

Are early-age limits morally worse than late-age ones?

Axel Gosseries
Hoover Chair of Economic and Social Ethics¹
FNRS & UCLouvain

1. Consider, to begin with, the following (realistic) list of age-based practices:

- Before 14 and after 67, you are being denied access to (some) jobs
- Before 18 and after 42, you are not being offered IVF treatment
- Before 18 and after 70, your right to drive is subject to specific restrictions
- Between 5 and 18, you are subject to compulsory education
- Before 18, you are not entitled to vote
- Before 65, you are not entitled to full pension rights

Some will want to defend the view that we should get rid of *all* age criteria, systematically seeking substitute criteria or simply dropping the restrictions at stake. Others may rather want to double-check, with an open mind, whether we do not have reasons to stick to age criteria in some cases. The point of this short note is to explore the implications of *combining* what I consider to be two of the best possible justifications for using at least some age criteria in social life. To my mind, two of the best justifications (if any) for still using age criteria consist of (1) relying on the value of chronological age as a proxy indicator of *current and future abilities* and (2) its value as a proxy indicator of *past opportunities*, in connection with *equality over entire lives*.²

I will state a set of claims and conjectures and explore what they entail, in a necessarily sketchy way. I will explore their implications for the use of lower or upper ages. My general question is whether using upper ages tends to be less problematic than using lower ages? I will check whether there is a convergence between the two justificatory strategies that I will now present in more detail.

2. I begin with the use of age as a proxy indicator for *abilities*. It can be used to indicate some physical, affective or cognitive abilities, the passage of (life) time being important for development and deterioration processes. Note that when it is used in the spirit of entire life egalitarianism – see below –, chronological age is *also* in some sense used as a proxy, taking the chronological age reached so far as signaling the degree to which one has already enjoyed access to certain valuable things in one's life. While longevity is admittedly an imperfect predictor of the range of opportunities that one has benefitted from, it may still remain a relevant one.

¹ This is a revised version of a note prepared for a workshop organized by Harvard's Human Rights Program on Nov. 18, 2022. I wish to thank G. Bogner, T. Meijers, G. Neuman, M. Sa Valente, V. Vandenberghe, J. Rennes and C. Wareham for comments on an earlier version. E-mail: axel.gosseries@uclouvain.be

² I discuss other ones elsewhere, including the one of "sequence efficiency" See Gosseries (2014)

Let me make three claims on age as a proxy indicator of abilities. First, using age as a proxy makes special sense when we are dealing with large numbers of people (e.g. massive elections, flows of travelers in airports, waves of COVID patients, etc.). Yet, there are also cases where even if numbers were not large, it might remain preferable to use a proxy indicator – age being one of the options - rather than relying on an individualized assessment. These reasons include avoiding test manipulability (chronological age is often easily observable on ID cards), protecting privacy (e.g. when assessing sexual or political maturity) or restricting the range for human error (e.g. when combining an age criterion with in-depth individualized assessment). Second, the stronger the correlation between a given chronological age and the target variable, the more justifiable it is to rely on such a proxy indicator. This is not self-evident, as gaining precision may lead to further group segmentation on grounds that are not necessarily within people's control, which does not necessarily promote fairness.

Third, statistical significance does not merely result from natural facts. It is also generated by background practices that could themselves be morally problematic. In such a case, we could have a reason (the nature of which ought to be clarified) not to rely on the proxy indicator, even if it were to make sense statistically speaking. For instance, using a gender criterion as a proxy may be problematic even if the correlation is strong, not only because it reinforces gender divisions that may be deemed undesirable, but also because what renders it statistically significant may in fact *result from* the very gender divisions that we deem undesirable. For instance, in a society in which girls are denied access to formal education, gender-based predictors of some skills acquired at school will be very reliable. This may not suffice to render their use morally acceptable. The same may hold for age.

On statistical significance, a first conjecture is that it tends to be stronger at “extreme” ages (very young and very old) than at mid ages (e.g. 30 or 50). This assumes that physical, affective and cognitive change is not linear in life. It is not so much about the magnitude of the age gap between the two individuals that we compare. It has more to do with the idea that there are steep developments at the beginning of people's lives and also that there tends to be quite systematic deterioration processes beyond an advanced age (e.g. after 80). This connects to a second - and more tentative - conjecture: statistical reliability is higher at young ages than at later ages. This is because, as our lives develop, a lot of other intervening factors have an impact on who we become. How we start our life may be more uniform than how we end it.

