaties, such as the International Covenant on Civil and Political Rights ("ICCPR") and the three basic regional treaties, address discrimination on a very broad range of grounds.[22] Other treaties are dedicated to discrimination on a particular ground and spell out a series of specific obligations considered particularly relevant to that ground.[23] The broad general provisions often list a series of regulated grounds of discrimination, with the addition of a residual category, such as "other status."[24] For example, ICCPR Article 26 requires protection against discrimination "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Other broad general provisions are stated abstractly, as in ACHR Article 24: "All persons are equal before the law.

20. Mass. Ret. Bd. v. Murgia, 427 U.S. 307, 313–14 (1976) (citation omitted) (upholding mandatory retirement age for state police officers).

21. EEOC v. Wyoming, 460 U.S. 227, 243 (1983); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000).

22. *E.g.*, ICCPR, *supra* note 3, Art. 26; ACHPR, *supra* note 3, Art. 2; ACHR, *supra* note 3, Art. 24; ECHR, *supra* note 3, Art. 14.

23. *E.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Organization of American States, Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance, June 5, 2013, T.S. No. A-68.

24. ICCPR Arts. 2 and 26, ICESCR Art. 2(2), Convention on the Rights of the Child Art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], ACHPR Art. 2, ECHR Art. 14, and Protocol No. 12 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, E.T.S. 177, set out a list including "other status." ACHR Art. 1(1) has a list including "other social condition." Article 5(2) of the Convention on the Rights of Persons with Disabilities [hereinafter CRPD] refers to discrimination "on all grounds," but Article 8 on "Awareness-raising," contains a provision requiring states parties "[t]o combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life." CRPD Art. 8(1)(b), Mar. 30, 2007, 2515 U.N.T.S. 3.

Consequently, they are entitled, without discrimination, to equal protection of the law."[25]

The scope of the provisions also varies in another dimension. Some provisions are "accessory" in the sense of regulating only discrimination with respect to human rights already protected substantively by the treaty, as in ECHR Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . ." Other provisions, such as Article 1(2) of Protocol 12 of the ECHR, stating that "[n]o one shall be discriminated against by any public authority on any ground such as . . . ," are "independent" in the sense of regulating discrimination without regard to the enumeration of rights in the treaty.[26]

The principal treaties do not list age as a regulated ground of discrimination,[27] and instead age has been recognized as an "other status" (or the equivalent). If one asks how a specific numerical age qualifies as a "status," the answer is that the treaty term "status" is not seen as strictly limiting the scope of the antidiscrimination provisions. The European Court of Human Rights ("ECtHR"), for example, has explained its interpretation of "status" as covering a wide range of personal characteristics that need not be inherent, including place of residence,[28] employment as a judicial

25. ACHR, *supra* note 3, Art. 24; *see* ACHPR, *supra* note 3, Art. 3.

26. *See* Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 604 (2d ed. 2005). The prohibitions of discrimination in Articles 2 and 3 of the ICCPR, Article 2 of the ICESCR, Article 14 of the ECHR, Article 1 of the ACHR, and Article 2 of the ACHPR are written as accessory. The prohibitions in Article 26 of the ICCPR, Article 1 of Protocol 12 to the ECHR, Article 24 of the ACHR, and Article 3 of the ACHPR are independent.

27. *But see* CRPD, *supra* note 24, regarding CRPD Art. 8. In addition, a few specialized regional treaties do explicitly prohibit age discrimination. Article 3 of the Inter-American Convention on Older Persons broadly prohibits age discrimination against a category of "older persons," and Article 1(1) of the Inter-American Convention Against All Forms of Discrimination and Intolerance, with only two parties, includes "age" in a long list of prohibited grounds of discrimination. *See* Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, T.S. No. A-70; Inter-American Convention Against All Forms of Discrimination and Intolerance, June 5, 2013, T.S. No. A-69. In contrast, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (not yet in force), the CRC, the African Charter on the Rights and Welfare of the Child, and the African Youth Charter do not explicitly prohibit discrimination on grounds of age against children or youth. *See* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, Jan. 31, 2016, (not yet in force), https://au.int/sites/default/files/treaties/36438-treaty-0051_-_protocol_on_the_rights_of_older_persons_e.pdf [https://perma.cc/249H-ZS5C]; CRC, *supra* note 24; African Charter on the Rights and Welfare of the Child, July 1, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999); African Youth Charter, July 2, 2006, (entered into force Aug. 8, 2009), https://au.int/sites/default/files/treaties/7789-treaty-0033_-_african_youth_charter_e.pdf [https://perma.cc/AH5X-W6FZ]. The Ibero-American Convention on the Rights of Youth, covering persons between fifteen and twenty-four does not explicitly prohibit age discrimination against youth, but one provision (Art. 27) guarantees youth equal working and union rights with other workers. Ibero-American Convention on the Rights of Youth Art. 27, Oct. 10/11, 2005, (entered into force Mar. 1, 2008). https://www.refworld.org/docid/4b28eefe2.html [https://perma.cc/7GMU-636P].

28. Baralija v. Bosnia and Herzegovina, App. No. 30100/18, Eur. Ct. H.R., ¶ 47 (Oct. 29, 2019).

clerk,[29] being a prisoner serving a determinate sentence of more than fifteen years,[30] and being a fisherman engaged in coastal fishing as opposed to open sea fishing.[31]

The Human Rights Committee, which monitors compliance with the ICCPR, is less transparent about the form of analysis that it applies to claims under the independent provision, ICCPR Article 26.[32] Often, its decisions avoid discussion of whether the alleged discrimination involves an "other status" and reject the claim on the ground that the differential treatment appears to be justified.[33] Some of these decisions appear open to the possibility that differential regulation of a particular occupation would count as "other status." A few decisions have found a violation based wholly on arbitrary official action against an individual, possibly with reference to the clause of Article 26 that guarantees "equality before the law,"[34] while other decisions dismiss Article 26 claims for failing to identify a regulated ground of discrimination.[35] The Committee's views point to several examples of "other status," including nationality,[36] irregular immigration status,[37] age,[38] disability,[39] sexual orientation,[40] former members of the armed forces of a foreign state,[41] socio-economic status,[42] and the distinc-

29. Pinkas v. Bosnia and Herzegovina, App. No. 8701/21, Eur. Ct. H.R., ¶¶ 59–60 (Oct. 4, 2022).

30. Clift v. United Kingdom, App. No. 7205/07, Eur. Ct. H.R., ¶¶ 61–63 (July 13, 2010).

31. Posti and Rahko v. Finland, App. No. 27824/95, Eur. Ct. H.R., ¶¶ 83–84 (Sept. 24, 2003).

32. *See* Niels Petersen, *The Implicit Taxonomy of the Equality Jurisprudence of the UN Human Rights Committee*, 34 Leiden J. Int'l L. 421, 430 (2021) (criticizing the Committee's jurisprudence as vague and inconsistent).

