Should Age Discrimination Be an Integral Part of Employment Discrimination Law?

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This Article argues that a universal approach to age discrimination promotes justice (including intergenerational justice) and efficiency. As explained herein, legal regimes regulate age discrimination in employment in various ways. While some regimes create specific anti–age discrimination legislation, others ban most kinds of employment discrimination, including age discrimination, in a general way. These latter promote a universal approach to age discrimination. The current Article explores the theoretical justifications for either a particularistic or a universal approach to age discrimination. Additionally, it enriches its theoretical discussion by taking and presenting a snapshot of current litigation in Israel – a country that has adopted a universal approach to age discrimination.

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Introduction

Legal regimes differ from one another with regard to the way in which they regulate age discrimination in employment. Several regimes explicitly ban age discrimination, and do so by means of specially targeted anti–age discrimination legislation. These regimes promote a particular approach to age discrimination. Other regimes, mainly in the past, used to permit age discrimination. There is a third type of regimes that promotes equality and bans most kinds of employment discrimination, including age discrimination, in a general way. The latter promote a universal approach to age discrimination, and give all types of discriminations the same substantial protection by law. The current Article aims to explore the advantages and flaws of a universal approach to age discrimination through a theoretical inquiry.

The theoretical inquiry is supplemented and enriched by taking and presenting a snapshot of current litigation in Israel, a country that has adopted a universal approach to age discrimination. In Israel, the same law prohibits all types of employment discrimination, including age, race, sex and 14 other types of discrimination.[1] The study of age discrimination litigation in Israel provides empirical data on the successes and failures of this litigation. The data provide a snapshot, if you will, of current litigation, which allows for a careful assessment of the effects of the universal regime that was adopted in Israel. The data may additionally serve as a starting point for future empirical comparative studies.

Part I discusses the advantages and flaws of a universal approach through a theoretical inquiry: section I(A) presents the main arguments against a universal approach to age discrimination and tries to repudiate them, while section I(B) presents the main justifications for a universal approach to age discrimination. Part II discusses comparative aspects of the regulation of age discrimination in U.S. federal law (a regime with a particularistic approach) and in Europe (a regime with a universal approach, but in which age discrimination is regulated in an inferior way as compared to other types of employment discrimination).

Part III presents the case study: the regulation of age discrimination in Israel – a country with a universal approach under which all types of employment discrimination are regulated in the same way. Section III(A) presents the history of the Israeli Equal Opportunities at Work Law, during which the number of protected groups has grown. Section III(B) presents the

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1 Employment (Equal Opportunities) Law, 5748–1988 (Isr.). Nonetheless, disability is regulated by a separate law: Equal Rights for People with Disabilities Law, 5758–1998 (Isr.).

historical expansion of discrimination stages in the Israeli Equal Employment Opportunities Law over the years (admittance to work, conclusion of work, etc.). Section III(C) presents the methodology of the present research into age discrimination in Israel, including the limitations of the research. Section III(D) presents findings from quantitative research into employment discrimination and age discrimination litigation in Israel. Section III(E) goes on to present the applications of the major doctrines of the Equal Opportunities at Work Law to age discrimination. Section IV discusses the findings and argues that the universal regulation of age discrimination offers advantages in terms of efficiency and justice. The last Part concludes.

I. A Universal Approach to Employment Discrimination

Age discrimination and how the law should tackle it is a subject of controversy between different scholars and policymakers. Some present arguments as to why a universal approach is not the right framework for dealing with this kind of discrimination. Some of these arguments, as will be presented in the following section, claim that it should not be acknowledged as a cause of action at all. I will try to repudiate these arguments and justify the inclusion of age discrimination in a universal antidiscrimination law.

