APROXIMACIÓN JURÍDICO-FILOSÓFICA

AGEING AND EQUALITY UNDER THE LAW

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Resumen

El envejecimiento de la población genera presiones para la reforma social. Dado que las personas mayores de 60 años constituyen una proporción cada vez mayor de la población, surgen nuevos desafíos y oportunidades, por ejemplo, en el lugar de trabajo y en el ámbito de la atención, por nombrar solo dos contextos para la reforma social. Este artículo examina cómo la ley debería regular la reforma social en una sociedad que envejece. Más específicamente, examina cómo debe interpretarse desde un punto de vista normativo la prohibición legal de discriminación por edad presente en varias jurisdicciones. El artículo ante todo reivindica que deberíamos respaldar una interpretación estricta de la discriminación por edad. De acuerdo con esta interpretación, la discriminación por edad prohíbe solo las políticas y prácticas que muestran falta de respeto a las personas debido a su edad. Una interpretación más amplia de la discriminación por edad que prohíbe también las políticas y prácticas que tienen un impacto diferencial en los intereses de las personas debido a su edad es injustificada. Después de elaborar el caso contra la amplia interpretación de la discriminación por edad, el artículo explica la interpretación estrecha con más detalle al profundizar en el sentido relevante en el que las políticas y prácticas pueden no mostrar «falta de respeto» a las personas debido a su edad. A continuación, ilustra la relevancia práctica de la interpretación estricta de la prohibición de la discriminación por edad en el contexto de la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas.

Palabras clave

Discriminación por edad; igualdad; igualdad simultánea; igualdad de por vida; compensación dentro de la vida; falta de respeto; prejuicio; generalización justificada.

Abstract

The ageing of a population creates pressure for social reform. As persons aged above 60 make up an increasing proportion of the population, new challenges and opportunities arise for example in the workplace and in the sphere of care, to name just two contexts for social reform. This article examines how the law should regulate social reform in an ageing soci-

ety. More specifically, it examines how the legal prohibition on age-discrimination present in a number of jurisdictions should be interpreted from a normative point of view. The main claim of the article is that we should endorse a narrow construal the legal prohibition of age-discrimination. According to this construal the prohibition of age-discrimination prohibits only policies and practices that show disrespect for persons due to their age. A wider construal that prohibits also policies and practices that have a differential impact on the interests of persons because of their age is unjustified. After elaborating the case against the wide construal of age-discrimination, the article explains the narrow construal in more detail by elaborating on the relevant sense in which policies and practices may not show «disrespect» for persons due to their age. It then illustrates the practical relevance of the narrow construal of the prohibition against age-discrimination in the context of the jurisprudence of the European Court of Justice.

Keywords

Age-Discrimination, Equality, Simultaneous equality, Lifetime equality, Compensation within lives, Disrespect, Prejudice, Warranted generalization.

Sumario: I. Two interpretations of age-based discrimination; II. A defence of the narrow interpretation; III. The narrow interpretation in practice: the Mangold case; IV. Age-discrimination and public health care; V. Conclusion

IN all developed states today, fertility rates are falling and life expectancy is growing. As a result, populations are ageing, in the sense that the proportion of older citizens (aged 60 and above) is growing relative to the proportion of younger citizens (1). This demographic transition alters the overall set of needs and capacities of a population and thus calls into question existing social regulations (2). More and more persons above 60 remain active and in good health, and are thus capable of working. Questions consequently arise as to whether the regulations of the labour market should be reformed, so as to make it easier for persons above 60 to work or more difficult for them to retire early. Another example involves the growing number of persons above 80 years of age who experience the familiar needs of that late stage of life, such as the need for health care. To what extent should the state use resources that could otherwise be spent on younger age groups in order to provide funding for this increased need for health care? These are but two examples of how ageing represents a tectonic shift in the social circumstances of developed states that creates pressure for social reform.

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(1) For an overview of population ageing in different countries in the world, see United Nations, Department of Economic and Social Affairs, *World Population Ageing*, New York, 2019.

(2) An excellent historical account of the three main demographic transitions that have taken place in the last three centuries is provided in Lee, R., «The Demographic Transition: Three Centuries of Fundamental Change», *Journal of Economics Perspectives*, 17, 2003, pp. 167-190.

This article is a philosophical inquiry into how the law should regulate this process of social reform. Needless to say, this question covers a very large area, not all of which can be examined in one article. The aim here is to explore one of its most significant parts. This concerns the legal prohibition in many states, including Spain, against the differential treatment of persons due to their age (3). The nature of the prohibition against age-based discrimination is crucial for understanding permissible policies and practices in a context of population ageing, because this is a context in which conflicts of interest between older and younger persons inevitably multiply. Yet it is not obvious what policies and practices are ruled out by the prohibition against age-based discrimination. For example, does the prohibition against age-based discrimination imply that companies may not refuse to hire persons above the age of 60, even if those companies believe that older workers are less effective at carrying out various job-related responsibilities? Does it imply that the state may not withhold funding for expensive drugs that treat diseases suffered predominantly by elderly persons –such as Alzheimer's disease– in favour of funding treatments that are needed by younger citizens, such as, for example, invitro fertilization? In order to answer these questions, we need to explore the foundations of age-based discrimination.