33. *E.g.*, Human Rights Committee [hereinafter HRC], Gonçalves v. Portugal, U.N. Doc. CCPR/C/98/D/1565/2007, ¶¶ 7.2–7.5 (Mar. 18, 2010) (upholding differential tax on tips earned by croupiers); HRC, Ngapna v. Cameroon, U.N. Doc. CCPR/C/126/D/2035/2011, ¶ 10.5 (July 17, 2019) (upholding preference for graduates of national training school over graduates of foreign training schools).

34. *E.g.*, HRC, Kavanagh v. Ireland, U.N. Doc. CCPR/C/71/D/819/1998, ¶¶ 10.2–10.3 (Apr. 4, 2001); HRC, Pezoldova v. Czech Republic, U.N. Doc. CCPR/C/76/D/757/1997, ¶¶ 11.2–11.6 (Oct. 25, 2002). *See generally*, Carla Edelenbos, *The Human Rights Committee's Jurisprudence Under Article 26 of the ICCPR: The Hidden Revolution*, *in* International Monitoring Mechanisms: Essays in Honour of Jacob Th. Möller 77 (Gudmundur Alfredsson et al. eds., 2d ed. 2009); Petersen, *supra* note 32, at 437.

35. *E.g.*, HRC, X v. Denmark, U.N. Doc. CCPR/C/114/D/2389/2014, ¶ 6.4 (July 22, 2015); HRC, Hamida v. Canada, U.N. Doc. CCPR/C/98/D/1544/2007, ¶ 7.4 (Mar. 18, 2010).

36. *E.g.*, HRC, Klain v. Czech Republic, U.N. Doc. CCPR/C/103/D/1847/2008, ¶ 8.3 (Nov. 1, 2011); HRC, Vandom v. Republic of Korea, U.N. Doc. CCPR/C/123/D/2273/2013, ¶ 8.4 (July 12, 2018).

37. HRC, Toussaint v. Canada, U.N. Doc. CCPR/C/123/D/2348/2014, ¶¶ 11.7–11.8 (July 24, 2018).

38. HRC, Love v. Australia, U.N. Doc. CCPR/C/77/D/983/2001, ¶ 8.2 (Mar. 25, 2003).

39. HRC, Q v. Denmark, U.N. Doc. CCPR/C/113/D/2001/2010, ¶ 7.3 (Apr. 1, 2015).

40. Although the Committee initially characterized discrimination based on sexual orientation as discrimination based on sex, it has recently seemed to treat discrimination based on sexual orientation as a freestanding ground. *Compare* HRC, Toonen v. Australia, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 8.7 (Mar. 31, 1994), *with* HRC, C. v. Australia, U.N. Doc. CCPR/C/119/D/2216/2012, ¶ 8.4 (Mar. 28, 2017).

41. HRC, Tsarjov v. Estonia, U.N. Doc. CCPR/C/91/D/1223/2003, ¶ 7.4 (Oct. 26, 2007).

42. HRC, Mellet v. Ireland, U.N. Doc. CCPR/C/116/D/2324/2013, ¶ 7.11 (Mar. 31, 2015).

tion between state-run or non-political public events and privately organized political events.[43]

Given the vast range of characteristics—intimate or commercial, durable or transient, juridical or social—covered as "other status," differentiation on the basis of "status" has highly varying relevance to legitimate policy goals, highly varying effects, and highly varying susceptibility to abuse. In international law, prohibited discrimination is typically distinguished from permissible differential treatment by means of a standard of justification, and the stringency of the justification required depends on the features of the challenged measure. In some cases, the standard of justification is heightened because of the ground of discrimination claimed, while in other cases it is heightened because of the subject matter of the discrimination. For example, the ECtHR has explained that in cases involving voting and candidacy, distinctions limiting eligibility to vote require stronger justification than those limiting eligibility to run for office.[44] But when eligibility for office is restricted based on ethnic origin or race, the most stringent standard of proportionality must be applied.[45] Other listed categories—such as sex, language, religion, political opinion, property, or birth—prompt varying degrees of protection. Distinctions based on an "other status" also vary in the strength of justification required, and some are examined more strictly than some of the listed categories. When the rights claim is particularly weak and the criterion of distinction raises no special concerns, the standard of justification may be reduced to whether the differential treatment is "manifestly without reasonable foundation."[46]

Moreover, in situations where the demand for justification would otherwise be stronger, the ECtHR may find that greater leeway is warranted (a wider "margin of appreciation") because a European consensus supports the differential treatment, or because European practices diverge greatly. Conversely, where differential treatment in a state falls below the standard reflected in a European consensus, the margin of appreciation may be narrowed. For example, in its recent analysis of discrimination against same-sex couples in *Fedotova v. Russia*, the ECtHR held that states had a narrow margin of appreciation regarding positive legal recognition of relationships, in view of the clear ongoing trend among member states, but a wider margin of appreciation regarding the form that recognition takes, in

43. HRC, Toregozhina v. Kazakhstan, U.N. Doc. CCPR/C/126/D/2311/2013, ¶ 8.7 (July 25, 2019). More precisely, the Committee held unlawful a distinction between public events of a social and political nature organized by NGOs and state-run or non-political events. *Id.* ¶¶ 8.6–8.8.

44. *See* Özgürlük ve Dayanişma Partisi (ÖDP) v. Turkey, App. No. 7819/03, Eur. Ct. H.R., ¶ 30 (Oct. 22, 2012).

45. Sejdić and Finci v. Bosnia and Herzegovina, App. Nos. 27996/06 & 34836/06, Grand Chamber, Eur. Ct. H.R., ¶¶ 43–44, 56 (Dec. 22, 2009).

46. *See, e.g.*, Difference in the treatment of landowners' associations set up before and after the creation of an approved municipal hunters' association, Advisory Opinion P16-2021-002, Eur. Ct. H.R., at 27–30, 34 (July 13, 2022).

view of the diversity of national approaches to same-sex marriage and its alternatives.[47]

The ECtHR has identified "age" as an "other status" category, but distinguished it from categories such as ethnic origin, gender, and sexual orientation for which a higher standard of justification is required.[48] The Court has accepted as nondiscriminatory the use of bright-line age rules for particular purposes, including a statute exempting criminal defendants aged sixty-five years or over from the imposition of a life sentence[49] and a maximum age of thirty-five for special housing benefits intended to encourage "young families" to have children.[50] It has also approved a policy making a forty-year age difference between a proposed adopter and adoptee an important factor indicating that the adoption would not be in the best interests of the child.[51] On the other hand, the Court found a violation of equality in a judicial decision that denied compensatory damages to two children—aged eleven and thirteen—for the death of their sister, purely on the ground that they were under fourteen and therefore too young to have suffered substantially from her death, without giving them an opportunity to testify.[52] The ECtHR noted that "without basing its findings on expert reports or any psychological evaluations . . . [the national court] set an arbitrary minimum age of fourteen years as a starting point for feeling pain and being negatively affected by the loss of their sister."[53]

At the global level, the treatment of age discrimination by the Human Rights Committee is opaque and unelaborated, aside from the general phrasing that differential treatment must be based on "reasonable and objective criteria,"[54] which by now presumably includes some form of proportionality. The Committee recognized age as an "other status" category under ICCPR Article 26 in *Love v. Australia*, where it upheld a sixty-year retirement age for airline pilots as a widespread practice aimed at maximizing flight safety.[55] It implicitly rejected the argument that the age-based rule was rendered unreasonable by the alternative option of individualized testing of pilots over sixty, which Australia had subsequently adopted.[56] In contrast, the Committee found that differential compulsory retirement ages

47. Fedotova and ors. v. Russia, App. Nos. 40792/10, 30538/14, 43439/14, Grand Chamber, Eur. Ct. H.R. ¶¶ 187–89 (Jan. 17, 2023).