A. Justifications for a Particularistic Approach to Age Discrimination

Since Butler defined the phenomenon of "ageism" in the late 1960s, an extensive literature has explored the phenomenon of age discrimination, including age discrimination in employment.[2] Concurrently, legislators in several countries began to enact anti–age discrimination laws. As emphasized by the literature,

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2 Robert. N. Butler, *Age–ism: Another Form of Bigotry*, 9 Gerontologist 243, 243–46 (1969). For age discrimination in employment, see, e.g., Malcolm Sargeant, Age Discrimination in Employment (1st ed., 2006); Ann Numhauser–Henning & Mia Ronnmar, *Concluding Discussion*, *in* Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond 431, 449 (Ann Numhauser–Henning & Mia Ronnmar eds., 2015); Pnina Alon–Shenker, *Nonhiring and Dismissal of Senior Workers: Is it all About the Money?*, 35 Comp. Lab. L. & Pol'y J. 159 (2014); Geoffrey Wood, Adrian Wilkinson & Mark Harcourt, *Age Discrimination and Working Life: Perspectives and Contestations – A Review of the Contemporary Literature*, 10 Int'l J. Mgmt. Reviews 425 (2008); Alysia Blackham, Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice (1st ed., 2016).

the unique characteristics of age discrimination differentiate it from other kinds of employment discrimination. These unique characteristics serve as a justification for regulating age discrimination in a separate law, which provides an adequate response to the special needs of elderly people.[3]

The first justification, then, is that a particularistic approach might better cope with the special problems of discrimination on the basis of age, which are not relevant to other forms of discrimination: compulsory retirement arrangements that mandate that employees retire from work at a certain age;[4] early retirement arrangements that provide retirement benefits only to employees who belong to a certain age group;[5] healthcare benefits that might be more expensive to purchase for elderly workers and pension benefits. In fact, the U.S. Age Discrimination in Employment Act (representing a particularistic approach) regulates these issues,[6] while the Israeli Law (presented below) does not.

Contrarily, it could be argued that the special needs of retirees and elderly workers do not justify a particularistic prohibition of age discrimination. Countries that have adopted a universal approach to age discrimination regulate matters such as mandatory retirement, early retirement, healthcare and pensions in other specific laws. For example, in Israel, the Retirement Age Law regulates retirement issues, including early retirement and mandatory retirement; the National Health Care Law regulates mandatory healthcare to all Israeli residents; the Mandatory Pension Expansion Order regulates occupational pensions.[7]

The second justification for a particularistic approach to age discrimination is that, in contrast to other forms of discrimination (such as race, sex and disability), everybody will (or at least is expected to) become old one day. According to a lifetime egalitarian approach, "there must be equality over the complete lifetimes of separate individuals."[8] Nonetheless, "at any given

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3 This claim served as a justification for regulating a special law for people with disabilities in the U.S. (The Americans with Disabilities Act).

4 Pnina Alon–Shenker, *Ending Mandatory Retirement: Reassessment*, 35 Windsor Rev. Legal & Soc. Issues 22 (2014).

5 Pnina Alon–Shenker & Lilach Lurie, *Do Trade Unions Promote Age Diversity and Intergenerational Solidarity in the Workplace? A View from Canada and Israel*, 70 Lab. L.J. (forthcoming 2019).

6 Michael J. Zimmer, Charles A. Sullivan & Rebecca Hanner White, Cases and Materials on Employment Discrimination 657–66 (6th ed., 2003).

7 The Retirement Age Law, 5764–2004 (Isr.); The National Health Care Law, 5755–1995 (Isr.); The Mandatory Pension Expansion Order (2008) (Isr.).