This article will defend the following claim about how age-based discrimination is best construed from a normative point of view. The foundations of age-based discrimination justify a narrow interpretation of that prohibition in the following sense. According to this narrow interpretation, the prohibition against age-based discrimination does not rule out policies and practices that have a differential impact on the interests of persons because of their age. In other words, policies and practices that have different impacts on the interests of persons above 60 compared to persons below that age, are not, for that reason, ruled out by the prohibition against age-based discrimination. What the prohibition does rule out are policies and practices that express disrespect towards persons because of their age, where this involves treatment of them that assumes that they, or their capacities, are of less worth than they in fact are. Sections 1 and 2 of the article defend the foundation for this narrow interpretation of age-based discrimination. Section 3 illustrates its relevance in the context of workplace discrimination. Section 4 illustrates its relevance in the context of public healthcare.

I. TWO INTERPRETATIONS OF AGE-BASED DISCRIMINATION

To prepare the ground for a defence of the narrow interpretation of age-based discrimination, four preliminary observations about age-discrimination are necessary. The first observation is that we can define age-based discrimi-

(3) Article 14 of the Spanish constitution states, for example, that Spaniards are equal before the law and may not in any way be discriminated against «on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance». The European Union Directive 78/2000 that prohibits age-discrimination in the workplace has also been transposed into Spanish law in Chapter III of Title II of Law 62/2003 on fiscal, administrative and social measures. I discuss Directive 78/200 in Section 3.

nation in a general and morally neutral manner. There are good reasons in favour of using a non-moralized definition of discrimination. First, it allows us to meaningfully ask certain helpful questions about discrimination, for example, whether some forms of discrimination are morally wrong and should be legally prohibited. As Lippert-Rasmussen explains, this question could not meaningfully be asked if one used a moralized definition of discrimination because, on such a definition, discrimination is by definition unacceptable (4). Secondly, a non-moralized definition of discrimination encourages us to identify the reasons why discrimination is morally wrong in those instances in which it is morally wrong. We are encouraged to ask why discrimination is wrong if we refrain from inserting wrongness into its very definition. The non-moralized definition of age-based discrimination I will use is therefore as follows: «a policy, practice or act commits age-based discrimination against a person, P, if it treats P differently from others because P's age is different from those others» (5).

Notice two important points about this definition. First, it allows that there may be practices of age-based discrimination that are not wrong and that should be legally permitted. This fits with widespread opinion. It is widely accepted, for example, that a legal prohibition against driving a car for persons below a certain age (e.g. 18 or 16 years old) is not wrong even though it amounts to age-based discrimination according to the non-moralized definition proposed in the previous paragraph. Secondly, the non-moralized definition includes so-called «positive discrimination» as a form of age-based discrimination. It will regard as discriminatory, for example, the practice of reserving seats for elderly persons on public transportation. This may seem to be a problematic feature of the non-moralized definition (it sounds odd to describe the reservation of seats for the elderly as «discriminatory»). However, once we keep in mind that the non-moralized definition does not involve a judgement about the moral status of any given discriminatory practice, its inclusion of «positive discrimination» as a form of discrimination is not problematic.

A second observation is this. The standard argument that can be made for why age-based discrimination should, under certain circumstances, be legally prohibited is the same standard argument for why race- or sex-based discrimination should, under certain circumstances, be legally prohibited. This is what we might call the *standard egalitarian argument* which states that such discrimination runs contrary to the principle that all persons must be shown equal concern and respect under the law (6). Indeed, the prohibition against discrimination under the law is standardly understood simply as the *expression* of the principle of equal concern and respect

(4) See Lippert-Rasmussen, K., *Born Free and Equal?*, Oxford University Press, Oxford, 2014, p. 25.

(5) This brief definition is compatible with the much more detailed definition of discrimination defended by Lippert-Rasmussen, K. *Born Free and Equal?*, Oxford University Press, Oxford, 2014, pp. 13-53. I am indebted to Lippert-Rasmussen's discussion.

(6) The idea that the law must treat all persons with «equal concern and respect» is most closely associated with Ronald Dworkin's political and legal philosophy across a number of works. See, in particular, «Liberalism» in his book, *A Matter of Principle*, Oxford University Press 1985, and *Sovereign Virtue*, Harvard University Press, 2000, pp. 4-7. Dworkin's last work in political and legal philosophy brings the twin ideas of equal concern and equal respect under a single concept of «dignity». See *Justice for Hedgehogs*, Harvard University Press, 2013.

for persons (7). If a given policy or practice treats a person, P, differently from others because P's age is different from those others, the reason this arouses concern for the law is that it suggests the possibility that P is being shown less than equal concern and respect compared to others (8).

The third observation is that we can distinguish between two versions of this standard egalitarian argument. These two versions are not mutually incompatible. Both of these versions of the standard egalitarian argument can be made at the same time and without incoherence in order to explain why a specific policy, practice or act that manifests age-discrimination should be legally prohibited. Where they differ from each other is over the specific feature of this policy, practice or act that they isolate as the reason for why it undermines equal concern and respect and should thus be legally prohibited. The first version of the standard egalitarian argument isolates the following feature as a reason for legal prohibition: the policy, practice or act has a *worse impact on P´s interests* because of P's age than it has on the interests of people of other ages. The second version of the standard egalitarian argument isolates a different feature of a policy, practice or act as the reason for legal prohibition, namely that it shows *less respect for P's worth or capacities* because of P's age than it does for the worth or capacities of people of others ages (9).

