

Age-Based Classifications in an Age of Centenarians

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With the number of older adults increasing worldwide¹ – and the ranks of the very old rising especially sharply² – countries are confronted with the question of how to respond to their expanding elderly populations. Historically, countries have responded to the “problem” of old age by creating special policies for older adults, such as pension programs for those of “retirement age.”

This chapter considers the role of such age-based law and legal entitlements in a world in which people routinely live to be 100 years old. It asks: In such a world, what should be the legal significance of advanced chronological age? Should an adult’s chronological age affect his or her legal status or entitlements? It posits that the rise of the 100-year life should prompt a shift away from age-based policy. Specifically, it shows why, as life expectancy increases, chronological age will become an increasingly poor proxy for other characteristics, and that, therefore, using chronological age to establish eligibility for legal entitlements will result in increasingly poorly targeted policy interventions. It also explains how the use of age-based classifications will become increasingly inequitable and regressive.

The chapter calls for a wholesale reconsideration of the use of age-based criteria. It argues that social welfare policies should increasingly reject age-based classifications in favor of approaches that target interventions to populations based on their actual vulnerability to the particular problems the policies aim to address. It explains that although this alternative approach may be more challenging to administer, it is increasingly necessary to ensure efficient and equitable distributions of resources.

¹ U.N. Dep’t of Econ. & Soc. Aff., *World Population Aging: Highlights* (2017), 8, https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Highlights.pdf.

² *Id.*; Jean-Marie Robine & Sarah Cubaynes, *Worldwide Demography of Centenarians*, 165 *MECHANISMS AGEING & DEV.* 59 (2017).

8.1 THE ROLE OF AGE-BASED CLASSIFICATIONS

Age-based legal classifications are ubiquitous. Across time and across cultures, jurisdictions have used chronological age as a mechanism for establishing rights and responsibilities.

Today, chronological age classifications occur in a variety of legal contexts. Chronological age is used to establish legal duties. In both criminal and civil cases, minors are typically held to a lower standard of care than are adults.³ Similarly, certain behaviors may be required of individuals at one age, and not at another. For example, states may require education for minors, or special tests for older adults seeking drivers' licenses.⁴ Chronological age can also determine eligibility for benefits. Although states have generally abandoned age as a basis for imposing guardianship or conservatorship, eligibility for public health insurance in the US largely depends on chronological age. Not only is Medicare coverage largely limited to those over sixty-five years of age, but older adults and children can more readily qualify for Medicaid than can younger adults. In addition, chronological age can determine the level of protection the law provides against actions by others. For example, the US Age Discrimination in Employment Act (ADEA) provides protection against age discrimination in employment to those aged forty and over, but no protection to those under the age of forty.⁵

The ubiquity of age-based legal classifications, in part, reflects their utility. In some contexts, chronological age is a meaningful predictor of individuals' needs or abilities, and, therefore, using age-based classifications can help efficiently target policy interventions and resources. Compulsory education requirements for minors, for example, largely reflect the distinct needs and abilities of youngsters, whose cognitive abilities generally develop in predictable ways corresponding with their chronological age.

The ubiquity of such classifications also, however, reflects their substantial administrative appeal. Chronological age classifications are easy to administer because chronological age can be readily determined without any need for discretionary judgment. Thus, policymakers are understandably likely to use age as a proxy for a wide range of other less-readily-ascertained characteristics. Indeed, age-based legal classifications are frequently used as proxies for more-difficult-to-measure attributes such as maturity, disability, or financial insecurity.

³ See DAN B. DOBBS ET AL., *THE LAW OF TORTS*, §§ 134–137 (2d ed. 2019) (discussing the standard of care for minors in US tort law); AM. L. INST., *MODEL PENAL CODE* § 4.10 (2018) (describing a general policy against convicting persons who were under the age of sixteen at the time an offense was committed).

⁴ See, e.g., FLA. STAT. ANN. § 322.18(5) (2021).

⁵ 29 U.S.C. § 631(a) (2021).

