Is Age Exceptional? Challenging Existing Rationales and Exploring Realities

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Introduction

As a ground of discrimination, age is treated exceptionally. Late to more standardized protection, subject to more limited scrutiny, and suffused by exceptions, age as a ground of discrimination is treated differently than other grounds of discrimination, such as sex or race, at the national, regional, and international levels. The European Convention on Human Rights ("ECHR") treats age as a less suspect ground of discrimination,[1] and the European Union protects age subject to limited, various exceptions.[2] Express protection against age discrimination at an international level is weak. Only the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families expressly prohibits discrimination on the basis of age,[3] while all other core human rights instruments fail to expressly prohibit age discrimination.[4] Age as a ground of discrimination has been found to implicitly fall within the definition of "other status" in equal treatment provisions.[5] However, even this implicit protection is in dispute, and practice is "far from consistent among human rights bodies."[6] At a European regional level, explicit and implicit protec-

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1. Carvalho Pinto de Sousa Morais v. Portugal, App. No. 17484/15, Eur. Ct. H.R., ¶ 45 (July 25, 2017).

2. Marijke de Pauw et al., *Ageism and age discrimination in international human rights law*, *in* Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons 174, 184 (Israel Doron & Nena Georgantzi eds., 2018).

3. International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families Art. 1, Dec. 18, 1990, 2220 U.N.T.S. 3.

4. De Pauw et al., *supra* note 2, at 182.

5. At the European Convention on Human Rights, age falls within the concept of "other status" in Article 14. *See* Schwizgebel v. Switzerland, App. No. 25762/07, Eur. Ct. H.R., ¶ 85 (June 10, 2010); Khamtokhu and Aksenchik v. Russia, App. No. 60367/08 and 961/11, Eur. Ct. H.R. ¶ 62 (Jan. 24, 2017); Dudgeon v. United Kingdom, App. No. 7525/76, Eur. Ct. H.R., ¶ 117 (Oct. 22, 1981).

6. Office U.N. High Comm'r Hum. Rts. [hereinafter OHCHR], *Normative standards in international human rights law in relation to older persons*, at 8 (2012), https://social.un.org/ageing-working-group/documents/OHCHRAnalyticalOutcomePaperonOldePersonsAugust2012.doc [https://perma.cc/W9VN-X334].

tion is afforded under EU law[7] and the ECHR.[8] However, both sets of protection are subject to significant restrictions with respect to their application and their personal and material scope.[9] Although the European Commission has put forward proposals for more extensive protection, these proposals have been stymied for many years.[10] While there has been consistent reassurance from legislative and judicial bodies at a regional and international level that age as a ground for discrimination is not at the bottom of the hierarchy of discrimination grounds, the consensus still abounds that age is different and its scope needs careful demarcation.[11]

Those advocating for the differential treatment of age as a ground of discrimination often posit that age is different from other grounds of discrimination such as sex and race. To determine if this is true, the "constellation of factors"[12] which are used to justify certain grounds of discrimination or enforcing certain grounds to a greater or lesser extent are analyzed. Such factors include (1) that a ground should only be protected if it is an immutable characteristic or a fundamental choice, and (2) that it is attached to a historical legacy of relative disadvantage, or where the group in question is politically disenfranchised. This ad hoc approach has allowed the law to develop dynamically to meet societal expectations and demands.[13] This Commentary responds to the common argument that age does not satisfy this factorial test and therefore warrants exceptional treatment, by arguing that age does meet these criteria and should not be afforded exceptional treatment. Additionally, as discussed in Part III of this Commentary, other factors which are also often used to justify exceptonal treatment in the age

7. Charter of Fundamental Rights of the European Union Art. 21, Oct. 26, 2012, 2012 O.J. (C 326) 391 [hereinafter CFR]; Consolidated Version of the Treaty on the Functioning of the European Union Art. 19 (formerly Art. 13 of the Treaty Establishing the European Community), Oct. 26, 2012, 2012 O.J. (C 326) 49 [hereinafter TFEU]; Council Directive 2000/78, 2000 O.J. (L 303) 16–22 (EC).

8. [European] Convention for the Protection of Human Rights and Fundamental Freedoms Art. 14, Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR]; *see also* Benny Spanier et al., *Older Persons' Use of the European Court of Human Rights*, 28 J. Cross Cultural Gerontology 407, 413 (2013).

9. For example, the European Union legislation currently is limited to protections in the employment context. Council Directive 2000/78, *supra* note 7, Art. 3. Compare this with the ECHR, which has a greater material scope but is nonetheless constrained by other restrictions such as the lack of an independent equality provision and the need for victim status. Elaine Dewhurst, *Age Discrimination Law Outside the Employment Field*, European Commission (2020), https://op.europa.eu/en/publication-detail/-/publication/d7477a6b-2e02-11eb-b27b-01aa75ed71a1/language-en/format-PDF/source-175095507 [https://perma.cc/83UX-C4F6].