This distinction between differential «impact on interests» and «respect for worth» is important for the overall argument of this article, so it will be helpful if we use an example to make the distinction fully clear. Consider the following hypothetical example used by James Woodward in a different context: «Suppose that Smith, who is black, attempts to buy a ticket on a certain airline flight and that the airline refuses to sell it to him because it discriminates racially. Shortly after, that very flight crashes, killing all aboard» (10). This is a clear example of a racially discriminatory act. A person, Smith, is subjected to differential treatment because of his race when the airline refuses to sell him a ticket. However, notice that this discriminatory act has *not* had a worse impact on the Smith's interests compared to the interests of other passengers. In fact, it has had a *better* impact on

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(7) The text of Article 14 of the Spanish constitution directly connects discrimination and equality before the law in this way. See fn. 4 above.

(8) How does the standard egalitarian argument relate to the Aristotelian argument that is frequently adduced in moral and legal discussions of discrimination, namely, that «like cases must be treated alike»? A brief, and partial answer, is that the standard egalitarian argument is consistent with the Aristotelian argument if one assumes that persons, simply as persons, are relevantly alike, and thus *presumptively* entitled to the same treatment under the law. Thus, age-based discrimination is presumptively problematic because it fails to treat like cases –i.e. persons– alike. This presumption can be defeated: there may be some contexts in which age differences between persons *do* make them «unlike cases» to each other, such that it is morally acceptable not to treat them «alike».

(9) These two versions of the standard egalitarian argument map on to the two dimensions of Dworkin's principle of equality, namely, that the law must show persons equal *concern* and equal *respect*. Equal concern can be understood as the idea that «it is important, from an objective point of view, that human lives be successful rather than wasted, and this is equally important, from that objectively point of view, for each human life». Equal respect can be understood as the idea that we must allow persons to make their own decisions about how to live their lives and express our sense of their worth as independent persons: «though we must all recognize the equal objective importance of the success of a human life, one person has a special and final responsibility for that success – the person whose life it is». These quotes are from *Sovereign Virtue*, p. 5.

(10) Woodward, J., «The Non-Identity Problem», *Ethics*, 96, 986, p. 810.

Smith's interests, given that the refusal to sell him a ticket prevented him from dying in the subsequent plane crash. How, then, can we explain the conclusion that there is, nevertheless, a troubling form of race-based discrimination in the example? We can explain it if we acknowledge that there exists a second feature of the airline's refusal to sell Smith a ticket - that is, a feature other than the impact this act has had on Smith's interests. In refusing to sell a ticket to Smith, the airline has showed less respect for his worth than it should. We are thus able to see why the hypothetical example involves race-based discrimination of a kind that should be prohibited once we recognise that showing less respect for a person can be a distinct feature of a discriminatory act, apart from the differential impact it has on his interests (11).

The observation just made about the distinction between differential impact and respect as distinct reasons for legally prohibiting discriminatory policies, practices or acts leads us to a fourth, and final preliminary observation. We can distinguish between a *wide* and a *narrow* interpretation of the legal prohibition against age-based discrimination, depending on whether it relies on one or both of the two reasons just distinguished for prohibiting discrimination. The wide and narrow interpretation both assume, and thus agree, that the law should recognise as a reason for prohibiting any instance of age-based discrimination that it expresses disrespect for a person's worth or his capacities. To assume this does not entail, of course, that policies, practices or acts must always be prohibited if they express such disrespect. There may be circumstances under which they must be permitted despite the fact that they express disrespect for a person's worth. An example might be when a private citizen refuses to invite older individuals to his dinner parties only because he thinks they are too old to be interesting. This is an example of an act of discriminatory treatment that expresses disrespect but that must be protected on the basis of a right to freedom of association. So, the point on which the wide and narrow interpretation agree is perhaps best expressed as follows: the fact that age-based discrimination expresses disrespect for a person's worth is always a *pro tanto*, though not necessarily always *decisive*, reason for the law to prohibit it.

Where the wide and narrow interpretations disagree is over whether any other reason should be recognised by the law as a reason to prohibit age-based discrimination. According to the narrow interpretation, the answer to this question is negative. On the narrow interpretation, it is *only* disrespect for a person's worth due to his age that counts as a reason to legally prohibit age-based discrimination. On the wide interpretation, by contrast, differential impact on a person's interests due to his age *also* counts as a reason for prohibiting age-based discrimination. The main claim of this article is that the narrow interpretation of age-based discrimination is more plausible than the wider interpretation.

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(11) One reaction to this example is that denying the black customer a ticket has a short-term worse impact on his interests than it has on other customers. It is only over a longer-term that the impact of that treatment on him turns out not to be worse, i.e. once the place departs and subsequently crashes. However, we can think of cases in which treatment manifests disrespect for a person even though it does not have a worse impact on his interests *in the short-term.* It would be disrespectful to segregate black from white passengers on a plane, even if the black passengers were offered the same service on the plane. The claim that disrespect can occur even if there is equal impact on interests was famously affirmed by the US Supreme Court when it declared, in *Brown, V., Board*, 1954, that «separate but equal» treatment on the basis of race is «inherently unequal».