Consistent with these advantages, chronological age-based classifications are particularly prevalent in policies designed to respond to the risks associated with aging. Indeed, age-based classifications are a core feature of US laws and policies designed to address the needs of older adults. The major entitlement programs in the US – Social Security, Medicare, and Medicaid – have rules that preference individuals for benefits based on advanced chronological age. Most Americans will only become eligible for government-provided health insurance because they become older.

Age-based classifications are also common in policies designed to address concerns about the safety of older adults. Indeed, the use of age-based classifications has increased in recent decades as the US has sought to respond to the problem of elder abuse and neglect. States are embracing elder-specific social service interventions. Almost all states have adopted mandatory elder abuse reporting.⁶ Many of these require third parties to report otherwise confidential information if the suspected victim is above a certain age. For example, Rhode Island requires “any person who has reasonable cause to believe that any person sixty years of age or older has been abused, neglected, or exploited or is self-neglecting” to “immediately” report it to the state.⁷ Others require reporting of suspected abuse when the victim is above a certain age and has a requisite level of disability.⁸

States have also created new crimes that exclusively apply to behavior directed at older adults.⁹ Some states have criminalized certain types of otherwise consensual sexual relationships where the “victim” is an older adult. For example, Washington prohibits sexual relations between disabled persons aged sixty and over and those who provide them with paid transportation.¹⁰ Similarly, some states have adopted statutes that create criminal liability for certain types of financial transactions if those transactions involve a person of advanced age.¹¹ And Maine allows for certain transactions to be voided if they were the result of undue influence exerted on a person aged sixty or older.¹²

⁶ Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053 (2009).

⁷ R.I. GEN. LAWS § 42-66-8 (2021).

⁸ See, e.g., MO. REV. STAT. §§ 192.2400, 192.2405 (2000).

⁹ See Nina A. Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 49 AMER. CRIM. L. REV. 1, 8–13 (2012).

¹⁰ See WASH. REV. CODE § 9A.44.100(1)(f), § 9A.44.010(16) (2020) (criminalizing sexual conduct with a “frail elder or vulnerable adult” defined as “a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself”); WASH. REV. CODE § 9A.44.100 (2020) (making it a felony for a paid transportation provider to knowingly cause a disabled person age sixty or older, other than his or her spouse, “to have sexual contact with him or her or another” even if the contact is consensual).

¹¹ See, e.g., 720 ILL. COMP. STAT. ANN. 5/17-56(a), (c) (2020).

¹² 33 MAINE REV. STAT. ANN. § 1021 et seq. (2020).

8.2 IMPACT OF EXPANDED LIFE EXPECTANCY: RECALIBRATION

Expanded life expectancy, and the growing ranks of the extremely old, should trigger recalibration – or, at least, a consideration of whether recalibration is in order – of age-based legal classifications that differentiate among adults.

Recalibration could help to better allocate scarce resources. As the population ages, entitlement programs for older adults will become substantially more costly without recalibration. This has been well recognized in the context of the Social Security system. Scholars and policymakers have long been in conversation about increasing the Social Security retirement age (either the early retirement age, normal retirement age, or both) to maintain the program's financial solvency. Anne Alstott, for example, has suggested that raising the retirement age for higher-income workers is appropriate both to address the program's solvency and to further fairness across the life cycle.¹³ Similar suggestions have been made, although with less political support, about raising the Medicare eligibility age in response to changing demographics.¹⁴

Recalibration could also improve the fit between age-based criteria and the underlying characteristics being targeted. Age-based criteria are often used in policy as a proxy for disability and frailty, but old age is actually a poor predictor of either, especially when it is defined broadly (such as sixty or sixty-five and older, as is common in US policy). At higher age thresholds, by contrast, there is a stronger correlation between chronological age and disability and frailty. For example, although dementia is often thought of as a common ailment in old age, less than 5 percent of those in their seventies have dementia, but over a third of those age ninety and older do.¹⁵

Thus, ratcheting up age-based eligibility criteria is likely to result in more tailored policy interventions because chronological age is a more accurate predictor of incidence of physical and cognitive disabilities for the very oldest of the old than for older adults who are younger (i.e., the “old-old” and “young-old”). The older the age classification used, the more likely the individuals covered by that classification will have predictable physical and cognitive vulnerabilities and thus the more likely the classification will be a reasonable proxy for such traits.