48. Šaltinytė v. Lithuania, App. No. 32934/19, Eur. Ct. H.R., ¶ 63 (Oct. 26, 2021).

49. Khamtokhu and Aksenchik v. Russia, App. Nos. 60367/08, 961/11, Grand Chamber, Eur. Ct. H.R., ¶¶ 81, 85–88 (Jan. 24, 2017). The differential treatment was challenged by younger defendants sentenced to life imprisonment.

50. Šaltinytė v. Lithuania, App. No. 32934/19, Eur. Ct. H.R., ¶¶ 79-82 (Oct. 26, 2021).

51. Schwizgebel v. Switzerland, App. No. 25762/07, Eur. Ct. H.R., ¶¶ 91–99 (Oct. 9, 2010).

52. Deaconu v. Romania, App. No. 66299/12, Eur. Ct. H.R., ¶¶ 32–39 (Jan. 29, 2019).

53. *Id.* ¶ 36.

54. *See* HRC, Love v. Australia, U.N. Doc. CCPR/C/77/D/983/2001, ¶ 8.2 (Mar. 25, 2003); HRC, Canessa Albareda and ors. v. Uruguay, U.N. Doc. CCPR/C/103/D/1637/2007 et al., ¶ 9.2 (Oct. 24, 2011).

55. HRC, Love v. Australia, U.N. Doc. CCPR/C/77/D/983/2001, ¶ 8.3 (Mar. 25, 2003).

56. *See id.* ¶ 4.13.

in Uruguay for two similar categories of civil servants amounted to age discrimination in violation of Article 26, after the state failed to explain what justified the ten-year difference.[57]

Despite the sparse jurisprudence and the lack of guidance, the Human Rights Committee has insisted in its concluding observations on state reports that states should adopt "comprehensive anti-discrimination legislation that prohibits all forms of direct, indirect and multiple discrimination, based on all prohibited grounds of discrimination, including age . . . in all public and private spheres."[58] It is far from clear what the Committee is asking the states to do, and why.[59]

III. Chronological Age and Direct Discrimination

To gain a critical perspective on the positive law, this Part begins with a discussion of the purposes served by antidiscrimination law and how they relate to actual human rights treaties. Against this background, it discusses some of the ways in which age differs from other bases of distinction addressed by antidiscrimination law, and argues that international human rights law ought to take these differences into account.

A. Discrimination in Theory

Theorists have put forward a variety of answers to the question of what makes *direct* discrimination, or particular kinds of direct discrimination, wrongful. Seeking a common feature in classical instances of discrimination, some argue that it is morally wrong to disadvantage people for reasons that are immutable and therefore not under their control.[60] Other authors see the wrong more generally in disadvantaging people arbitrarily, without good reasons.[61] A more nuanced group of rationales, previously persuasive in U.S. constitutional law, emphasizes the wrongfulness of treating a person or group as having lower moral status than others, or as not entitled to equal respect and concern.[62] Differential treatment of groups that have suf-

57. HRC, Canessa Albareda and ors. v. Uruguay, U.N. Doc. CCPR/C/103/D/1637/2007 et al., ¶¶ 9.3–9.4 (Oct. 24, 2011). In an earlier case, the Committee had upheld the unexplained use of age as a criterion for dismissal in the reorganization of a government agency in Peru, prompting a dissent from several Committee members that it was failing to examine the reasonableness of the differentiation. HRC, Hinostroza Solís v. Peru, U.N. Doc. CCPR/C/86/D/1016/2001, ¶ 6.4 (Mar. 27, 2006).

58. *E.g.*, HRC, Concluding Observations, Hong Kong, China, U.N. Doc. CCPR/C/CHN-HKG/CO/4, ¶ 9 (Nov. 11, 2022).

59. *See* Gerald L. Neuman, *Questions of Indirect Discrimination on the Basis of Religion*, 34 Harv. Hum. Rts. J. 177, 191–92 (2021) (making a similar point about religious discrimination).

60. *See, e.g.*, Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1519–20 (2011).

61. *See, e.g.*, Re'em Segev, *Making Sense of Discrimination*, 27 Ratio Juris 47, 54 (2014) (explaining the central wrong of discrimination in terms of an obligation to take account of morally significant facts and not to take account of morally insignificant facts).

62. *See, e.g.*, Benjamin Eidelson, Discrimination and Disrespect 73–74 (2015); Deborah Hellman, When Is Discrimination Wrong? 29–33 (2008).

fered prejudice, hostility, or systematic neglect are particularly likely to transgress this principle. Proponents of this latter approach may reject the idea that the inaccuracy or arbitrariness of a policy, without more, inflicts discrimination-specific harm.[63]

Perhaps, as some have argued, no single account captures the wrongfulness of discrimination, but rather a combination of such explanations is required.[64] Moreover, governments may have stricter obligations than individuals. They may have stronger duties to treat people with equal respect and concern,[65] and there may be a specific duty of government not to disadvantage people without a legitimate public purpose.

Theorists also disagree on whether *indirect* discrimination is morally wrong for the same reasons why direct discrimination on the same ground is wrong, or wrong for different reasons, or not morally wrong at all.[66] Some argue that indirect discrimination is morally wrong when it adds to the disadvantages of an existing pattern of social injustice.[67] Some arguments emphasize a duty of society as a whole, or of the government, to prevent indirect discrimination, as part of a holistic project of substantive equality needed to rectify structural injustice.[68] Laws against indirect discrimination have also been defended instrumentally as a supplement to laws prohibiting direct discrimination, to overcome the difficulty of proving hidden motives.[69]

Even if a particular category of discrimination is not morally wrong, preventing it may be useful as a matter of government policy. Some legal guarantees of equality do not reflect moral imperatives.[70]

Against this background, it should be recognized that the substantive provisions of human rights treaties do not necessarily represent the direct translation of a philosophically precise principle into operative positive law.[71] Instead, the drafting of these provisions may involve compromises among the views of states and stakeholders. The jurisprudence developed under such provisions may be informed by moral conceptions, but also by other considerations of text, context, and effectiveness.

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63. *See, e.g.*, Deborah Hellman, When Is Discrimination Wrong? 121–37 (2008) (arguing that arbitrariness in policy is not the same kind of injustice as wrongful discrimination).