II. A DEFENCE OF THE NARROW INTERPRETATION

We can state the main problem with the wide interpretation succinctly as follows: it does not fit well with the standard egalitarian argument that is meant to justify the prohibition against discrimination. The wide interpretation says that there is reason to prohibit age-based discrimination if it has a differential impact on a person's interests due to his age. But as this section will now argue, policies, practices or acts that have a differential impact on a person's interests due to his age, do not necessarily show less than equal concern and respect for that person. So, the wide interpretation is wider than it should be according to its own foundations.

To see this problem more clearly and in detail, it is helpful to consider another hypothetical example of a practice that has a differential impact on people's interests due to their age. Suppose that an employer refuses to hire salespersons in his shops if they are above 30 years of age. His reason for this is that his shops sell clothes to younger customers and he believes that younger customers are more likely to buy his clothes if the salespersons they interact with in his shops belong to the same age group as them. The employer's recruitment policy clearly has a differential impact on the interests of persons who are above 30 years of age as compared to persons below that age. It denies members of the older age-group a job opportunity that it provides for members of the younger age-group. So, this is an example of age-based discrimination that has a different impact on people's interests due to their age.

Let us now add some further details to the example. We can suppose that all persons above the age of 30 had the same opportunity to work in the employer's shops when they were below the age of 30, and that those currently below the age of 30 will no longer have an opportunity to work in his shops when they are above the age of 30. Suppose, furthermore, that the employer does not discriminate against anyone on any other grounds – that is, on the basis of their sex, race, or sexual orientation.

Does the employer's recruitment practice show less than equal concern and respect for persons above 30? Two observations pull us in opposite directions when we think about this question. First, the impact of his recruitment practice on persons who are currently above 30 years of age and persons who are currently below that age is not *simultaneously equal*. That is, its impact on those two age groups is not the same at the current moment in time. This observation might lead us to conclude that his recruitment policy is in conflict with equal concern and respect. Secondly, the impact of his recruitment practice on persons in those two age groups is *equal over time*. Over time, it has the same impact on persons in both age groups. This second observation might lead us to conclude that his recruitment policy is not, in fact, in conflict with equal concern and respect. To determine whether the employer's recruitment policy should be prohibited on grounds of age-based discrimination, we need to determine which of these two observations is decisive. Should we believe that the principle of equal concern and respect for persons requires *simultaneous equality* or *equality over time*?

In the philosophical literature on distributive justice, powerful criticisms have been raised against the idea that persons must be simultaneously equal (12). Its problems are fairly intuitive and easy to see. Simultaneous equality seems to imply, for example, that persons may not take turns enjoying a particular benefit. (Yet as many parents and school-teachers know, «taking turns», is, in many contexts, the way in which we ensure that persons *are* treated equally.) The requirement of simultaneous equality implies that it is unacceptable, for example, that younger adults, who work, have less leisure time as compared to older retirees, even if younger workers will themselves enjoy the benefits of retirement and even if the retirees were once young workers themselves. But this runs contrary to common-sense.

The fundamental problem with the idea that equal concern requires simultaneous equality is that it overlooks the possibility that benefits and burdens at different moments within a life can compensate for each other (13). The possibility of compensation within a life is familiar to us from our everyday, moral experiences. People often try to amend for the bad things they do to others by offering them a benefit at a later point in time. Or people will take the fact that someone had a benefit in the past as a reason for why he need not be given this benefit in the present. Good and bad experiences at different moments in time can cancel each other out, and leave a person as well off, overall, as if neither of those experiences had occurred. The possibility of compensation within a life is a reason for rejecting the idea that equal concern and respect for persons requires the same impact on their interests at each moment in time. It suggests instead that equal concern and respect allows differential impact on persons at a given moment in time, if those whose interests are fulfilled less at that moment in time have their interests fulfilled more at other moments. This entails that we should broaden the period of time over which we compare people when deciding whether they are being shown equal concern and respect, so that we take into account all the moments within their lives between which their good and bad experiences can compensate for each other. In other words, we should understand equal concern and respect as requiring that persons are treated equally *over time* rather than *simultaneously*.

This conclusion needs to be qualified in an important respect. It is possible that different moments in a life cannot compensate for each other if the psychological continuity between the earlier and later stage of a person's life is broken. This might be happen, for example, in a case that involves a person who suffers from advanced Alzheimer's disease, and who, for that reason, no longer remembers the earlier stages of his life. It may not be appropriate to invoke earlier benefits for this person as a reason for denying him benefits in the present because his inability to remember those earlier benefits may entail that they no longer genuinely compensate him in the present for whatever difficulties he is now facing. Cases involving persons who suffer from advanced Alzheimer's are therefore an exception to the

(12) For the most sophisticated discussion of this topic, see McKerlie, D.,«Equality and Time,» *Ethics*, 99, 1989, pp. 475-491; McKerlie, D., «Equality between Age-Groups», *Philosophy & Public Affairs*, 21, 1992, pp. 275-295; and McKerlie, D., *Justice between the Young and the Old,* Oxford University Press, Oxford, 2013.