8 Alexander A. Boni–Saenz, *Age, Equality and Vulnerability*, 21(1) Theoretical Inquiries L. 161 (2020).

moment in time, there might be inequalities between individuals . . ."[9] Several scholars have even claimed that there is no reason why a specific prohibition against age discrimination should exist. As Richard A. Posner explained,

> [B]oth the people who make employment policies for corporate and other employers and most of those who carry out those policies by making decisions about hiring or firing specific workers are themselves middle–aged rather than young. They are unlikely to harbor misunderstandings about the abilities of workers in this age group.[10]

A good riposte to the second justification is that although everybody will eventually become old (if everything goes well), young people suffer from myopia and are unable to imagine what their needs will be once they become old.[11] They might not be able to imagine they will suffer from age discrimination. At a young age our needs and thoughts are sometimes so different from when we become old that it might be more correct to look at our young self and old self as two different people, and not use a lifetime egalitarian approach.[12] In fact, many researchers have shown that people suffer from biases against elderly people (although they themselves will turn old one day).[13] Moreover, researchers have shown that even elderly employers suffer from biases against elderly employees.[14]

The third justification for a particularistic approach to age discrimination is that its forms are less severe than race and sex discrimination. While historically Afro–Americans and women have suffered from severe discrimination (including slavery and lack of entry to specific professions), elderly workers have not suffered from the same sort of discrimination.[15]

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9 *Id*.

10 Richard A. Posner, Aging and Old Age 319–61 (1st ed., 1995); Richard A. Posner, *Employment Discrimination: Age Discrimination and Sexual Harassment*, 19 Int'l Rev. L. & Econ. 421, 421–22 (1999).

11 *Cf* Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. Chi. L. Rev. 1257, 1297–1300 (1991).

12 *Cf* Anne Alstott & Bruce Ackerman, The Stakeholder Society 134–36 (1999).

13 Deborah E. Rupp, Stephen J. Vodanovich & Marcus Crede, *Age Bias in the Workplace: The Impact of Ageism and Causal Attributions*, 36 J. Applied Soc. Psychol. 1337 (2006).

14 Cliff Oswick & Patrice Rosenthal, *Towards a Relevant Theory of Age Discrimination in Employment*, *in* Equality, Diversity and Disadvantage in Employment 156, 162 (Mike Noon & Emmanuel Ogbonna eds., 2001).

15 Smith v. City of Jackson, 544 U.S. 222 (2005) (Justice Stevens, Section IV) ("Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII."); Nina A. Kohn, Elder Law: Practice, Policy and Problems 73 (2014).

A good riposte to this argument is that age discrimination is not a new phenomenon. For a long time it simply did not draw the same attention and treatment from discrimination lawyers.[16] Moreover, as population is aging, age discrimination is becoming more widespread.[17] The fact that in the past elders did not suffer from the same type and level of discrimination, does not contradict the fact that today these forms of discrimination take similar attributes. Even if we accept the historical argument, and agree that historically elderly people were not discriminated against, at present these forms of discrimination are similar, and according to research, sometimes age–discrimination is more severe.[18]

The fourth justification for a particularistic approach to age discrimination is that unlike in other forms of discrimination, elderly workers often earn better wages and receive better benefits than young workers due to their seniority.[19] Moreover, unlike race or gender (but similarly to disability), there sometimes is an inverse correlation between an individual's age and her ability to perform a job.[20] Therefore, a special legislation that includes a

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16 John Macnicol, Age Discrimination: An Historical and Contemporary Analysis (2006); Butler, *supra* note 2.

17 *See*, *e.g.*, Michèle Céline Kaufmann, Franciska Krings & Sabine Sczensny, *Looking Too Old? How an Older Age Appearance Reduces Chances of Being Hired*, 27 Brit. J. Mgmt. 727 (2016).

18 In Israel, for example, a study asked jobseekers belonging to different groups (including workers above the age of 45, women, mothers of small children and Arabs) whether they felt they were being discriminated against during their job search, due to the group to which they belong. The highest rate of feeling such was reported by the group of elderly workers. While 48% of the jobseekers above the age of 45 reported they felt they had been discriminated against due to their age, only 19.7% of the women reported they felt they had been discriminated against due to their gender (and only 29% of the Arabs due to their ethnicity, and 16.7% of the mothers of young children due to their familial condition). *See* Min. Just. & Econ., Shuki Hendlas, Thushat Aflaiya Shel Mehapsei Avoda Ve'Ovdin, Vma Hatzibur Hosehv Al Kach [A Perception of Discrimination in the Eyes of Jobseekers and Workers, and What is the Public Opinion] (2010) [in Hebrew], http://www.economy.gov.il/Research/Documents/DiscriminationFeelings2010.pdf.