10. *See, e.g.*, *Commission proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426 final, at 2 (Feb. 7, 2008), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF [https://perma.cc/BB4H-4AUB].

11. Case C-388/07, The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Opinion of AG Mazák, Enterprise and Regulatory Reform, 2009 E.C.R. I-01569, ¶ 74.

12. Sandra Fredman, Discrimination Law 139 (2d ed. 2011). *See also* Tarunabh Khaitan, A Theory of Discrimination Law 50 (2015).

13. Khaitan, *supra* note 12, at 3.

context, such as the societal acceptance of age-based classifications and the underdeveloped nature of age-based discrimination law, are also challenged.

Analyzing each of these factors in turn, it is concluded that there is no compelling reason that justifies the exceptional treatment of age as a ground of discrimination.[14] Age discrimination is insidious and detrimental to the lives of all persons—young, middle-aged, or old—and commonly intersects with other grounds of discrimination, compounding disadvantage.[15] Age discrimination is a serious human rights violation which can also carry economic consequences arising from lack of employment opportunities and social consequences, particularly when intersected with other grounds such as gender, race and disability.[16] Additionally, the exceptionalism afforded to age discussed here means that it attracts fewer resources leading to a lack of data, analysis, and lower levels of enforcement. Treating age as something inevitable and legally exceptional—which each individual experiences similarly—rather than recognizing the diverse impacts it can have on individuals, only further entrenches this disadvantage.[17] This author challenges this exceptional approach applied to age as a ground for discrimination, and urgently calls for the reversal of this trend.

I. Immutability and Fundamental Choice

One of the most commonly cited factors for the protection of certain grounds in anti-discrimination law is the concept of "immutability," or "fundamental choice."[18] Sex and race, for example, are considered immutable.[19] Age, however, ought to fall into this category as well, for several reasons: (1) age is potentially constructively immutable, (2) the complete life equality view can perpetuate inequality between generations, and (3)

14. "Exceptional" in this context means that age as a ground of discrimination has been treated differently to other grounds of discrimination. As discussed further in this Article, it has been one of the last grounds of discrimination to find protection in many international and regional treaties. In addition, age as a ground of discrimination has conditions attached to it which are not usually attached to other grounds of discrimination. For example, in *Carvalho Pinto de Sousa Morais v. Portugal*, age is treated as a less suspect form of discrimination and direct age discrimination can be justified, unlike other grounds, under European Union law. App. No. 17484/15, Eur. Ct. H.R. (July 25, 2017).

15. *See generally* Toni Calasanti & Neal King, *Intersectionality and Age*, *in* Routledge Handbook of Cultural Gerontology 193–200 (Julia Twigg & Wendy Martin eds., 2015).

16. Claudia Mahler (U.N. Independent Expert on the enjoyment of all human rights by older persons), *International Day of Older Persons, Oct. 1, 2021*, Press Release, U.N. Special Procedures (Sept. 30, 2021), https://www.ohchr.org/en/press-releases/2021/09/pandemic-exposes-ageism-and-age-discrimination-society-says-un-expert [https://perma.cc/BB6Z-CNNH].

17. *See* Elaine Dewhurst, *Dismissed and Invisible: How human rights law's treatment of age discrimination reflects the reality of older women's experiences in Europe*, *in* Older Women in Europe: A Human Rights-Based Approach 34–35 (Isabella Paoletti ed., 2023).

18. Khaitan, *supra* note 12, at 57–59 (discussing usage of the immutability factor in various jurisdictions, citing Korematsu v. United States, 323 U.S. 214 (1944); Fullilove v. Klutznick, 448 U.S. 448 (1980); R v. McKitka [1987] BCJ No. 3210. *See also* Fredman, *supra* note 12, at 131; Cass Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410 (1994)).

19. Khaitan, *supra* note 12, at 56–57.

the law is sufficiently adaptable to meet any efficiency or egalitarian concerns raised by the complete life equality view.

Traditionally, age as a ground of discrimination has been viewed as a relative criterion which is not immutable.[20] Age is conceptualized as a "point on a scale" which everyone experiences at a certain moment in time.[21] This lack of immutability has been consistently noted by regional courts and treaty bodies as a significant justification for the objectively different treatment of age.[22] The European Court of Human Rights ("ECtHR") has indicated that age is one of the grounds of discrimination that, although not expressly listed, is protected under the concept of "other status" because it is not "limited to characteristics which are personal in the sense that they are innate or inherent."[23] At an international level, an individual member of the Human Rights Committee ("HRC") has also indicated that age has a "distinctive character" because of its application to all persons as opposed to only certain groups.[24] The conception of age as relative as opposed to immutable has limited the scrutiny applied to age-based classifications both in the United Kingdom[25] and in the United States.[26] The United States Supreme Court, in the case of *Massachusetts Board of Retirement v. Murgia*, did not explicitly state that age was not immutable but the implication from the judgment is that older persons are not an insular or discrete group because this group can be joined by everyone at a particular point, linking age with a lack of immutability which could essentially be outgrown, and is not permanently inescapable.[27]