(13) That the possibility of compensation within a life is a reason to compare persons over time, rather than simultaneously, is argued by Nagel, T., *Mortal Questions*. Cambridge University Press, Cambridge, 1979, p. 120, and McKerlie, D., «Justice Between the Young and the Old», *Philosophy & Public Affairs,* 30, 2001, p. 151.

idea that we must compare persons over time, rather than simultaneously. We will return to this point in more detail in Section 4.

Let us now take up the example of the employer who adopts recruitment practices that are discriminatory based on age. If the job opportunities he provides to persons are the same over time, and assuming that he does not discriminate on other grounds, such as race, sex or sexual orientation, we should not *necessarily* conclude that anyone has been denied equal concern and respect. However, recall that that is precisely what the wide interpretation of age-based discrimination tells us to conclude. We should therefore reject the wide interpretation of age-based discrimination.

We can now shift our attention to the narrow interpretation of age-based discrimination. This interpretation prohibits age-based discrimination only when it manifests disrespect for a person's worth or her capacities due to her age. Such disrespect consists of the manifestation of an attitude towards that person that regards her or her capacities as less valuable than they in fact are. Racist or sexist employers show such disrespect, for example, when they refuse to hire black or female job applicants because they mistakenly believe that being black or female makes them less capable than they in fact are. Disrespect for a person's worth can also be a reason for refusing to hire a job applicant because of her age. Some employers may believe, unreasonably, that being above a certain age makes a person less capable than she in fact is. The narrow interpretation of the prohibition on age-discrimination condemns such employment practices. However, this is not because they have a differential impact on a person's interests due to her age, but because they show disrespect for her due to her age (14).

We can further specify the nature of the disrespect that the narrow interpretation of age-based discrimination condemns if we consider the following question. The narrow interpretation condemns policies, practices or acts that discriminate against a specific person on the basis of a belief that underestimates this person's capacities because of his age. An example of a clear case of this is when an employer notices that one of his employees is wearing a hearing-aid, then forms the unwarranted judgement that this employee is performing insufficiently well in her position within the company, and terminates her contract. However, there are many cases of policies, practices or acts that discriminate against persons on the basis of their age that do not involve the kind of prejudice that is evident in the example just given, but rather involve reliance on well-supported statistical generalisations about the persons above a certain age (15). Does the narrow interpretation of age-based discrimination also condemn such cases or does it only condemn cases that involve prejudiced belief?

In addressing this question, it is helpful to consider some examples in which employers rely on statistical generalisations about job applicants above a certain age in order to determine whether or not to recruit them. Take, first, a case in which persons above the age of 60 apply for a job as an airline pilot (in many jurisdictions,

(14) For a thoughtful elaboration of this point to which I am indebted see CUPIT, G., «Justice, Age, and Veneration», *Ethics* 108, 4, pp. 702-718.

(15) For a helpful overview and moral analysis of different ways in which people rely on generalisations in their conduct towards others, see SCHAUER, F., *Profiles, Probabilities and* Stereotypes, Harvard University Press, Cambridge, MA, 2006.

the law actually prohibits persons from working as airline pilots once they reach a certain age, but let us leave this point aside for a moment). Relying on statistical generalisations about the capacity of persons above the age of 60 to fly aeroplanes, the airline decides to dismiss all applicants above 60. We can suppose that this airline fully accepts that a minority of persons above 60 are able to perform well as pilots. Nevertheless, it rejects all applicants aged above 60 because it would take a lot of time and effort in order to identify the minority of persons above 60 who are able to perform well in the job. Notice that when the airline rejects all applicants who are above 60, it does not do so on the basis of a prejudiced belief about the capacities of any specific applicant. Is this airline manifesting the kind of disrespect towards persons that the narrow interpretation condemns?

The most plausible answer to this question is that it does not because the airline cannot reasonably be expected to incur the costs of discovering whether older applicants do or do not have the capacities needed for the position in his company. If, by contrast, the costs of discovery were not very high, a different judgement would seem warranted. In a different example, we could imagine a secondary school that rejects applicants who apply for a job as music teacher because they are above 60 years of age. This may well be disrespectful towards those applicants because the school does not have a good enough basis for refusing to determine whether those applicants are or are not capable of performing the job well. Among other things, the school can interview them, observe them teaching a class, and review their performance shortly after hiring them. These costs are not so high as to make it reasonable for the school simply to dismiss all applicants above the age of 60.

The underlying point of these examples can be summarised as follows. A policy, practice or act can manifest the kind of disrespect that the narrow interpretation of age-based discrimination condemns even if it is not based on a prejudiced belief about the capacities of any specific person. It is enough for disrespect to occur that the policy, practice or act treats persons above a certain age as if their capacities are insufficient when it can reasonably be expected that the company in question should determine this matter more carefully. Put more simply, the disrespect that is condemned by the narrow interpretation is treatment of others that arises from an unwarranted failure to form sufficiently precise judgements about them – and this occurs both in clear cases that involve prejudiced belief and in cases that involve unnecessary reliance on statistical generalizations. Note that this disrespect can be shown to persons not only because they are of a certain age, but also because of their race, sex and sexual orientation.