19 Alon–Shenker, *supra* note 2. Moreover, in several countries young workers (and not only the elderly) suffer from wage discrimination in the labor market (as well as high rates of unemployment). *See, e.g.*, Massimiliano Mascherini et al., NEETs: Young People Not in Employment, Education or Training: Characteristics, Costs and Policy Responses in Europe (2012).

20 Alon–Shenker, *supra* note 2.

right to accommodation might meet elderly workers' special needs and enable them to better perform their job.

The riposte to the fourth justification is that even though when elderly workers are in the market they often do earn higher wages than younger workers, when they lose their job, they find it hard to find a new one, and might have to settle for reduced terms.[21] Moreover, as noted above, a universal prohibition of age discrimination does not exclude a special act which will regulate, for example, vocational training.

B. Justification for a Universal Approach Towards Age Discrimination

The uniqueness of "ageism" in employment might serve as a justification for regulating age discrimination as a unique category. Nonetheless, taking a universal approach towards age discrimination may provide certain advantages, such as creating a solution that will assist all workers through dealing with age discrimination cases as an integral part of the regulation of discrimination law. Examples of such integrative solutions include flexible working–hour arrangements and vocational training, which might assist all workers, including those taking care of family members.[22] In the following paragraph, I will provide several justifications for the regulation of age discrimination as an integral part of employment equality law rather than as a distinct and specialized category.

First, in many OECD countries, elderly workers suffer from long periods of unemployment.[23] Once they do find a job, they often settle for nonstandard employment for lower pay.[24] While the labor market is unfriendly to elderly workers, workers must work many years today in order to receive a pension

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21 OECD, Live Longer, Work Longer: A Synthesis Report (2006); Pnina Alon–Shenker, *Legal Barriers to Age Discrimination in Hiring Complaints*, 39 Dalhousie L.J. 289 (2016).

22 *Cf.* Pnina Alon–Shenker, *Towards a Diversity Approach to Equality at Work: The Case of Age Discrimination* (Presented in the LLRN Conference in Toronto, 2017). On flexible working hours, see, e.g., Jacqueline O'Reilly, Inmaculada Cebrian & Michel Lalelment, Working Time Changes: Social Integration Through Transitional Labour Markets (2000). Another example of an integrative solution is providing protection to people who take care of elderly people (similar to the protection for people who take care of people with disabilities provided in the Israeli Equal Rights for People with Disabilities Law, 5758–1998).

23 OECD, *supra* note 21.

24 Alon–Shenker, *supra* note 21.

upon retirement, which will provide them with a high replacement rate.[25] Thus, an inferior (and targeted) protection against age discrimination "undermines the civil and human rights of age discrimination victims,"[26] whereas a universal approach would put them on the same level as other risk groups that are exposed to discrimination in the labor market.

Second, as scholars taking the Transitional Labor Market (TLM) approach have shown, the transition between ages (and between work and retirement) is a labor market transition like other labor market transitions, such as the transition between work and disability or between work and taking care of family members. It poses the same risk – of social exclusion – and should therefore be treated in the same way as other labor market transitions.[27] Women who took time off from work in order to take care of their children, elderly workers who retired but now want to go back to the labor market — all face the same risk of an unfriendly labor market. Due to the fact that work is not only a way to makes ends meet, but also a way for someone to achieve self–realization, meet coworkers and accumulate human capital, the risk of not finding a job (due to discrimination as well as due to other factors) is an immense risk and should be treated accordingly.