While it is clear that age is not, in the same manner as sex or race, immutable, Alon-Shenker argues that age as a personal characteristic is potentially a "constructive[ly] immutab[e]" characteristic because it is something that is difficult to alter.[28] The more recent dicta of the ECtHR would

20. Case C-227/04 P, Lindorfer v. Council of the European Union, Opinion of AG Jacobs, 2007 E.C.R. II-B-2-00157, ¶ 85.

21. *Id.* ¶ 84.

22. *See, e.g.*, Human Rights Committee [hereinafter HRC], Love v. Australia, Individual Opinion of Committee Member Mr. Nisuke Ando (concurring in the result), U.N. Doc. CCPR/C/77/D/983/2001 (Mar. 25, 2003).

23. Carvalho Pinto de Sousa Morais v. Portugal, App. No. 17484/15, Eur. Ct. H.R., ¶ 45 (July 25, 2017). *See also* Carson and others v. United Kingdom, App. No. 42184/05, Eur. Ct. H.R., ¶¶ 61, 70 (Mar. 16, 2010); Clift v. United Kingdom, App. No. 7205/07, Eur. Ct. H.R., ¶¶ 56–58, (Jul. 13, 2010). The Court has recognized that age might constitute "other status" for the purposes of Art. 14 of the ECHR. *See* Schwizgebel v. Switzerland, App. No. 25762/07, Eur. Ct. H.R. ¶ 85 (June 10, 2010).

24. HRC, Love v. Australia, Individual Opinion of Committee Member Mr. Nisuke Ando (concurring in the result), U.N. Doc. CCPR/C/77/D/983/2001 (Mar. 25, 2003).

25. Seldon v. Clarkson Wright and Jakes [2012] UKSC 16, ¶ 4; R (Carson and Reynolds) v. Secretary of State for Work and Pensions [2006] 1 AC 173, ¶ 60.

26. Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (holding that immutability of sex favored rendering sex a "suspect" ground for discrimination).

27. 427 U.S. 307 (1976); Howard Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 888–89 (1981).

28. *See* Pnina Alon-Shenker, *Age is Different: Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting*, 17 CAN. LAB. & EMP. L.J. 31, 39 (2013) (citing Dale Gibson, *Analogous*

appear amenable to this viewpoint.[29] In *Novaković v. Croatia* it was held that a person's age "obviously forms part of a person's physical identity".[30] Therefore, it is asserted that while age is not immutable in the same manner as other grounds of discrimination, it is relatively or constructively immutable as individuals have no fundamental choice over their age and it "segregates the individual on the basis of a characteristic which he himself has not chosen and which he has no power to change."[31] Stuart Goosey, an anti-discrimination law scholar, notes that "[a]ge is not a characteristic we can control and therefore age discrimination can reduce people's options without people's choices making a difference."[32]

This apparent lack of immutability or limited nature of immutability should not be a determinant for the exceptional treatment of the age ground. Axel Gosseries, an intergenerational justice scholar, notes that the concept of immutability alone "does not tell us as such whether and why this should lead to a more lenient *moral* and *legal* treatment of age[.]"[33] However, one compelling counterargument, which theorists and courts have based their justification for the legal leniency of age as a ground for discrimination on, is the "complete life equality" view.[34] The argument is that even though one may be treated differently at a certain age, eventually everyone will obtain some benefit from age-based classifications so that over a complete lifetime the impact of age discrimination is neutral.[35] From a legal perspective, as explained by Lady Hale in the Supreme Court of the United Kingdom case, *Seldon v. Clarkson Wright and Jakes*, the relative nature of age means that "younger people will eventually benefit from a provision which favors older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favors younger people, such as a mandatory retirement age."[36]

There are two primary criticisms of the complete life equality view. The first revolves around the distributive inequality which can arise from utilizing this assessment in an age discrimination case, and which may result "in old people often having to accept disadvantageous measures and young

Grounds of Discrimination Under the Canadian Charter: Too much Ado about Next to Nothing, 29 Alberta L. Rev. 772, 786 (1991)).

29. *See* Novaković v. Croatia, App. No. 73544/14, Eur. Ct. H.R., ¶ 48 (Mar. 17, 2020).

30. *Id.*

31. Eglit, *supra* note 27, at 862.

32. Stuart Goosey, *Is Age Discrimination a Less Serious Form of Discrimination?*, 39 Legal Stud. 533, 540 (2019).

33. Axel Gosseries, *What Makes Age Discrimination Special: A Philosophical Look at the ECJ Case Law*, 43 Neth. J. Legal Phil. 59, 60 (2014) (emphases in original).