III. THE NARROW INTERPRETATION IN PRACTICE: THE *MANGOLD* CASE

The discussion of age-based discussion undertaken so far has pursued questions that are mainly philosophical in nature. Let us now try to determine what practical difference the discussion makes in terms of the interpretation of law. Once again, this a very large and complicated terrain. The following discussion is intended only to be indicative rather conclusive.

To illustrate the practical relevance of the narrow interpretation, we can focus on a case that arose under EU law, and specifically, under EU Directive 2000/78 (which has been transposed in to the national legislation of EU member states). Let us briefly review two articles in the directive. Article 1 of the directive states that its purpose is to «lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment» (16). Article 2 explains that the «principle of equal treatment» prohibits both «direct» and «indirect» discrimination on any of the just mentioned grounds, including age. Direct discrimination occurs «where one person is treated less favourably than another is, has been or would be treated in a comparable situation.» Indirect discrimination occurs when «an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons» (17). Article 2 also includes two grounds for exception to the prohibition on discrimination. Discrimination is not impermissible if the «provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary» (18).

The first case in which the directive was applied by the European Court of Justice (ECJ) was *Mangold* (Mangold v Helm (2005) C-144/04). *Mangold*, involved an exception to a provision in the German Labour Code, concerning fixed-term labour contracts. The exception relieved employers of having to objectively justify terminating fixed-term contracts for people above the age of 52. The rationale for the exception was that this would encourage employers to hire older workers in greater numbers, given that the employment conditions employers would face in doing so would be less strict. Mr Mangold, a 56-year old worker, challenged this exception on grounds of age-based discrimination.

In deciding this case, the ECJ applied the following three-step scrutiny. In a first step, it ascertained whether the exception to the German Labour Code subjected persons to differential treatment based on their age. It answered this question in the affirmative (indeed, this was self-evident). In a second step, the ECJ determined whether the differential treatment was objectively justified by a legitimate aim. It answered this question also in the affirmative: «the purpose of that legislation is plainly to promote the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work» (Judgement, Paragraph 59). In the third and final step, the court asked whether the exception to the German Labour Code was «appropriate and necessary» as a means for pursuing the purpose of the legislation. Here, the court returned a negative answer on the basis of the following reasoning:

> In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the

(16) Official Journal of the European Communities, L 303/18, 2000.
(17) Official Journal of the European Communities, L 303/18, 2000.
(18) Official Journal of the European Communities, L 303/18, 2000.

> personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued (Judgement, Paragraph 65).

Let us now observe the following point about the three-step scrutiny in *Mangold*. It is not the strictest form of scrutiny that a court can apply when assessing discriminatory legislation. It is not as strict, for example, as the «strict scrutiny test» applied by the US Supreme Court when it assesses legislation that discriminates on the basis of race. The strict scrutiny test requires that legislation be shown to meet a «compelling state interest» before it can be allowed to stand, whereas the scrutiny in *Mangold* required only that legislation pursue a «legitimate aim using appropriate means» (19). That being said, the level of scrutiny applied in *Mangold* was of a somewhat exacting nature: it was sufficiently exacting, after all, for the ECJ to find that the exception to the German Law Code could not stand.

This point raises two questions. First, is it reasonable that differential treatment based on age should invite the level of judicial scrutiny that we observe in *Mangold*? Here, it is worth bearing in mind something quite elementary, which is that a citizen does not ordinarily have the right to challenge a piece of legislation in court merely on the grounds that that legislation does not pursue a legitimate aim using appropriate means. Is it reasonable that a person should have this right merely insofar as this legislation treats him differently from others because of his age?

The natural answer, of course, is that it is, because the law requires that all persons be shown equal concern and respect. However, as we have seen, this principle of equal treatment is open to interpretation. We have observed that there is a strong reason for rejecting the idea that the treatment of persons must be *simultaneously equal*. It is not a matter of fundamental concern that legislation should have a worse impact on a person's interests than it has on the interests of others only because of his age, provided, of course, that he and those others have all received the same treatment under the law *over time*. This suggests that the scrutiny of legislation that is applied in *Mangold* is unreasonable. It is true that the exception to the German Labour Code had a worse impact on Mr. Mangold's interests as a worker than it had on the interests of younger workers, given that it deprived Mr. Mangold of a form of legal protection that is available to younger workers. But the exception to the German Labour Code does not treat older and younger workers unequally over time: all will receive the stronger form of protection when young and the weaker form of protection when old. Rather, we should adopt a narrow interpretation of age-based discrimination and ask whether the exception to the German Labour Code shows less respect for Mr. Mangold. Arguably, the answer to this question is that it does not. The rationale for the exception was that it would encourage employers to hire older workers, and this rationale does not seem to show disrespect for older workers in general, or Mr. Mangold in particular.

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(19) The US Supreme Court first used the standard of strict scrutiny in *Korematsu V. United States,* 1944.