Recalibration may also impact the experience of growing older, potentially in positive ways for some. Age-based legal classifications help shape the social meaning of chronological age. For example, turning sixty-five is perceived as an entrance into

¹³ ANNE L. ALSTOTT, *NEW DEAL FOR OLD AGE: TOWARD A PROGRESSIVE RETIREMENT* (2017); Anne L. Alstott, *A New Deal for Old Age*, 97 B.U. L. REV. 1933 (2017).

¹⁴ See KAISER FAMILY FOUND., *RAISING THE AGE OF MEDICARE ELIGIBILITY* (2013), <https://www.kff.org/wp-content/uploads/2013/01/8169.pdf>.

¹⁵ B. L. Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMIOLOGY 128 (2007), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2705925/>.

old age and a major milestone for Americans because it has been deemed “retirement age” for Medicare (and previously was “normal retirement age” for Social Security benefits). As one blogger wrote: “Turning 65 years old is one of those life passages – like college hazing and infantry basic training – many men would rather avoid contemplating until it’s upon us . . . Nobody wants to think about becoming an elder.”¹⁶ Thus, increasing the minimum age criteria for policies designed to address the needs of older adults may prolong the perceived experience of middle age.

On the other hand, recalibration in the form of simply raising the eligibility age for benefits (e.g., Social Security, Medicare, access to retirement accounts without penalty) will come with substantial costs and often inequitable results. As eligibility ages are raised, we can expect people to remain in the workforce longer, potentially crowding out younger workers and workers with lower wages.

Increased inequities can be expected because although people’s chronological age increases at parallel rates, their biological ages do not. Biological age, which may be estimated based on biomarkers and other indicia of health, occurs at different rates in different people. In addition to genetic contributors, socioeconomic status, lifestyle, and environmental factors, including exposure to pollution, may impact the rate of biological aging.¹⁷ Thus, responding to increases in longevity by increasing eligibility thresholds – without accompanying those changes with new supports that meet the needs of those of advanced biological age – will tend to be increasingly regressive: disproportionately disadvantaging already disadvantaged and marginalized groups.

In short, the rise of the 100-year life should not simply cause recalibration of age-based classifications; it should trigger reconsideration of their use in the first place.

8.3 THE IMPACT OF EXPANDED LIFE EXPECTANCY: RECONSIDERATION

The rise of the 100-year life should revive and reenergize the classic debate¹⁸ over what role (if any) chronological age should play in determining rights or establishing eligibility for benefits. That is, it should seriously call into question not only *what* age-based classifications are used but also *whether* such classifications should be used at all.

¹⁶ Suddenly Senior, *Turning 65 Years Old: Scream about It* (Mar. 26, 2018), <https://www.suddenlysenior.com/turn-65-and-scream-about-getting-old/>.

¹⁷ Tze Pin Ng et al., *Socio-environmental, Lifestyle, Behavioural, and Psychological Determinants of Biological Ageing: The Singapore Longitudinal Ageing Study*, 66 GERONTOLOGY 603 (2020).

¹⁸ See AGE OR NEED? PUBLIC POLICIES FOR OLDER PEOPLE (Bernice Neugarten ed., 1982) (discussing the modern debate over age-based classification – considered the seminal book on the topic).

One reason that expanding life expectancy should also prompt reexamination of the use of age-based legal classifications is that chronological age is likely to be an increasingly poor proxy for underlying characteristics that policymakers wish to target (e.g., functional abilities or needs).