34. Gosseries, *supra* note 33, at 66–70.

35. *See* Rachel Horton, *Justifying Age Discrimination in the EU*, *in* EU Anti-Discrimination Law Beyond Gender 273, 277 (Uladzislau Belavusau & Kristin Henrard eds., 2018); Dennis McKerlie, *Equality between Age-Groups* 21 Phil. Pub. Affs. 275, 276 (1992).

36. Seldon v. Clarkson Wright and Jakes [2012] UKSC 16, ¶ 4.

workers often being treated more favorably."[37] The second criticism relates to the fact that lifetimes are not stable: environments can change depending on government policies, environmental factors (e.g., COVID-19 or climate change), or public interest needs (e.g., increase in pension age).[38] It is this very lack of stability which leads Gosseries to conclude that the complete life equality model is not an appropriate rationale for age exceptionalism as it "irremediably leads to a differential impact on members of successive generations . . . ."[39]

Gosseries also argues that there are additional factors to consider such as sequence efficiency and affirmative egalitarian arguments which, together with a complete life equality view, can justify age exceptionalism.[40] Most simplistically, the former refers to the efficiency gains which can be made through following certain timings in life, for example attending compulsory education at a young age.[41] The latter relates more to equality over complete lives and argues that in some cases certain actions, like mandatory retirement, are needed to ensure equality over a lifetime and between cohorts.[42] Gosseries makes clear that these are not necessarily standalone arguments, but in fact interplay with other defenses to justify age exceptionalism.[43]

However, Gosseries' arguments do not necessarily justify age exceptionalism because anti-discrimination law sufficiently flexes and adapts to (1) accommodate justifiable and proportionate differential treatment for efficiency or egalitarian gains, (2) ensure positive action, and (3) make provision for exceptions, such as "genuine occupational requirements" in the context of labor law.[44] The arguments related to sequence efficiency and affirmative egalitarianism are addressed by ensuring that justifiable and proportionately responsive mechanisms necessary to achieve these goals are maintained.[45] This flexibility in the law has been clearly illustrated in the context of the United Kingdom, where the 2010 Equality Act has been used both to justify a mandatory retirement age for one professor at the University of Oxford, and to find that the mandatory retirement age for another professor at the same institution was discriminatory.[46] The Employment Appeals Tribunal noted in a joint decision on these cases that "the

37. Beryl ter Haar, *Is the CJEU Discriminating in Age Discrimination Cases?* 13 Erasmus L. Rev. 78, 78 (2020).

38. Gosseries, *supra* note 33, at 68–69.

39. *Id.* at 69.

40. *Id.* at 69–70.

41. *Id.* at 70–74.

42. *Id.*

43. *Id.* at 74.

44. In the EU context, *see* Council Directive 2000/78, *supra* note 7, Arts. 4, 6, 7.

45. *Id.* Art. 6.

46. Pitcher v. Chancellor, Masters and Scholars of the University of Oxford, EA-2019-000638-RN, & Chancellor, Masters and Scholars of the University of Oxford v. Ewart, EA-2020-000128-RN, [2021] EAT, ¶ 183.

nature of the assessment that has to be undertaken by [employment tribunals] when determining the question of objective justification is such that it is possible for different [employment tribunals] to reach different conclusions when considering the same measure adopted by the same employer in respect of the same aims."[47] The ability of the law to respond flexibly means that it can adapt to meet certain necessary objectives and ensure efficiency and egalitarianism. Additionally, measures such as positive action provisions and "occupational requirement" provisions, which exist in all areas of non-discrimination law,[48] can be used to support and bolster this flexibility. For example, in the EU context, the occupational requirement provisions have been used to justify mandatory retirement provisions and age proxies in certain professions such as firefighters.[49] These cases provide evidence that existing legal norms have the capacity to eliminate, or at least mitigate, any potential inefficiency or inequality arguments raised, rendering the immutability factor and the complete life equality viewpoint too weak to justify age exceptionalism.

An examination of the concept of immutability, or a lack of immutability, as a factor for age exceptionalism reveals three things: First, even though we don't consider age as necessarily immutable, we can still view it as constructively immutable because we can do little about the passage of time. Second, critics often target the complete life equality model that justifies age exceptionalism, as it can lead to inequality between successive generations. Finally, the existing anti-discrimination law adapts well enough to address any efficiency or egalitarian concerns raised by a complete life equality view, so there is no strong legal reason for treating age exceptionally.