The second question we should consider is this. If we reject the wide interpretation of age-based discrimination in favour of the narrow interpretation, what alternative kind of scrutiny should the ECJ ideally apply? (The ECJ should of course only apply a kind of scrutiny that is compatible with Directive 2000/78. When I ask what kind of scrutiny the ECJ should «ideally» apply, I am imagining a scenario in which the directive could be revised in line with the narrow interpretation of age-based discrimination.) A plausible answer is this. The ECJ should adopt a two-step process of scrutiny. It should first ask whether a policy or practice shows a person less respect for his worth or capacities due to his age. This should be assessed in the terms suggested in the previous section, i.e. by asking whether this person has been subjected to treatment based on prejudice or unnecessary statistical generalisation because of his age. In a second step, it should then ask whether there is a compelling state interest that requires that he be subjected to such treatment. This two-step scrutiny is a narrower but stronger form of scrutiny compared to the three-step scrutiny applied in *Mangold.*

An example of age-discrimination case that fails this stronger, but narrower form of scrutiny is provided by Colm O'Cinneide (20). It is not an ECJ case, but an Irish case called *Byrne v FAS* (2002) In this case, a 48-year old woman was refused a vocational training place, and was told in an interview that this was because older students were less successful at technical drawing (which was an element of the training in question). As O'Cinneide explains, no objective evidence was provided to support this assessment. The interviewer seemed to have simply made a set of assumptions when refusing her a vocational training place based on the interviewer's beliefs about the capacities of older students. Here, disrespect is being shown to a person due to her age in the sense identified by the narrow interpretation of age-based discrimination because there is an unwarranted failure to form a sufficiently precise judgement about the 48-year old woman's capacities. Since no compelling state interest is served by this practice, it is an example of age-discrimination that should be prohibited.

IV. **AGE-DISCRIMINATION AND PUBLIC HEALTH CARE**

Let us next consider the practical implications of the narrow interpretation of age-based discrimination in the context of public health care. As we noted in the introduction, ageing societies experience a growing, aggregate need for health care amongst the elderly. In this context, difficult decisions need to be taken about how limited public funds devoted to health care should be divided between the elderly and younger age groups. How exactly does the prohibition on age-based discrimination constrain these decisions?

Consider, for example, the question of whether there should be public funding for medication that delays the effects of Alzheimer's disease, which is a disease suffered mainly by elderly citizens. To ensure this, public funding would have to be diverted away from other kinds of medications or treatments,

(20) O'Cinneide, C., «Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age», *Revue des Affaires Europeennes,* 2, 2009-10, pp. 253-276.

many of which are needed by younger persons. If public authorities were to decide against paying for medications that delay the effects of Alzheimer's disease, and if they were to use the funding saved in order to provide treatments for younger persons, would this be an example of age-based discrimination that should be prohibited? (21).

At first sight, the narrow interpretation of age-based discrimination may seem mistaken in how it responds to this question. The apparent mistake is that the narrow interpretation appears to be too permissive in allowing certain kinds of public health care policy towards the elderly. Recall that the narrow interpretation permits policies or practices that have a differential impact on a person's interests due to her age, so long as that policy or practice treats the interests of all persons equally over time. It would therefore seem to permit *any* policy or practice for funding health care that differentially impacts on the interests of the elderly, so long as all citizens are subjected to that self-same policy or practice over time. Not only does this imply that public funding for medication for Alzheimer's may be withheld, it implies that even relatively inexpensive forms of medication and treatment for the elderly may be withheld. This result is contrary to widespread conviction.

However, this analysis of the implications of the narrow interpretation is too quick. It overlooks the fact that the narrow interpretation of age-based discrimination is only one part of a complete account of what a society owes its elderly citizens and while the narrow interpretation may permit certain kinds of treatment of the elderly, these treatments may be prohibited by other parts of a complete account. We can put this point as follows. While certain kinds of treatment of the elderly may not be problematic because they are *discriminatory*, they can still be problematic for *other reasons.* This means that adopting the narrow interpretation of age-based discrimination still allows us to conclude that certain kinds of treatment of the elderly that run contrary to widespread conviction should be prohibited. We would only need to show that other reasons for prohibiting those kinds of treatment exist – that is, apart from reasons that have to do with discrimination. Let me now explain two such other reasons that affect how a society should treat its elderly citizens in the context of health care.

First, while the narrow interpretation of age-based discrimination allows simultaneous inequality between persons, it requires that citizens have a right to the same overall pattern of medication and treatment over a lifetime. It is then a further question exactly which overall pattern of medication or treatment over a lifetime a society should implement. The most influential answer to this question in the distributive justice literature is that it should be an overall pattern that most people would prefer if they adopted an impartial perspective that did not favour any particular standpoint within society (22). This allows us to conclude

(21) In the United Kingdom, the National Institute for Health and Care Excellence (NICE), the institution responsible for deciding whether given medications should be publicly funded, has rejected funding drugs for treating Alzheimer's. This has led to significant controversy. See HARRIS, J., «It's not NICE to Discriminate», *Journal of Medical Ethics*, 31, 2005, pp. 373-375 and the reply to Harris by RAWLINS, M., and DILLON, A., «NICE Discrimination», *Journal of Medical Ethics* 31. 2005, pp. 683-684.