As life expectancy increases, we can expect increased heterogeneity in the experiences and life trajectories of people born in the same year. This is because aging fosters heterogeneity. As a generational cohort grows older, its members become more diverse in their functional abilities and health status. Heterogeneity in health-related characteristics is particularly pronounced in early older age.¹⁹ Consistent with this general pattern, a recent study of older adults in Canada, which considered thirty-four health-related characteristics, found that, overall, health heterogeneity peaks around seventy years of age²⁰ but continues to increase for certain characteristics – including functional performance – into at least the eighties.²¹

The increased heterogeneity among age peers reflects, at least in part, the effect of cumulative advantage and disadvantage over the life course. In particular, those with lower socioeconomic status and lower levels of education, on average, experience poor health and more functional limitations than those with higher socioeconomic status and levels of education.²²

A second more fundamental reason why expanding life expectancy should prompt reexamination of the use of age-based classifications is equity. The expansion of the ranks of centenarians, and the oldest-of-the-old more broadly, is not evenly distributed in society. Although it is often said that everyone grows old, this is simply untrue. Old age is not an inevitable experience. Not everyone will reach older age. Illness, accidents, and violence mean that many will die in their youth or younger adulthood. As of 2021, life expectancy at birth for non-Hispanic Black Americans was six years less than for non-Hispanic white Americans, and more than seven years less than that for Hispanic Americans.²³

Very old age is even less certain. As of 2018, less than 10 percent of Americans born alive lived to the age of ninety, and under 2 percent lived to be 100. Incidence of very old age varies by race and ethnicity. For example, as of 2018, Hispanic Americans were nearly twice as likely to live to age 100 as non-Hispanic Black Americans, and nearly 2.5 times as likely to live to age 100 than non-Hispanic white Americans.²⁴

¹⁹ Quoc Dinh Nguyen, *Health Heterogeneity in Older Adults: Exploration in the Canadian Longitudinal Study on Aging*, 69 J. AMER. GERIATRIC SOC. 678 (2021).

²⁰ *Id.*

²¹ *Id.*

²² David J. Lowsky et al., *Heterogeneity in Healthy Aging*, 69 J. GERONTOLOGY SERIES A. BIO. SCI. & MED. SCI. 607 (2014).

²³ Ctrs. for Disease Control, *Vital Statistics Rapid Release, Provisional Life Expectancy Estimate for January through June 2020* (2021), <https://www.cdc.gov/nchs/data/nvsr/nvsr69/nvsr69-12-508.pdf>.

²⁴ Ctrs. for Disease Control, *National Vital Statistics Reports, United States Life Tables*, 2018 (2020), <https://www.cdc.gov/nchs/data/nvsr/nvsr69/nvsr69-12-508.pdf>.

The likelihood of reaching very old age also varies substantially by socioeconomic status. In fact, in the US, educational attainment level is one of the strongest predictors of adults' health and mortality. Notably, the gap in life expectancy by socioeconomic status is widening in many parts of the country. A recent study of disparities in mortality found that the gap between those with higher levels of education and those with lower levels of education has widened in many states (especially those in the South and Midwest) since the mid 1980s.²⁵

Even if all Americans had an equal chance of surviving to very old age, however, the rise of the 100-year life would create new equity concerns about policies that disproportionately allocate resources to the very old. This is because such policies may create an inequity from a lifespan perspective. When compared with younger adults, older adults appear vulnerable. However, when compared to others of their own birth cohort, older adults are resilient – they are the survivors and privileged relative to others born at the same time who did not live to old age. Thus, policies that target older adults for special assistance may further entrench inequities by reducing the overall share of resources spent on groups that disproportionately die at younger ages (a group disproportionately composed of those with lower educational attainment, the poor, individuals with disabilities, and Black Americans).

In short, the effect of differences in life expectancy means that the use of age-based classifications is likely to increasingly result in an inequitable distribution of resources. As gaps in longevity increasingly accrue to some socioeconomic groups and not others, policies that differentiate among adults based on chronological age will increasingly serve to compound disadvantage or advantage.