II. The Requirement of Disadvantage and Political Disenfranchisement

Scholars identify the concept of "disadvantage" or "relative disadvantage" as a "powerful indicator" of which grounds should be protected by anti-discrimination law.[50] The age ground arguably fails to meet the criteria of other forms of discrimination that have "long and unfortunate" histories, leading to exceptional treatment of age.[51] In the United States, other grounds of discrimination usually receive a "strict scrutiny" approach,

47. *Id.*

48. Council Directive 2000/78, *supra* note 7, Art. 4.

49. Case C-299/08, Colin Wolf v. Stadt Frankfurt am Main, 2010 E.C.R. I-00001, ¶¶ 34, 40.

50. Fredman, *supra* note 12, at 139; *see also* Khaitan, *supra* note 12, at 49 (identifying "relative disadvantage" as one of the most significant factors in defining the protectorate of discrimination law, along with immutability or fundamental choice).

51. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

whereas age does not.[52] Advocate General Mengozzi in *Vital Perez* confirmed in the EU context that the specific regime for age partly stems from the fact that age does not have a "tragic historical legacy."[53] Evidence of such a conception of age discrimination can also be identified in General Comment No. 20 of the Committee on Economic, Social and Cultural Rights ("CESCR"), noting that the grounds generally protected by the International Covenant on Economic, Social and Cultural Rights ("ICESCR") include those that "reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization."[54] The overarching conception is that while older or younger, or even middle-aged people, may be victimized in a number of ways, "their group history does not reveal a litany of violence, disenfranchisement and subordination equivalent to that of racial minorities or women."[55] Because age does not meet this threshold of disadvantage, it is often considered justifiable to grant it exceptional treatment.[56] However, age as a ground of discrimination does, arguably, meet this legacy of disadvantage, as disadvantage can manifest in multiple ways, and younger age groups in particular face political disadvantage due to age discrimination.[57]

Disadvantage can arise in many forms, including material, political, social, or cultural, and there is no general requirement that it must be "caused by past discrimination, or indeed by human agency at all."[58] However, even if one accepts that there should be some past legacy of disadvantage accruing to a particular group, there is no general consensus that age fails to meet this historical legacy of disadvantage, or that it fails to meet the criteria of disadvantage at all.[59] The Supreme Court of Canada has distinguished younger people, who perhaps "do not have a similar history of being undervalued," from older people, who "are presumed to lack abilities that they may in fact possess," and so may well qualify under this definition.[60] Academics also agree that older people represent a "historically disadvantaged group, particularly in the workplace."[61] Many gerontologists

52. *See, e.g.*, *id.*; Massachusetts Board of Retirement v. Murgia, 427 U.S. at 313–14 (1976); Vance v. Bradley, 440 U.S. 93, 106 (1979); Kimel v. Florida Board of Regents, 528 U.S. 62, 83–84 (2000); *see also* Eglit, s*upra* note 27, at 880; Nina Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades Old Consensus*, 44 U.C. Davis. L. Rev. 213, 228 (2010).

53. John Macnicol, *Ageism and Age Discrimination: Some analytical issues,* International Longevity Centre UK, 5–6 (2010), https://ilcuk.org.uk/wp-content/uploads/2018/10/AgeismAndAgeDiscrimination.pdf.

54. Committee on Economic, Social, and Cultural Rights [hereinafter CESCR], General Comment No. 20, U.N. Doc. E/C.12/GC/20, ¶ 27 (July 2, 2009).

55. Eglit, *supra* note 27, at 884.

56. *See, e.g.*, Seldon v. Clarkson Wright and Jakes [2012] UKSC 16, ¶ 4.

57. *Political Disengagement in the UK: Who is disengaged?*, House of Commons Library Briefing Paper, No. CBP-7501, at 16 (2001) https://commonslibrary.parliament.uk/research-briefings/cbp-7501/ [https://perma.cc/5N22-Z2VU].

58. Khaitan, *supra* note 12, at 34.

59. See the cases and academic discussions that follow and that demonstrate this lack of consensus.

60. Gosselin v. Quebec (AG) [2002] SCC 84, ¶ 32; *see also* Alon-Shenker, *supra* note 28, at 36.

61. Alon-Shenker, *supra* note 28, at 37–8.

argue that while older people are not a typical "minority," and may very well include certain privileged individuals, they do have some "central characteristics and shared social and institutional expectations" and are routinely subjected to negative stereotypes and face discrimination.[62] While such disadvantage may not be as visible or as easily delineated as in the case of race or sex, ageism is still "related to as much inequality as racism or sexism."[63] Older people, in particular, are not always the "objects of veneration."[64] Howard Eglit, the preeminent scholar on law and aging, points to a decline in the social status of older people throughout the past three centuries, to the point where many in this category are now considered to be "powerless and dependent," and do "bear some aspects of second class citizenship" as a result.[65] The COVID-19 pandemic has also heightened the disadvantage of older people in many areas of life, particularly in healthcare.[66] Additionally, we should not ignore the "cumulative impact of a lifetime of discrimination" arising from various social inequalities which can be "devastating in old age."[67]