64. *See, e.g.*, Patrick S. Shin, *Is There a Unitary Concept of Discrimination?*, *in* Philosophical Foundations of Discrimination Law 180 (Deborah Hoffman & Sophia Moreau eds., 2013).

65. *See, e.g.*, Ronald Dworkin, Justice for Hedgehogs 330 (2011).

66. *See, e.g.*, Tarunabh Khaitan & Hugh Collins, *Indirect Discrimination Law: Controversies and Critical Questions*, *in* Foundations of Indirect Discrimination Law 1, 5–7 (Tarunabh Khaitan & Hugh Collins eds., 2018).

67. *See, e.g.*, Deborah Hellman, *Indirect Discrimination and the Duty to Avoid Compounding Injustice*, *in* Foundations of Indirect Discrimination Law 106 (Tarunabh Khaitan & Hugh Collins eds., 2018).

68. *See, e.g.*, Sandra Fredman, *Substantive Equality Revisited*, 14 Int'l J. Const. L. 712 (2016).

69. *See, e.g.*, Benjamin Eidelson, Discrimination and Disrespect 46–48 (2015).

70. For example, consider "most favored nation" provisions in international trade agreements, and the guarantees of equal representation of states in the U.S. Senate. *See* U.S. Const. Art. I, § 3, Art. V.

71. *See* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 Stan. L. Rev. 1863, 1868 (2003).

Accordingly, general antidiscrimination provisions may be understood as simultaneously embodying more than one approach to the wrongfulness of discrimination. Some groups in society may be especially in need of protection from denial of respect and concern. Unequal restriction of certain human rights may amount to a strong instance of denial of respect and concern even for a group that is not more widely subjected to discrimination. Additionally, an antidiscrimination provision may serve as a baseline guarantee against willful exercises of government power that serve no legitimate public purpose. The ECtHR's application of a "manifestly without reasonable foundation" standard to certain cases of alleged discrimination may illustrate such a baseline guarantee.[72]

B. How is Age Different?

This Section describes four complementary reasons for hesitancy about treating direct discrimination on the basis of chronological age as closely analogous to direct discrimination on the basis of race, gender, religion, or sexual orientation and affording strong international protection against it. First, the Section discusses some general reasons relating to the fact that everyone ages. Second, it points out that the conceptualizations of age and the life span prevalent in developed Western states are not universal, as illustrated by the different conceptualizations present in some traditional societies. Third, it questions the justification for strong protection at intermediate ages in societies where most adults do not suffer systematic disadvantage. Fourth, it discusses some issues regarding direct discrimination among or against children, in light of the existing international regime of the rights of the child.

To be clear, this discussion does not suggest that direct discrimination on the basis of chronological age should be exempt from international equality norms or that ages (or various ranges of ages) should not be considered an "other status" regarding general policies or with regard to denial of an internationally protected right. Rather, the discussion relates to the intensity of the demand for justification when distinctions are made on the basis of chronological age or specific age categories.

1. *Ages Change*

For purposes of antidiscrimination law, chronological age has certain unusual characteristics. One's age is not subject to one's control but changes continually as long as one lives. People pass from one age to another by the mere passage of time—in one direction only.

In various portions of the age spectrum, many policy-relevant characteristics correlate with chronological age. Some of these correlations have physiological bases. Others reflect longevity—within appropriate age ranges,

72. Difference in the treatment of landowners' associations Advisory Opinion, *supra* note 46, ¶ 94.

chronological age often correlates with experience and cumulative accomplishment, as well as with cumulative records of misconduct, because the passage of time increases the opportunity for their accrual. Longevity also correlates with decreasing life expectancy. Some correlations result from social structures or legal regimes in a given society that channel people at different ages into or away from particular activities.

Given these correlations, age is often used as a single proxy—or as a factor in a composite proxy—for another characteristic that is difficult to measure directly or that involves predicting the future. The usefulness of such proxies depends on a comparison with alternative options, including the cost, accuracy, and intrusiveness of more individualized assessments. A bright-line age rule may also serve a notice function in the regulation of interactions between individuals, for example by requiring an adult to ascertain that a child is above a certain age, rather than to evaluate the child's maturity.[73] An intermediate option may also be to use a particular age as the trigger for requiring an individualized assessment, as in the case of vision tests for renewing a driver's license after the age of sixty-five.[74]

All three of these methods—using age as a single proxy, as a factor, and as a trigger—raise potential issues of direct discrimination. If differentiation by age were always forbidden, none of these would be permissible. From the perspective of proportionality, it seems clear that using age as a single proxy, and denying a benefit as a result, is more "restrictive" than using age as a factor or as a trigger.[75] Sometimes, however, use as a single proxy may be appropriate when the context requires a simple and immediate answer. Comparing use as a factor with use as a trigger in terms of restrictiveness seems more difficult, and the evaluation may depend on the details.

Measuring age by whole numbers of years breaks the continuous process of aging into conventional segments familiar in most cultures. This practical approximation should not be considered problematic per se. Fred Schauer's analysis of line-drawing on the basis of age cogently refutes the idea that a chronological age limit is arbitrary—in the sense of being irrational—merely because situations slightly above and slightly below the limit are assigned different outcomes that would not be empirically justified by a direct comparison of the two situations in isolation from the broader scheme of regulation.[76] If accurate statistical generalizations sup-

73. Jonathan Herring, *Should the standards used to evaluate the claims of discrimination based on age vary depending on the field(s) of activity to which the norm applies? When to use age and when to use capacity based approaches*, Harv. Hum. Rts. J. Online (Nov. 2022), https://harvardhrj.com/2022/11/should-the-standards-used-to-evaluate-the-claims-of-discrimination-based-on-age-vary-depending-on-the-fields-of-activity-to-which-the-norm-applies-when-to-use-age-and-when-to-use-capacity-bas/ [https://perma.cc/79FX-EDPE].

74. *See, e.g.*, Utah Code Ann. § 53-3-214(3)(d) (LexisNexis 2023).

75. *Cf.* Govind Persad, *Reforming Age Cutoffs*, 56 U. Rich. L. Rev. 1007 *passim* (2022) (arguing against minimum age cutoffs for benefit eligibility and in favor of combining age with other factors).

76. Frederick F. Schauer, Profiles, Probabilities and Stereotypes 115–17 (1st ed. 2003).

port the relationship between age and performance on a larger scale, then the justification of an age limit depends on its being a good place to draw the line, not on being the uniquely best place to draw the line.

Judicial suggestions that age discrimination is different from race or sex discrimination because people's ages continually change would appear to have some merit. First, policymakers have been young, and can foresee being older, so they may be better able to identify with individuals of other ages than with individuals of another race or sex. This is a contingent proposition, which may apply in some societies and not others. Second, a person who is burdened by a rule at one age may benefit from the rule at another age.