Radical reconsideration of age-based criteria may have some advantages for older adults. Age-based classifications are typically thought of as benign with regard to older adults. Yet, this is increasingly untrue as states adopt legislation that – in the name of protecting older adults from abuse and exploitation – selectively burdens the rights of older adults.²⁶

Moreover, reconsideration may benefit older adults even when it involves reconsidering policies that in fact provide for a preferential treatment of older adults. Chronological age criteria that are used to establish eligibility for benefits or to set legal duties, but which are not highly correlated with need or do not reflect meaningful differences in capabilities, may perpetuate stereotypes about age. This in turn can fuel ageism (i.e., stereotyping and discrimination based on age). Policies that provide special benefits to older adults or try to limit or punish certain types of arrangements if they involve older adults (e.g., certain types of sexual relationships or financial transactions) may promote stereotypes about older adults as helpless, frail,

²⁵ Jennifer Karas Montez et al., *Education Disparities in Adult Mortality across U.S. States: How Do They Differ, and Have They Changed since the Mid-1980s?* 56 *DEMOGRAPHY* 621 (2019).

²⁶ For further discussion of this phenomenon, see Kohn, *supra* note 6 and Kohn, *supra* note 9.

or unable to make decisions. Such ageist stereotypes are not merely distasteful; they may increase risk of elder abuse. Although the empirical evidence of the link between ageism and elder abuse is still emerging and more is needed to show that ageism in fact causes elder abuse, there is some suggestive evidence that points to a likely causal connection.²⁷ As Edman Palmore has argued, “stereotypes of the old as helpless, worthless, and repulsive” may promote elder abuse by encouraging “people to vent their frustrations on elders or to see them as vulnerable targets for exploitation.”²⁸

A move away from age-based criteria has precedent. It would be, for example, consistent with a shift in the law’s approach to court-appointed guardians and conservators. Historically US states have authorized the appointment of a guardian or conservator to make decisions for people whom a court determined had a particular status, such as old age and a disability associated with old age, or a particular medical diagnosis. Influenced by the Uniform Probate Code’s alternative approach, states have largely moved away from such status and age-based criteria. Today most states only permit the appointment of a guardian or conservator – and the corresponding removal of rights from the person for whom one is appointed – if a court finds that individual has functional limitations that result in a need for such an arrangement.

8.4 AN ALTERNATIVE FRAMEWORK

A reconsideration of age-based classifications should lead to a move away from using chronological age as a proxy for other ascertainable characteristics – such as disability, health status, or financial insecurity – in favor of more direct approaches. In a world where chronological age is likely to be an increasingly poor indicator of functional ability or need, and where socioeconomic gaps in life expectancy are substantial, it will be increasingly indefensible to use chronological age to differentiate among adults.

Chronological age should not be seen as a reasonable criterion for targeting public policy interventions simply because it is convenient or perceived to be a proxy for need, health status, or vulnerability. Instead, politics should seek to find alternative targeting mechanisms. To do so, politics should consider the growing literature on how “vulnerability” can be a basis for the allocation of resources. This school of thought builds on Martha Fineman’s “vulnerability theory,” which proposes that vulnerability is inherent to the human condition, and that governments therefore have a duty to respond by ensuring that all people have equal access to

²⁷ Karl Pillemer, David Burnes & Andie MacNeil, *Investigating the Connection between Ageism and Elder Mistreatment*, *NATURE AGING* 159 (2021).

²⁸ See ERDMAN B. PALMORE, *AGEISM: NEGATIVE & POSITIVE* 138 (1999).

societal institutions that distribute resources.²⁹ The approach has captured the imagination of some elder law scholars already.³⁰ For example, in the context of old-age policy, Swedish scholars Titti Mattsson and Lottie Giertz look to Fineman to argue that states should move away from allocating social services based on group-based identities like age or diagnosis; instead, they propose, the state should focus on vulnerability – which they describe as allowing for more individualistic interventions.³¹

The vulnerability approach is a promising alternative to group identity (e.g., race, gender, poverty) as a basis for targeting social welfare policy. However, as I have discussed at length elsewhere,³² policies cannot respond to vulnerability merely as a universal characteristic of human beings. Thus, using a vulnerability approach to target policy interventions requires a contextual approach that defines vulnerability relative to the threat being addressed and targets people based on their vulnerability to a specific problem. This would be consistent with a conceptualization of vulnerability being a product of the relationship between individuals and their environment.