Disadvantage in the case of younger or middle-aged groups on account of age discrimination is more challenging to establish, although this in itself does not justify the exceptional treatment of age as a ground of discrimination. Nevertheless, these groups have experienced sharp political disadvantage.[68] Often, one of the hallmarks of whether a particular classification will receive the full protection of the courts is whether the individual with a particular characteristic requires some form of "extraordinary protection from the majoritarian political process"[69] because they are politically disenfranchised.[70] Older generations are often politically enfranchised because they are considered to have strength in numbers, are actively involved in the political process, and have been traditionally successful in securing and retaining benefits,[71] although recent case law indicates that youth, too, have on occasion been able to influence political outcomes.[72] However, notwithstanding occasional successes, the interests of younger people are often not

62. Alon-Shenker, *supra* note 28, at 38 (citing Jack Levin & William C. Levin, Ageism: Prejudice and Discrimination Against the Elderly 65 (1980)).

63. Erdman B. Palmore & Kenneth Manton, *Ageism Compared to Racism and Sexism*, 28 J. of Gerontology 363, 363 (1973).

64. Eglit, *supra* note 27, at 884.

65. *Id.* at 885.

66. European Union Agency for Fundamental Rights, *Coronavirus Pandemic in the EU – Fundamental Rights Implications*, at 21 (2020), https://fra.europa.eu/en/publication/2020/covid19-rights-impact-june-1 [https://perma.cc/2EMY-F47T].

67. De Pauw et al., *supra* note 2, at 178.

68. *See generally* House of Commons Library Briefing Paper, *supra* note 57.

69. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

70. *See* Khaitan, *supra* note 12, at 52–53.

71. Eglit, *supra* note 27, at 892.

72. *See generally* Make It 16 Inc v. Attorney General [2022] NZSC 134.

served by the political process, and they are, as a result, politically marginalized.[73]

As illustrated, the argument that a lack of disadvantage warrants age exceptionalism lacks support. An analysis of disadvantage, or lack of disadvantage, as a factor for age exceptionalism reveals three important points. First, while age as a ground for discrimination may not have a historical legacy of disadvantage, there are many other forms of disadvantage, and older people in particular do meet this threshold of disadvantage. Second, younger age groups can also be subjected to disadvantage through political disenfranchisement. Finally, because the case for lack of disadvantage is so weak, so too is the legal argument for the differential treatment of age.

III. Societal Norms and Established Principles

Age-based classifications and proxies are largely ingrained in our society and these often form part of the reasoning for the exceptional treatment of age.[74] Not only are these age-based classifications considered "acceptable," but they are also considered a "positively beneficial and sometimes essential" way of easily administering social benefits and other forms of governmental activity.[75] The acceptance of such proxies and classifications is evident at national, regional, and international levels.[76] These proxies and classifications only serve to entrench discrimination and disadvantage, and the exceptionalism attributed to age has over-complicated the discourse.

There are potentially many "socially beneficial functions" of age-based classifications, including making "life easier for government bureaucrats," saving "costs which would be incurred by individual treatment," and averting "injustice[ ] which might arise through application of discretion were a system of individualised treatment to supplant our age-geared society."[77] The simplistic nature of age-based classifications and their widespread application in areas such as social welfare has meant that age-related discrimination is not viewed with the same suspicion by legislatures or judiciaries as

73. Young people are less likely to vote, register to vote, and be elected, but older people tend to have more negative attitudes about politics and participate less in selected political activities. The average age of MPs has been around fifty for the last decades. *See generally* House of Commons Library Briefing Paper, *supra* note 68.

74. Fredman, *supra* note 12, at 101 (pointing out some of the many age classifications normally acceptable in society, including age limits for voting or driving, legislation restricting children's ability to undertake paid work and minimum wage, to name but a few).

75. Case C-227/04, Lindorfer v. Council of the European Union, Opinion of AG Jacobs, 2007 E.C.R. II-B-2-00157, ¶ 85.

76. *See, e.g.*, HRC, Love v. Australia, U.N. Doc. CCPR/C/77/D/983/2001, ¶ 8.3 (Mar. 25, 2003) (accepting mandatory retirement as a societal norm, noting that the Committee should take "into account the widespread national and international practice, at the time of the author's dismissals, of imposing a mandatory retirement age of 60.").