The academic literature on age discrimination highlights a contrast between two approaches to measuring equality: one that compares the situation at the particular point in time of individuals of different ages and one that compares individual lives taken over their whole duration.[77] Under the "complete lives" approach, an age-differential policy may not produce injustice because the disadvantage to people at one age may be outweighed by the advantage it gives to the same people at another age. Moreover, sometimes the temporary disadvantage is the cause of the later advantage, or the rule that creates the disadvantage is the cause of the earlier advantage. This analysis may also emphasize that people's needs typically vary over the course of their lifespan; therefore, a consistent policy may have inconsistent effects depending on the stage of life in which it is applied.

This "complete lives" approach may be particularly relevant to the allocation of a scarce resource such as an expensive medical treatment.[78] In the medical context, the earlier treatment may even have enabled the same individuals to survive to the age when the treatment is less likely to be made available to them. Regarding employment policy, it has been argued that the approach could justify differential assistance to young adults in finding their first jobs, to ensure their initial integration into the labor market.[79] This argument does not require a conclusion that young adults are systematically disadvantaged as a general matter in their society.[80] It is enough that their objective situation in the labor market creates a specific need for intervention in the labor market. Such intervention should not be obstructed by claims that it discriminates against those who have already had the opportunity to gain experience.

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77. *See* Juliana Uhuru Bidadanure, Justice Across Ages: Treating Young and Old as Equals 23 (2021); Axel Gosseries, *What Makes Age Discrimination Special? A Philosophical Look at the ECJ Case Law*, 43 Neth. J. Legal Phil. 59, 66–70 (2014).

78. *See* Norman Daniels, Just Health: Meeting Health Needs Fairly 171–81 (2008).

79. *See* Bidadanure, *supra* note 77, at 154–61; *see also* Gosseries, *supra* note 77, at 72.

80. To say this is not to deny that young adults *could* be systematically disadvantaged in general in a given society. If that is the case, then it would strengthen an argument for broader protection from discrimination against them.

The implications of the "complete lives" perspective for the evaluation of alleged discrimination are debated. From an international human rights perspective, the insights from this approach should not be overstated, and it would need to be applied in combination with respect for other rights of the individual.[81] Moreover, the appraisal of the advantages and disadvantages of a policy should not neglect the intensity of the disadvantage that the comparison is supposed to justify. Nonetheless, the insight provides a useful correction to an overly generalized demand for symmetry of treatment across one's life span, based on a mistaken analogy with different contexts where the advantages and disadvantages accrue to entirely distinct groups. It does not entail that differential treatment on the basis of age is never unjust. But it does more than merely illustrate that differential treatment by age can sometimes meet a stringent test of justification. It complicates the distinction between victims and beneficiaries of differential treatment, and calls attention to the negative effects that invalidating a challenged policy may have for members of the assumed victim class.

2. *Cultures May Conceptualize Age Differently*

Many of the practices involving chronological age arise in social settings that are industrialized and are either Western or globalized urban centers. Domestic and international legal norms designed to evaluate age distinctions in such settings may not be well suited to all societies. This stipulation is especially relevant in legally plural contexts where international human rights law and Western-inspired, often colonially imposed, legal systems share a social field with non-state legal and normative systems.[82]

Differences that are economy-, society-, or culture-specific would already be expected in systems that share a Western understanding of chronological age. For example, one can imagine how many of the standard examples of age discrimination assume a society with capitalist modes of production, publicly funded social security systems, a civil service, or a formalized public education system. The relevance of social and cultural differences is more acute, however, when it comes to the normative systems of age-set societies in which the understanding of time, seasons, chronological age, life-course transitions, and social roles operate in radically different ways.

In age-set societies—such as indigenous Mursi and Nuer communities inhabiting Ethiopia, Kenya, and South Sudan—chronological age, or mental or physical maturity, are not paramount in determining age-related social identity, status, or role.[83] Individuals join into an age-set through

81. *Cf.* Gosseries, *supra* note 77, at 67 (making a similar point in terms of accounts of justice).

82. *See generally* Sally Engle Merry, *Legal Pluralism*, 22 Law & Soc'y Rev. 869 *passim* (1988) (relying on notions of legal pluralism and semiautonomous social orders developed by Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 Law & Soc'y Rev. 719 (1973)).

83. David Turton, *Territorial Organisation and Age among the Mursi*, *in* Age, Generation and Time: Some Features of East African Age Organisations 95, 103–109 (P.T.W. Baxter & Uri Almagor

extensive collective initiation rituals. For the Mursi, these rituals take place roughly every fifteen years with some age-grade changes taking place in shorter intervals.[84] The Nuer, on the other hand, have periods of about six years that are open for initiation into one age-set, followed by about four "closed" years, which separate both initiation periods and age-sets.[85] Once an age-set is formed, it will constitute a cohort or an incorporated set of individuals whose social identity, status, and role are determined by the age-grades into which the group enters through a series of subsequent initiations.[86]

Individuals remain members of their age-set for life and are bound together with ties of social solidarity. The cohort of individuals that belong to that age-set will, in a manner of speaking, "graduate" together from one age-grade to another. The age-grade the cohort happens to be in at any one time determines the group's legal capacity (for example, to own cattle, to marry, to vote, to speak in public assemblies), socioeconomic roles (nursing sheep and goats, herding adult cattle, fighting wars), and even the part of the village or homestead they are allowed to reside in.[87]

The sequence of age-sets does correlate with chronological age. For instance, for both the Nuer and Mursi, initiation from childhood to adulthood begins when age-set members are roughly around their mid-to-late teens at which point they would be launched from homestead roles to independently herding cattle or joining war efforts.[88] Although marriageability is also attained at this time, Mursi and Nuer do not marry until they are able to accumulate enough bridewealth and find willing mates and in-laws.[89] One could also see some similarity between Western-style and age-set societies in the starkness of the passage from childhood to adulthood. Although the transformations are loosely linked in time with physiological development, just as one suddenly becomes an adult at midnight at age eighteen, one comes out of initiation rituals with radically transformed social and legal roles.

One could reject the entire social structure of these societies as age discrimination,[90] but short of that, evaluating particular practices within the society is not helped much by applying standard notions of ageism, stereotyping, and unjustified generalization to the allocation of roles among the

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eds., 1978); E.E. Evans-Pritchard, *The Nuer: Age-Sets*, 19 SUDAN NOTES & RECS. 233 *passim* (1936). *See generally* Anne Foner & David Kertzer, *Transitions Over the Life Course: Lessons from Age-Set Societies*, 83 AM. J. SOC. 1081 (1978).

84. Turton, *supra* note 83, at 105–107.

85. Evans-Pritchard, *supra* note 83, at 236.

86. Turton, *supra* note 83, at 103–09; Evans-Pritchard, *supra* note 83, at 233–35.

87. *See* Turton, *supra* note 83, at 103–107; Evans-Pritchard, *supra* note 83, at 235–38, 246–49, 261–68; Foner & Kertzer, *supra* note 83, at 1084–87.