The implications of this twofold conjecture are that the use of *early age* criteria may be *statistically* more justifiable than the use of late age criteria. In addition, there could be a *pro tanto* argument for its superior moral acceptability in reference to background practices that render the age criterion statistically reliable. Early age practices (e.g. age-based compulsory education or the paternalistic use of age) that increase the statistical reliability of early age as a proxy indicator may be morally less problematic than practices that rely on old ages.³ At this stage, the provisional conclusion is that if the only reason to use age criteria were their value as

³ See Møller Lyngby Pedersen (in press) (on paternalism and the twofold role of age)

a proxy indicator for physical, affective or cognitive features, relying on early ages would be slightly more acceptable than relying on late ages.

3. I have just presented a few ideas about age as a proxy indicator for physical, affective or cognitive abilities. How do the implications of the *entire life equality* view combine with its use as a proxy for past opportunities?

Two points about complete life egalitarianism. First, I understand *egalitarianism* in broad terms here. Philosophers and economists have long stressed that reducing inequalities and improving the situation of the least well-off are two goals that do not always coincide. Hence, within the broad egalitarian family, one of the dividing lines is between those who advocate reducing inequalities as such and those who stress that our core concern should be with improving the situation of the least well-off, even at the cost of letting inequalities increase. The divergence between classical egalitarianism on the one hand and leximin egalitarianism or Gini prioritarianism on the other hand typically leads to different practical guidance when our choices take place in a game that is not a zero-sum one.

The second point is about the *complete life* intuition. Here, the idea is that if we care about inequalities or about the situation of the least well-off, this should be assessed over people's entire lives rather than at specific moments in time taken in isolation. The view comes in various versions. One way of putting it is that we should give priority as a matter of distributive justice to how people fare over their entire lives, even if some spot inequalities may also matter on top. This does not render spot inequalities irrelevant. It simply means that we should mostly worry about spot inequalities if we anticipate that they contribute to inequalities over our entire lives. Incidentally, this also suggests, not only one way of interpreting inequalities between birth cohorts, but also that we should be more centrally concerned about cohortal inequalities than about age group inequalities. This is not necessarily reflected in anti-discrimination law regimes that do not allow for a cohortal reading of their anti-age discrimination provisions. Age discrimination laws that only ban discrimination above or below a certain age (e.g. above 40) typically do not allow for such a cohortal reading.⁴

How do we connect the complete life intuition with our concern for age limits? Here, we can distinguish a *defensive* use from an *affirmative* use of the entire life egalitarian idea.⁵ The former states that relying on age-based differential treatment is *acceptable* to the extent that it *does not generate further* inequalities over people's entire lives. This is typically relied upon when defending e.g. a minimum voting age, in conjunction with stressing the function of age as a proxy for political maturity.

In contrast, the *affirmative* argument states that relying on age-based differential treatment is *desirable* to the extent that it *contributes to reducing* entire life inequalities. For example, the affirmative argument could feed a *pro tanto* case supporting age-based compulsory retirement

⁴ See Gosseries (2015) (on the difference between an age group and a birth cohort reading of age discrimination)

⁵ See Gosseries (2023)

in some professions. Of course, moving to an all-things-considered argument for age-based compulsory retirement requires more than that. One needs to check the relationship between the age reached and the extent of access to employment that one has effectively enjoyed. An account of the relative importance of access to employment compared with other opportunities in people's lives would be necessary too. In addition, account would have to be taken of the efficiency impact of retirement. While freeing some jobs, retirees do not simply leave the game. They entail extra costs to the active population. Some versions of complete-life egalitarianism, i.e. those that – like Gini prioritarianism or leximin egalitarianism – care about improving the situation of the least well-off rather than reducing inequalities as such, may be especially sensitive to such efficiency concerns while remaining complete-life egalitarians in broad terms.⁶ Costs might be such that age-based compulsory retirement, while possibly reducing inequality in lifetime access to employment, would in the end worsen the general situation of the least well-off over their entire life. Yet, age-based compulsory retirement is not the only possible illustration of an affirmative use of age-based differential treatment. The use of relative ages in access to life-prolonging health care provides another illustration.

Now, the problem with the *defensive* version of the complete-life view is twofold. First, it is insufficient because we still lack a *positive* reason to support the age-based differential treatment at hand. In other words, even if an age-based exclusion were not to generate any inequality over complete lives between two individuals, it would still amount to a restriction of people's opportunities or freedom that requires justification. Second, in many contexts, age-based differential treatment *is not* neutral – as a matter of fact – in terms of its impact on inequalities over entire lives. In other words, there are many types of age-based rules that do increase inequalities over entire lives. Often, if you are only entitled to something beyond the age of 45, it means that all those who happened to have died before 45 and who may have needed it before then will end up having never benefitted from it, adding insult to injury.