77. Eglit, *supra* note 27, at 899.

other forms of discrimination.[78] However, just because a norm has become socially acceptable or it reduces administrative burden, this is not a justifiable reason to maintain the status quo and fail to protect individuals from discriminatory treatment.[79] Cultural mores change over time and the law should be a leader of change or should, at the very least, avoid entrenching discrimination in this manner.[80] It may well be that the "evil" which age discrimination may "perpetrate is not perceived as invidious"[81] as other grounds of discrimination, but administrative simplicity in itself should never be a ground upon which to allow discrimination to flourish. Gosseries notes that a reliance on proxies or classifications is "insufficient to ground for the moral specialness of age."[82]

Linked to the societal acceptance of age-based distinctions is a reluctance to move forward the age discrimination agenda due to its relative newness and underdevelopment.[83] Within the European regional context specifically, there has been a view that age may be treated differently from other grounds of discrimination because it is "less absolute" and "more recent," making its protection more "uneven"[84] and less precise than other grounds of discrimination law.[85] This is a rather unusual basis upon which to found an argument for different treatment of age. Much of the judicial reticence around extending equal treatment to age-based forms of discrimination appears to center on a concern surrounding the development of legal principles in a vacuum, particularly when the European Commission itself readily admitted that even member states had, at the introduction of the age discrimination principles in the EU, very little legislation developed in this area.[86] The fact that age also appears last in the list of characteristics protected by Article 21 of the EU Charter of Fundamental Rights ("CFR"), led Advocate General Cruz Villalón in *Prigge v. Deutsche Lufthansa* to conclude that this at least indicated "that '[age]' is not exactly the oldest or most 'classical' of the prohibitions of discrimination" and that its "undis-

78. Case C-388/07, The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform, Opinion of AG Mazák, 2009 E.C.R. I-01569, ¶¶ 73–75.

79. *See* Alon-Shenker, *supra* note 28, at 41 (noting that just because we tend to see norms as an "essential way of ordering our society" and a "permissible statistical generalization" does not mean that they are not a "manifestation of stereotyping and prejudice.").

80. It has been noted that the exceptional treatment of age bears a "remarkable similarity between attitudes about older workers and the beliefs many managers held about female and minority workers 25 years ago." Oscar Martinez & Brian Kleiner, *Discrimination in Employment by Age*, 12 Equal Opportunities Int'l 1, 1 (1993).

81. Eglit, *supra* note 27, at 900.

82. Gosseries, *supra* note 33, at 79.

83. Case C-427/06, Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, Opinion of AG Sharpston, 2008 E.C.R I-07245, ¶ 46.

84. *Id.*

85. C-227/04, Lindorfer v. Council of the European Union, Opinion of AG Jacobs, 2007 E.C.R. II-B-2-00157, at ¶ 87–88.

86. Case C-427/06, Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, Opinion of AG Sharpston, 2008 E.C.R I-07245, ¶ 47.

puted modernity makes it a type of non-discrimination the principles of which remain to be fully considered, and which, in some respects at least, continues to evolve through the construction of a political and social consensus."[87] Therefore, it appears that age, as a newcomer to the discrimination arena, has been hindered in its development by a legislative and judicial reluctance to overstep established boundaries and tread on new and previously untrodden paths.[88]

The reliance on the relative newness of the principle as a basis for exceptional treatment is hard to justify when one considers that other new grounds of discrimination were also introduced at the same time as the age discrimination principles at an EU level. Yet these other grounds of discrimination, most notably discrimination on grounds of sexual orientation, disability, and religion, have not been subjected to the same treatment. One potential reason for this differential treatment (immutability and disadvantage aside) is the arguably difficult delineation of certain aspects of age discrimination cases. Comparisons can be difficult to establish, as there is often no "clearly demarcated boundary between the group subject to discrimination and others,"[89] and Eglit concludes that ambiguity often intrudes in age discrimination cases in the United States because of the vague distinctions between terms such as "young," "middle age," and "old."[90] Other difficulties may arise in determining prima facie evidence of age discrimination, with the opinions of the Advocates General in the Court of Justice of the European Union indicating that while discrimination based on "sex," for example, is an "extremely crude form of discrimination, involving very sweeping generalizations," discrimination based on age "may be graduated and may rely on more subtle generalizations."[91] However, while determining such cases may be difficult, this does not logically form a solid basis for differential treatment. There is also little evidence to support the contention that these difficulties have stymied courts in determining cases. To date, courts and tribunals have had few difficulties in determining comparisons in age discrimination cases or in determining

87. Case C-477/09, Prigge v. Deutsche Lufthansa AG, Opinion of AG Villalón, 2011 E.C.R. I-08003, ¶ 32.

88. *Id.*

89. Fredman, *supra* note 12, at 101. This is also a central issue for Alon-Shenker, who argues that age is different because there is no clear delineation between the discriminator and the discriminated. In general, the assessment as to whether discrimination occurs is carried out by comparing individuals who share a certain protected characteristic (in-group) with those who do not (out-group). The age ground is different as it essentially requires an intra-group comparison between those who share the same protected characteristic (age) but experience differential treatment because of belonging to a particular part of that group (younger, older, retired, etc.). Alon-Shenker, *supra* note 28, at 39.