88. Turton, *supra* note 83, at 104–106; Evans-Pritchard, *supra* note 83, at 234–35, 237, 254–59.

89. Turton, *supra* note 83, at 106; Evans-Pritchard, *supra* note 83, at 258.

90. Another example of what one might find objectionable is that the two age-set systems are exclusively male institutions wherein women's secondary roles are defined around or in relation to men.

age-sets that occupy different age-grades. The collective promotion of age-sets to higher responsibilities instead of individualized merit-based hiring may not pass the instrumental rationality of proportionality analysis, especially if the analysis treats the age-set as a demographic segment rather than a cohesive social group. Comparable Western practices—such as elevated minimum ages for certain political offices, various young adult age ranges for military conscription, and minimum ages for voluntary retirement at full pension—are likely to be upheld because they are common in modern societies, as age grades are not.

The example of age-sets illustrates the problem of applying the dominant global assumptions about age to societies that conceive of age differently. It adds a further reason for hesitation about stringent international review.

3. *Ages in the Middle*

Although some age discrimination laws regulate differential treatment on the basis of any chronological age, or any adult age, it is far from clear why international human rights law should require this. If older persons, suitably defined, form a vulnerable social group denied opportunities and respect and at great risk of poverty in most societies, it does not follow that all age categories face equivalent harm or prejudice. Evaluating the situation of different demographic segments is partly a normative question but also very dependent on empirical circumstances, which may vary considerably from society to society.

In the United States, the thirty-year-old beautician who was told that she was too young by a beauty salon at a retirement home in Oregon faced an isolated disadvantage to a generally favored age group, for job-specific reasons.[91] A thirty-five-year-old in another state who is unable to start a career as a firefighter because he has just exceeded a statewide age limit for initial hires would face a broader disqualification, but only from a particular physically strenuous vocation, and the age limit presumably decreased the competition he would have faced in an earlier application.[92] Including

91. *See* Ogden v. Bureau of Lab., 699 P.2d 189, 190 (Or. 1985), aff'g 682 P.2d 802 (Or. Ct. App. 1984). The courts in *Ogden* upheld the claim of age discrimination in employment under state law. The appeals court rejected a defense under a narrow standard of bona fide occupational requirement, observing that "[i]t may be true that clients averaging between 80 and 95 years of age would prefer the company of a person in mid-life, but there is nothing in this case to suggest that a younger person, otherwise qualified as a beautician, would disrupt the normal operation of petitioner's business." 682 P.2d at 810.

92. The description is drawn from *Jaksha v. Butte-Silver Bow County*, 214 P.3d 1248 (Mont. 2009), but that case was not actually decided under the state age discrimination statute because the age limit was itself statutory. The state supreme court found that the statutory age limit had no rational relationship to public safety and violated the equal protection clause of the state constitution. The state of Montana did not attempt to defend the statute, but rather left the dispute to the county. It is interesting to contrast *Jaksha* with the judgment of the European Court of Justice in *Wolf v. Stadt Frankfurt am Main*, Case C-229/08, 2010 E.C.R. I-00001 (Jan. 12, 2010), which upheld a 30-year age limit on the recruitment of firefighters as empirically justified, applying the standard of a European Union directive to a different factual record.

situations such as these in a strict prohibition of age discrimination extends the benefit of a rule designed for situations of more serious disadvantage to others who cannot make the same claim.

Extending protection against differential treatment to age categories that are not generally disadvantaged could be based on arguments other than the normative equivalence of the individual harm. Perhaps regulating differential treatment based on such ages contributes to an effort to discourage the social practice of attributing significance to chronological age, to protect people at ages when they are most disadvantaged by it. But in developed Western societies, where consideration of chronological age is so common and would often be relevant, one may be skeptical about whether the social practice would be undermined by adopting broad regulations and then upholding numerous exceptions. Covering the full age range may avoid disagreements and uncertainty over the age range for which protection is genuinely needed, or it may be politically expedient because making all voters beneficiaries increases political support for laws that also address the more serious forms of age discrimination. These pragmatic arguments might then be weighed against the costs of extending the protected categories, including the degree to which a broader statute would undermine the protection of the most disadvantaged categories.

The point that "age discrimination" should not be regarded as an undifferentiated phenomenon raises another issue. Not only may different societies exhibit systematic disadvantage at different ranges of the age spectrum, but certain age ranges may experience serious disadvantage only within certain sectors of activity. As the reader has probably noticed, the common U.S. threshold of forty years for protection against age discrimination in employment differs greatly from other definitions of "older persons," in the United States and internationally, because it was tailored to conditions of the U.S. job market.[93] It would be hard to argue that people in their forties constitute a systematically disadvantaged class across numerous policy domains in the United States.

Similarly, the existing regulation of age discrimination in European Union law limits itself to the employment sector.[94] Even the proposed EU directive from 2008 (which has not been adopted) would have extended protection only to certain sectors, with looser rules for age differentiation in

93. *See supra* Section I; 42 U.S.C. § 3607(b)(2) (defining "housing for older persons" by reference to ages 55 and 62, for exemption in Fair Housing Act); 42 U.S.C. § 3002 (15), (40) (defining "older individual" by reference to age 60 in protection against elder abuse); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, *supra* note 27, Art. 1 (defining "older persons" by reference to age 60); Inter-American Convention on Protecting the Human Rights of Older Persons, *supra* note 27, Art. 2 (defining "older person" presumptively by reference to age 60).

94. *See generally* Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L 303/16).

financial services and tolerance for "fixing of a specific age for access to social benefits, education, and certain goods and services."[95]

While these legal configurations are not necessarily ideal, and they have been criticized, they suggest a strategy that is different from a uniform prohibition based on an abstract notion of "ageism." A state could regulate direct discrimination based on age robustly in those sectors where it is needed, for the age ranges that are identified as needing protection in those sectors. These regulations could be supplemented by one or more guarantees against wholly arbitrary differentiation and of course by other protections of substantive rights. Such legislation should be periodically reconsidered to determine whether the need for protection has increased and coverage should be added. Some age ranges—such as a suitably defined category of "older persons"—may require protection across all sectors, but others may not.

Under such a strategy, international human rights review would examine the appropriateness of the regulatory system for the particular country but would not treat universal and uniform regulation of discrimination based on all chronological ages as the governing standard. Treaty body review of state reports provides a well-adapted method for dialogue about the configuration of a state's laws. Case-by-case adjudication in the regional human rights courts might incorporate procedural elements, requiring states to submit evidence of the studies or deliberations that underlie their regulatory conclusions. Either way, if the international body concluded that the state's evaluation of its own situation was appropriate, that conclusion would guide the analysis.

In short, human rights law should not view isolated instances of disadvantageous treatment based on chronological age, affecting age ranges that do not suffer systematic disadvantage, as necessitating substantial legal protection. They do not require the same level of justification as differential treatment of age groups that do suffer systematic disadvantage. The need for protection of particular age groups will vary from society to society. International human rights law should take this variability into account.