Hence, the scope of the defensive argument is more limited than we think and is not fully complemented, I submit, by the scope of the affirmative argument. For the problem with the *affirmative* argument is also that the ability of age criteria to promote equality over entire lives may be *more limited* than we anticipate, even if we give importance to longevity in how well people's lives fare.⁷ Many ways in which we use age criteria *do not* reduce inequalities over entire lives at all. The use of age for enfranchisement purposes or of age gaps in criminal law are cases in point. In other words, if the affirmative argument is the most solid of the two, its scope may be equally limited if we consider the whole range of uses of age criteria that we typically rely upon.

The conjecture here is that, based on the entire life equality idea and more specifically on the affirmative argument, there is a limited range of cases in which using age criteria *against the elderly* is less problematic (and even desirable in some cases when we are dealing with scarce resources) than using age criteria *against the young*. This is due to the role of longevity as an

⁶ On compulsory retirement: Lippert-Rasmussen (2019), Halliday and Parr (2022).

⁷ Gosseries (2023)

indicator of the *past opportunities* that a person has had so far - rather than as an indicator of the person's *current and future abilities*, be they physical, affective or cognitive. Of course, there remains a vast range of cases in which differential treatment against the elderly will *not* contribute to reducing lifetime inequalities, nor be neutral from the perspective of entire life inequalities.

Note as well that when looking into the use of age as a proxy indicator for present and future abilities— as opposed to an indicator for past opportunities -, the *direction* of differential treatment (for or against) is not necessarily central. What matters from that perspective is the proxy's statistical reliability. In contrast, when we look at age from the angle of entire life equality concerns, it is the *direction* of differential treatment (for or against) rather than the age location (early or late) that is crucial. Admittedly, the notion of direction of discrimination (for or against) is not always straightforward to use, as the case of paternalism illustrates.

4. Can we derive any general conclusions from combining these two possible grounds for age-based differential treatment? When it comes to age as a *proxy indicator for abilities*, there might be a slight presumption that relying on advanced ages is more problematic than relying on early age, whatever the direction of discrimination. Yet, it is only a very slight presumption premised on the second – and quite tentative - conjecture formulated in section 2. When it comes to age as a *proxy indicator of past opportunities*, there is a clear presumption that relying on early ages to deny entitlements to the young is more problematic than relying on advanced ages to deny entitlements to the elderly. Yet, this depends on the ability of the age practice at hand to effectively contribute to entire life equality and/or to generate significant efficiency gains, which is not the case in a significant range of practices in which relying on age pursues other goals.

Hence, we are far from a clearcut argument to support a general presumption that differential treatment based on late ages is less problematic than differential treatment based on early ages. While the exclusive focus of the 1967 Age Discrimination in Employment Act on 40-plussers is puzzling, we should also not go all the way down in the other direction to care exclusively about age-based practices that exclude teenagers or young adults.⁸

⁸ For a great piece of work putting the emphasis on young adults: Bidadanure (2021)

References

- Bidadanure, J., 2021.** *Justice Across Ages. Treating Young and Old as Equals*, New York: Oxford University Press, 238 p.
- Gosseries, A., 2014.** “What makes age discrimination special? A philosophical look at the ECJ case law”, *Netherlands Journal of Legal Philosophy*, 43(1): 59-80
- 2015.** “Environmental Degradation as Age Discrimination”, *e-Pública. Revista electrónica de Direito Público* (Lisbon), 2(2), 26-39.
- 2023.** “Age limits and the significance of entire life egalitarianism”, in Bognar G. & A. Gosseries (eds.), *Ageing without ageism? Conceptual Puzzles and Policy Proposals*, Oxford: Oxford University Press, pp. 82-93
- Halliday, D. & T. Parr, 2022.** “Ageing, Justice, and Work: Alternatives to Mandatory Retirement” in C. Wareham (ed.), *The Cambridge Handbook of the Ethics of Ageing*, Cambridge: Cambridge University Press, pp. 228-242
- Lippert-Rasmussen, K., 2019.** “The EU and age discrimination: Abolish mandatory retirement!”, in Fritz-Vannhame J. & M. Meyer (eds.), *Twelve Stars. Philosophers Chart a Course for Europe*, Gütersloh: Verlag Bertelsmann Stiftung, pp. 127-138
- Møller Lyngby Pedersen, V., In Press.** “In defence of age-differentiated paternalism”, in Bognar G. & A. Gosseries (eds.), *Ageing without ageism? Conceptual Puzzles and Policy Proposals*, Oxford: Oxford University Press