By way of example, imagine a state wished to address the problem of financial exploitation. Adopting a vulnerability approach would suggest that states should resist the urge to create age-specific crimes (like “elder abuse” or “exploitation of an elderly adult”). Instead, the state should identify factors that make people susceptible to such exploitation or its impacts and allocate resources with a view to supporting conditions that increase resilience to financial exploitation. Thus, states might support interventions that target conditions associated with the risk of exploitation, such as social isolation, lack of long-term care supports, limited financial literacy, and lack of access to civil legal services for those who experience exploitation.

While vulnerability will increasingly be a superior basis for distributing resources, it would be a mistake to demand an end to all age-based classifications. Even with demographic shifts, polities could reasonably use age-based criteria where their underlying policy goal is specifically related to chronological age. A polity could decide – as a matter of public policy – that it considers age to be an appropriate and ethical basis for allocating resources (e.g., health care, basic income) or assigning duties (e.g., participation in compulsory education). Similarly, a polity might reasonably choose to allocate resources in a way that explicitly favors older adults to express appreciation for older adults or reward them for the contributions they made

²⁹ Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9–15 (2008) (originating the theory).

³⁰ See, e.g., Alexander A. Boni-Saenz, *Age, Equality, & Vulnerability*, 21 THEORETICAL INQUIRIES L. 161 (2019).

³¹ Titti Mattsson & Lottie Giertz, *Vulnerability, Law, and Dementia: An Interdisciplinary Discussion of Legislation and Practice*, 21 THEORETICAL INQUIRIES L. 139 (2020).

³² Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1 (2014).

during their lifetimes. There are times where policymakers may wish to use age-based legal classifications not as a proxy for other characteristics but because policymakers think chronological age itself matters. For example, schemes that provide pension payments to older adults (such as the US Old Age Survivor's and Disability Insurance program – commonly referred to as Social Security) may also function as a way for society to express appreciation for older adults or reward them for the contributions they made during their lifetimes. Favoring older adults for public benefits may compensate for disadvantages associated with older age. And the prospect of future benefits may help all people by reducing the fear of aging.

Likewise, increased longevity does not call into question distinctions between minors and adults. It remains reasonable for politics to continue to distinguish between adults and minors in a host of situations. Among children, chronological age remains a reasonably robust proxy for the stage of development. Moreover, a polity will frequently have compelling justifications for treating children differently from adults. For example, it might reasonably decide to provide public education to children but not adults on the grounds that children can make best use of that resource because of their development stage or because they will (on average) have more years of life to benefit from that public investment.

In addition, whether abandoning age-based criteria will actually further efficiency and equity depends on politics. Efforts to replace age-based eligibility criteria in critical social safety net programs, such as Social Security and Medicare, risk unleashing political forces that would dismantle the programs.

Thus, those seeking to replace age-based classifications with targeting based on vulnerability will need to be mindful of the potential political consequences of their actions, as well as the additional administrative costs associated with the use of what are likely to be more complex classification systems. But in a world where age-based classifications are becoming more inefficient and inequitable, the benefits of abandoning age-based classifications will likely increasingly outweigh the costs.

8.5 CONCLUSION

This chapter has examined how the law should respond to the challenge posed by old age when old age itself is changing. It has suggested that, as life expectancy increases, the use of age-based classifications will become less efficient and more regressive. Accordingly, not only will age-based criteria need to be recalibrated to ensure that scarce resources can be allocated efficiently, but the use of such criteria should be reconsidered altogether. A promising alternative to reliance on age-based criteria is to use a vulnerability-based approach: targeting social welfare interventions to populations based on the population's vulnerability to the particular concern the intervention aims to address. While this approach may lack the alluring convenience of age-based criteria, it has the potential to more equitably and efficiently allocate resources in an aging world.