4. *Rights of the Child*

An additional complication is that some differential treatment by age may be *required* by human rights law. The ICCPR expressly prohibits states that maintain the death penalty from imposing it for crimes committed by persons below the age of eighteen.[96] The Convention on the Rights of the Child ("CRC") has some distinctions based on chronological age built into its text, and the Committee on the Rights of the Child ("CRC Commit-

95. *Commission Proposal for a Council Directive on implementing the principle of equal treatment irrespective of religion or belief, disability, age, or sexual orientation*, Art. 2(6), COM (2008) 426 final (July 2, 2008). The financial services exception would also apply to disability. *Id.* Art. 2(7).

96. ICCPR, *supra* note 3, Art. 6(5).

tee")—the treaty body that monitors compliance—has adopted others by interpretation. For example, the Convention's definition of "child" refers presumptively to the chronological age of eighteen years (Article 1) and refers both to age and maturity as criteria for the increasing weight that should be given to a child's views (Article 12). CRC Article 32 requires states to adopt "a minimum age or minimum ages" for employment, which the CRC Committee aligns with the International Labour Organization's standard of fifteen years generally for nonhazardous work and thirteen years for light work.[97] CRC Article 40 calls for a minimum age of criminal responsibility. The CRC Committee currently urges that this minimum be set at fourteen years or higher.[98] The CRC Committee also promotes a minimum age of legal consent to sexual activity.[99] Furthermore, the Committee insists on an absolute and exceptionless minimum age of eighteen for marriage, although marriage is protected as a human right for adults.[100] The Committee also favors a minimum age of eighteen for purchase and consumption of alcohol and tobacco.[101]

Some of these CRC age rules operate unequivocally in favor of the children they cover, while other age rules limit the autonomy of children to perform actions that will be lawful or even guaranteed as rights when they become older (as adults or older teenagers). Thus, the CRC regime does not consistently rely on individualized determinations of a child's maturity but sometimes encourages the use of minimum chronological ages as a mechanism to protect children by limiting their options.

The existence of these age rules in the treaty itself could be viewed in either of two contrasting ways. They may suggest the legitimacy of other age rules that are not explicit in the text, or they could be considered as exclusive exceptions to the impropriety of distinctions among children based on chronological age. Evidently the CRC Committee views them as nonexclusive, as shown by its favoring of an age of consent for sexual activity that is below eighteen.

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97. *See* U.N. Committee on the Rights of the Child [hereinafter CRC Committee], General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, U.N. Doc. CRC/C/GC/20, ¶ 84 (Dec. 6, 2016); ILO Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297.

98. *See* CRC Committee, General Comment No. 24 (2019) on children's rights in the child justice system, U.N. Doc. CRC/C/GC/24, ¶¶ 21–22 (Sept. 18, 2019).

99. *See, e.g.*, CRC Committee, General Comment No. 20, *supra* note 97, ¶ 40; CRC Committee, Concluding Observations, Iran, U.N. Doc. CRC/C/IRN/CO/3-4, ¶ 58 (2016) (recommending increase to sixteen years); John Tobin & Florence Seow, *Article 34 Protection from Sexual Exploitation and Sexual Abuse*, *in* THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 1310, 1321 (John Tobin ed., 2019).

100. *See* U.N. Committee on the Elimination of Discrimination against Women [hereinafter CEDAW Committee]) & CRC Committee, Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices, U.N. Doc. CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1, ¶ 20 (May 8, 2019) (revising a prior joint general comment from 2014, to eliminate the option for judicial approval of a mature adolescent's decision to marry).

101. *See* CRC Committee, *supra* note 97, ¶ 40.

In the drafting of the CRC, states consciously omitted any guarantee of the right to vote.[102] It would be hard to argue that seventeen-year-olds in a normal, peaceful democracy are denied the right to vote in order to protect them from harm. However, the issue of voting rights for children raises a difficult trilemma. If the minimum voting age is eighteen, then undoubtedly there are some individuals slightly below that age who have knowledge, experience, and intellectual qualifications just as strong as many people slightly above that age. That is often the case when age is used as a proxy for other characteristics. To argue from that observation to a conclusion of age discrimination, however, requires the identification of alternative voting criteria that would be more appropriate. First, direct examination of voters' understanding of politics and electoral processes would be highly susceptible to biased evaluation by incumbent officials, as the long history of "literacy tests" in the United States confirms.[103] The clarity and administrability of an age criterion is much safer, at least in a society where age is well documented.

Second, arguments for lowering the voting age fall into a kind of "infinite descent" fallacy—the same scrutiny that condemns age eighteen could be extended sequentially to age seventeen, age sixteen, or any lower age above zero. No sharp line uniformly distinguishes the abilities of children at any chosen age from the abilities of all children one year younger. Although a recent judgment of the New Zealand Supreme Court found the voting age of eighteen discriminatory, special features of the legal framework in New Zealand greatly simplified the Court's task in a manner that is not available at the international level or in most other states.[104] In New Zealand, the bill of rights defined the right against age discrimination as applying *only* to persons sixteen or older.[105] The Court therefore had a stopping point for its analysis.

Third, no one thinks that newborns have the capability to vote, and the only way to implement a voting right for literally all children would be by letting someone else, such as parents, vote on their behalf, as has indeed been proposed.[106] But voting as proxy for a child is not voting *by* a child, an objection that would be made immediately if this system were applied to

102. *See* Office U.N. High Comm'r Hum. Rts., *Legislative History of the Convention on the Rights of the Child*, U.N. Doc. HR/PUB/07/1, at 468 (2007).

103. *See, e.g.*, Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 Colum. Hum. Rts. L. Rev. 362, 370–76 (2014) (describing manipulation of literacy tests in order to disenfranchise Black citizens).

104. *See* Make It 16 Inc v. Attorney-General [2022] NZSC 134 at [45]–[57], [72]; *see generally* Claire Breen, *Voter Eligibility and Age Discrimination: The View From Aotearoa New Zealand*, 36 Harv. Hum. Rts. J. 299 (2023).

105. *See* Make It 16 Inc v. Attorney-General [2022] NZSC 134 at [14].

106. *See* Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 Minn. L. Rev. 1463, 1502–09 (1998); Warren Binford, *Instituting Children's Full Political Participation and Representation in the 21st Century United States*, Harv. Hum. Rts. J. Online (Nov. 2022), https://journals.law.harvard.edu/hrj/2023/07/instituting-childrens-full-political-participation-and-representation-in-the-21st-century-united-states/ [https://perma.cc/8HCW-X9JP].

seventeen-year-olds. Although there are interest-based arguments for why children may (often) benefit from such an indirect form of electoral representation, they do not respond to the claim that children should have the *same* voting rights as adults.

The examples given here may persuade some that the international framework of children's rights actually discriminates against children and should be reformed.[107] For others, including the present authors, they provide confirmation that distinctions based on chronological age can be both approximate and appropriate within a human rights analysis.