90. Eglit, *supra* note 25, at 899.

91. Case C-227/04, Lindorfer v. Council of the European Union, Opinion of AG Jacobs, 2007 E.C.R. II-B-2-00157, ¶ 84; *see also* Case C-416/13, Mario Vital Pérez v. Ayuntamiento de Oviedo, Opinion of AG Mengozzi, 2014 ECLI:EU:C:2014:2109, ¶ 4 n. 6.

whether discrimination has occurred.[92] While there may be subtle difficulties in making out age discrimination cases, this should not form a basis for denying equal treatment. The existing exceptional treatment of age may also add exponentially to these difficulties, creating as they do alternative lines of inquiry in age cases. It may well be that the exceptionalism granted to age by many judiciaries and legislatures has over-complicated the field, perhaps leading to an even greater reluctance to move beyond this distinctive treatment.[93]

Whether age exceptionalism is necessary to maintain socially accepted norms is not something that has been considered to any great extent and is beyond the scope of this Commentary. It is asserted here that the law is sufficiently adaptable to allow for certain age classifications to be maintained. For example, if an age classification has a legitimate objective and is imposed in a suitable and least oppressive way (proportionality test), if it is imposed to meet a positive objective (positive actions), or if it is imposed to meet an exceptional need (like an occupational requirement), then the law is flexible enough to accommodate these goals. An assessment of this factor for age exceptionalism reveals two important points. First, that age proxies and classifications, and their existing legal treatment, have the potential to perpetuate and entrench disadvantage. Second, that the differential treatment of age has only served to further mystify and complicate the fact that age discrimination is just discrimination and should be treated legally as such.

Conclusion

"Discrimination law is controversial. It could not fail to be, given that it seldom keeps in step with society but often ends up one step ahead."[94] In the case of age discrimination law, it appears that it is indeed controversial, but perhaps is not yet one step ahead. Far from it, age as a ground of discrimination is treated exceptionally to other grounds of discrimination with more limited scrutiny and subject to myriad exceptions. Responding to the justifications put forward for age exceptionalism, it is determined that the three most commonly cited factors lack sufficient support to justify exceptional treatment.

The three factors which have been put forward to justify this exceptionalism range from lack of immutability, to lack of disadvantage and political disenfranchisement, to lack of social acceptance and established principles. Analyzing each of these in turn, this Commentary concludes that there is no solid foundation for the exceptional treatment of age. Age may not be

92. *See, e.g.*, Case C-144/04, Werner Mangold v. Rüdiger Helm, 2005 E.C.R. I-09981, ¶ 78 (determining that identification of differential treatment has not caused any issues).

93. *Id.*

94. Khaitan, *supra* note 12, at 1.

immutable, but the complete life equality model is also insufficient to justify differential treatment. Age lacks a historical legacy of disadvantage, but disadvantage comes in a variety of forms and older and younger persons are often the subjects of societal disadvantage or political disenfranchisement. Proxies and age-classifications may be socially, legally, and politically acceptable, and the lines of age discrimination law may not be sufficiently certain, but this is not a valid justification for reinforcing stereotypes and entrenching discrimination. Arguably, the exceptionalism afforded to the age ground has only served to exacerbate existing prejudices around the concept of age equality. Indeed, using this as a ground to justify exceptional treatment only goes to widen the social recognition justice gap,[95] which is the real obstacle to achieving age equality and which is leading to the "invisibility of numerous serious human rights violations against older persons, owing to the lack of specific research, information, disaggregated data and systematic analysis."[96] The treatment of age in this exceptional manner has set a dramatic precedent which will be hard to undo in future years. Closing this gap through eliminating exceptionalism is the only real solution to overcoming these challenges.

The most obvious question then is what would happen if we afforded the age ground the same scrutiny as other grounds of discrimination and eliminated this exceptionalism. While this is not the subject of this particular Commentary, it is argued that existing legal principles would be adequate to ensure any concerns are met.[97] Existing anti-discrimination law includes various justificatory and proportionality assessments, exceptions to avoid inequality in certain sectors, positive action measures and additional justifications in certain fields such as genuine occupational requirement provisions in labor law.[98] Therefore, the legal mechanisms which already exist are arguably sufficiently flexible and adaptable to accommodate the challenges posed by our age-based systems. Age as a ground for discrimination is not radically different to other grounds of discrimination. On the contrary, there is little to support such exceptional treatment.

95. U.N. Open-ended Working Group on Ageing, Fourth working session report, U.N. Doc. A/AC.278/2013/2, at 14 (Sept. 24, 2013), https://social.un.org/ageing-working-group/fourthsession.shtml [https://perma.cc/DDE3-2JTK].

96. U.N. Open-ended Working Group on Ageing, Eighth working session report, U.N. Doc. A/AC.278/2017/2, at 9 (July 28, 2017), https://social.un.org/ageing-working-group/eighthsession.shtml [https://perma.cc/MG39-WMQZ].

97. *See* discussion, *supra* Part I.

98. *See* Council Directive 2000/78, *supra* note 7, for the EU context, which includes various justificatory and proportionality assessments, positive action measures and genuine occupational requirement provisions.