(22) This answer, which is summarised very roughly here, is defended by DANIELS, N., *Am I My Parents' Keeper?,* Oxford University Press, Oxford, 1988. For a similar view, see DWORKIN, R.,

that certain kinds of treatment of the elderly should be publicly funded if most people would impartially prefer that these kinds of treatment are included in the overall pattern of treatment that they should receive over a lifetime. For example, end-of-life intensive care for the elderly –at least over a short period– may be a form of treatment that most people would prefer to receive from the state at the expense of other kinds of treatment they could receive when younger, because it allows people to say goodbye to their loved ones. It would therefore be unacceptable for the state to deny an elderly person end-of-life intensive care, *not* because this would be *discriminatory* based on age, but for the different reason that it would run contrary to the overall pattern of treatment most people would prefer over their lifetimes.

Secondly, there may be certain extreme conditions of persons that must be given priority in the allocation of medication or treatment regardless of the age of the person, simply because they involve suffering (23). Examples include severe physical pain or intense anxiety. We can therefore endorse the narrow interpretation of age-based discrimination and say that while denying elderly persons who suffer severe physical pain or anxiety may not be discriminatory based on age, it is still unacceptable because such extreme conditions must always be alleviated.

If we adopt the two reasons just summarised alongside the narrow interpretation of age-based discrimination –i.e., that public authorities must implement the preferred overall pattern of medication and treatment over a lifetime and that they must alleviate suffering– we can avoid what may initially have seemed to be too permissive an approach to determining acceptable forms of public health care for the elderly.

Before concluding, we should also note a further consideration that is relevant for identifying the implications of the narrow interpretation of age-based discrimination in the context of health care. As noted earlier, some elderly persons –for example, those who suffer from advanced forms of Alzheimer's disease– may no longer experience psychological continuity with their earlier selves. Denying them medication or treatment cannot easily be justified on the grounds that the resources and opportunities they enjoyed when younger now compensate them for their current condition. It was the possibility of such compensation, recall, that led us to conclude that we need not ensure that people are simultaneously equal and that age-based discrimination should be interpreted more narrowly so that it requires only that no one be show less respect than others. However, if the past cannot compensate elderly persons who suffer from advanced Alzheimer's disease, then the idea that we should compare their present condition to those of others becomes much more plausible. The narrow interpretation thus allows an exception –because this is what its own foundation implies– namely, that we should seek to alleviate the distress of advanced Alzheimer's disease to the extent that we can, regardless of the resources and opportunities that persons who suffer from this terrible disease have had in the past.

Sovereign Virtue, Harvard University Press, Cambridge, MA, 2002, pp. 307-319.

(23) For a helpful discussion of the duty to alleviate suffering, see MAYERFELD, J., *Suffering and Moral Responsibility*, Oxford University Press, Oxford, 1999.

V. CONCLUSION

The main claim of this article is that we should endorse a narrow interpretation of age-discrimination when considering permissible social reform in the context of an ageing society. This claim has implications for the kind of legal scrutiny courts should give to policies and practices that are challenged on grounds of age-discrimination. The scrutiny must consider whether the policies and practices in question rely on unwarranted generalizations about the capacities of elderly persons. It should not consider the broader question of whether policies and practices have differential impact on elderly persons as compared to younger persons. Note that this does not imply that other parts of the law should not protect elderly persons in certain contexts. The claim defended here is only about the proper scope of the prohibition against age-discrimination and it is thus consistent with the view that other parts of the law should protect elderly persons, as it should all persons, against suffering.

BIBLIOGRAPHY

Cupit, G., «Justice, Age, and Veneration», *Ethics* 108, 4, pp. 702-718.

Daniels, N., *Am I My Parents' Keeper?*, Oxford University Press, Oxford, 1988.

Dworkin, R., *A Matter of Principle*, Oxford University Press, Oxford, 1985

— *Sovereign Virtue*, Harvard University Press, Cambridge, MA, 2002.

— *Justice for Hedgehogs*, Harvard University Press, Cambridge, MA, 2013.

Harris, J., «It's not NICE to Discriminate», *Journal of Medical Ethics*, 31, 2005.

Lippert-Rasmussen, K., *Born Free and Equal?*, Oxford University Press, Oxford, 2014.

Lee, R., «The Demographic Transition: Three Centuries of Fundamental Change», *Journal of Economics Perspectives*, 17, 2003, pp. 167-190.

Mayerfeld, J., *Suffering and Moral Responsibility*, Oxford University Press, Oxford, 1999.

McKerlie, D., «Equality and Time», *Ethics*, 99, 1989, pp. 475-491.

— «Equality between Age-Groups», *Philosophy & Public Affairs*, 21, 1992, pp. 275-295.

— «Justice Between the Young and the Old», *Philosophy & Public Affairs,* 30, 2001.

— *Justice between the Young and the Old,* Oxford University Press, Oxford, 2013.

O'Cinneide, C., «Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age», *Revue des Affaires Europeennes,* 2**,** 2009-10.

Rawlins, M., and Dillon, A., «NICE Discrimination», *Journal of Medical Ethics* 31, 2005, pp. 683-684.

Schauer, F., *Profiles, Probabilities and* Stereotypes, Harvard University Press, Cambridge, MA, 2006.

Thomas, N., *Mortal Questions*, Cambridge University Press, Cambridge, 1979.

United Nations, Department of Economic and Social Affairs, *World Population Ageing*, New York, 2019.

Woodward, J., «The Non-Identity Problem», *Ethics*, 96, 986, p. 810.