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The considerations in the preceding Sections militate against the extrapolation of an international framework for prohibiting age discrimination that is undifferentiated and modeled on race or gender discrimination norms. Once more, this is not an argument for excluding age from equality analysis altogether or for rejecting its treatment as an "other status." Rather, it is an argument for a more differentiated approach to direct discrimination on the basis of chronological age.

IV. Indirect Discrimination and Chronological Age

While the extension of direct discrimination analysis to the full spectrum of chronological age raises difficulties, even greater problems arise from the extension of indirect discrimination norms. As previously mentioned, many policy-relevant characteristics correlate with chronological age, either across the entire age spectrum or within particular age ranges.[108] If direct discrimination arguments prevent the use of chronological age as a proxy for such characteristics, indirect discrimination arguments could threaten the use of the characteristics themselves because they correlate with chronological age.

The viability of such challenges depends on the methodology employed in analyzing indirect discrimination. In the United States, disparate impact analysis is a feature of statutory rather than constitutional law, and in practice it is notoriously weak even for race and gender claims. The standard under the ADEA is even weaker, with the "reasonable factor other than age" defense. In international human rights law, the standard for evaluating

107. *See generally* Brian Gran, *The International Framework of Children's Rights Fosters Discrimination against Young People*, 36 Harv. Hum. Rts. J. 315 (2023).

108. Moreover, age discrimination litigation in the United States has raised issues about the proper definition of affected categories for statistical purposes, with concerns about the manipulation of group definitions to find disproportionate effect. *See* Marc Chase Allister, *Subgroup Analysis in Age Discrimination Cases: Striking the Appropriate Balance Through Age Cutoffs*, 70 Ala. L. Rev. 1073 *passim* (2019); Mahler v. Jud. Council of California, 282 Cal. Rptr. 3d 34, 59–60 (Cal. Ct. App. 2021). Some of the responses to these concerns rely on features of U.S. antidiscrimination doctrine that may not be available in other legal regimes.

indirect discrimination has been articulated in terms of proportionality, but its specific content has not been clearly elaborated. The Human Rights Committee did not explicitly apply the proportionality standard to indirect discrimination in an individual communication until a gender discrimination case in 2020, and there is considerable room for further explanation.[109] The European Court of Human Rights similarly understands the concept of indirect discrimination as involving the absence of "a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realized."[110] In European human rights law, proportionality analysis operates in conjunction with the margin of appreciation doctrine, which may increase the state's leeway with regard to certain subject matters or depending on the perceived presence or absence of a European consensus.[111]

To the extent that indirect discrimination on the basis of chronological age is adjudged in terms of proportionality, the outcome would depend on factors including the "weight" attributed to the age-related disadvantage and the normative importance of avoiding it. If there is a category of "older persons" who suffer systematic discrimination, then that discrimination may be likely to continue for the rest of their lives. Age-related disadvantages for other age groups may be temporary. Some of these may be mild and may be compensated by later advantage. Yet other disadvantages correlated with age may be isolated exceptions to a generally favorable situation. These variations suggest that a uniformly restrictive standard of justification for indirect discrimination with regard to all age ranges may not be appropriate. And if practical considerations make a simple, uniform standard necessary for all instances of indirect age discrimination, more questions arise about what it should be.

In contexts where indirect discrimination analysis imposes only a weak reasonableness requirement, it may not ultimately do much to obstruct responsible policymaking, and thus may operate as a baseline guarantee against government arbitrariness. Its main cost may be the expense of litigation to confirm the legitimacy of a regulation, which may include settlement to avoid the litigation.

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109. HRC, Genero v. Italy, U.N. Doc. CCPR/C/128/D/2979/2017, ¶¶ 7.4–7.6 (Mar. 13, 2020). The Committee found a 165 cm height qualification for permanent firefighters discriminatory because it excluded most women and included most men, because Italy had not given reasons why that height standard was needed and because Genero had successfully performed as a "temporary" firefighter for more than a decade. The Committee's discussion varies between discussing the applicable standard as proportionality, necessity, reasonableness, and objectivity. *See also* HRC, Ory v. France, Individual Opinion of Mr. Fabián Omar Salvioli (Concurring), U.N. Doc. CCPR/C/110/D/1960/2010, ¶¶ 7–8 (Mar. 28, 2014). For the Committee on Economic, Social, and Cultural Rights [hereinafter CESCR], see CESCR, Walters v. Belgium, U.N. Doc. E/C.12/70/D/61/2018, ¶¶ 12.1–12.7 (2021) (requiring the state to avoid disproportionate impact on the right to housing of a low-income older person, to the maximum of its available resources, and finding it "not unreasonable" given Belgium's high per capita income).

110. *E.g.*, D.H. v. Czech Republic, App. No. 57325/00, Grand Chamber, Eur. Ct. H.R. ¶ 196 (Nov. 13, 2007); Di Trizio v. Switzerland, App. No. 7186/09, Eur. Ct. H.R., ¶ 91 (Feb. 2, 2016).

111. *E.g.*, Di Trizio v. Switzerland, App. No. 7186/09, Eur. Ct. H.R., ¶ 81 (Feb. 2, 2016).

When indirect discrimination analysis involves more demanding review, however, there is ground for serious concern that empirically justified criteria will be disallowed because they correlate with age. The cost of such constraints on government policy and private activity could be acceptable if they are outweighed by their contribution to a substantive equality agenda, preventing or redressing harm to a systematically disadvantaged group in society. But there is no basis for a substantive equality agenda to redress presumed structural discrimination against people of every age.[112]

Even more than for direct discrimination, application of indirect discrimination norms to effects on every age range appears excessive. Parallel to the earlier suggestion (in Section III(B)(3)), human rights bodies should not take generally phrased nondiscrimination norms, or ambiguous references to "age," as a mandate for imposing the full machinery of antidiscrimination law at all ages and at all sectors of public and private activity.[113] States should be afforded the opportunity, subject to international monitoring, to determine where the relevant needs are found in their particular societies and to regulate accordingly, which may mean selectively.

Conclusion

Age is different from the characteristics for which international antidiscrimination law was first designed. Ages are different from each other, and age has different consequences in different sectors of activity and in different societies. That does not mean that human rights law should exclude chronological age from antidiscrimination analysis, but it does mean that analyses should be more nuanced. They should not simply be extrapolated from race or gender discrimination models or from employment discrimination law. Designers of human rights treaties, and interpreters of existing treaties, have reason to take this complexity into account.

112. *But see* Alexander Boni-Saenz, *Legal Age*, 63 B.C. L. Rev. 521 *passim* (2022) (discussing a hypothetical right to define one's own age subjectively as an element of chosen identity).

113. Indeed, these considerations call into question the reflexive assumption of the Human Rights Committee that all forms of "other status" require substantial legal protection against indirect discrimination accompanying protection against direct discrimination. Human rights law should not require states to eliminate every practice that has "disproportionate" adverse effect on every conceivable social grouping, let alone on every group of people who share an activity, such as croupiers, coastal fishers, or graduates of particular schools. But this is an issue to be pursued another time.