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25 The net replacement rate is defined as the individual net pension entitlement divided by net pre–retirement earnings. *See*: OECD, Net pension replacement rates (indicator) (2019), https://data.oecd.org/pension/net–pension–replacement–rates.htm (last visited Aug. 16, 2019). For average replacement rates by country, see *Id.* In defined contribution pensions the replacement rate is unknown until retirement (It depends on many factors: contributions to the funds, years of work, management fees paid to the fund, capital market gains and life expectancy tables). *See, e.g.*, Lilach Lurie, *Pension Privatization – Benefits and Costs*, 47 Indus. L.J. 399 (2018). For an assessment of the replacement rates that Israeli retirees will receive upon retirement, see Sarit Menahem Carmi & Avia Spivak, Karnot HaPensia HaHadashot: Behinat Yahas HaTahlufa VeHitnahalut HaMevutahim [The New Pension Funds: Replacement Rates and the Insurers' Behavior] (2018), https://www.prisha.co.il/UserFiles/File/pdf/research/pensia072018.pdf (according to the study, Israeli men will receive a replacement rate of 35% and Israeli women a replacement rate of 29%).

26 Malcolm Sargent & Susan Bisom–Rapp, *Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States*, 44 Loy U. Chi. L.J. 717 (2013).

27 *Cf*. Günther Schmid & Bernard Gazier, The Dynamics of Full Employment: Social Integration Through Transitional Labour Markets (2002); Ralf Rogowski, The European Social Model and Transitional Labour Markets (2009); Günther Schmid, Full Employment in Europe: Managing Labour Market Transitions and Risks (2008).

Third, a distinct and specialized regulation of age discrimination has the potential to stigmatize elderly workers. Due to the stigmatization effect, elderly workers might hesitate before claiming their right to equal treatment. Indeed, an extensive literature shows that social security programs that include means tests, or are targeted towards specific categories of the population (usually the poor or people with disability), tend to stigmatize the potential recipients of the program.[28] One of the stigmatization effects is that potential clients do not realize their rights.[29] In contrast to means test programs, universal programs (aimed at all parts of society without any means test) have fewer stigmatization effects.[30] Regulation of age discrimination as an integral part of employment equality law has the potential, then, to promote equality and reduce discrimination.

Fourth, many plaintiffs suffer from multiple forms of compound discrimination: age and disability; age and sex; age and race.[31] As Malcolm Sargeant explained, "Age is an extra dimension to the scope of discrimination that people may suffer. It is often the combination of age with another apparent disadvantage that may multiply the discrimination suffered."[32] Israel Doron writes (in this current issue):[33]

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28 Richard M. Titmuss, *Universal and Selective Social Services*, *in* Commitment to Welfare 113, 114 (1968).

29 Anne Corden, Changing Perspectives on Benefit Take–Up 16−17 (1995); Robert Moffitt, *An Economic Model of Welfare Stigma*, 73 Am. Econ. Rev. 1023 (1983); Ruth Hancock et al., *The Take–Up of Multiple Means–Tested Benefits by British Pensioners: Evidence from the Family Resources Survey*, 25 Fiscal Stud. 279 (2004); Tomer Blumkin, Yoram Margalioth & Efraim Sadka, *The Role of Stigma in the Design of Welfare Programs* (CESifo, Working Paper No. 2305, 2008). *But cf*. John Gal, Michael Shalev & Mimi Ajzenstadt, *Mitzuy Zehuyot Universaliyot BeMa'arehet Ha'Bitahon HaSotziali BeIsrael* [*Universal Take–Ups in the National Security System: An Empirical Examination*], *in* Negishut LeTzedek Hevrati BeIsrael [Access to Social Justice in Israel] 187 (John Gal & Mimi Ajzenstadt eds., 2009) [in Hebrew] (showing that universal benefits also do not achieve full take–up).

30 Lilach Lurie, *Integrative Employment and Social Security Rights*, 29 Int'l J. Comp. Lab. L. & Indus. Rel. 325, 341–43 (2013).

31 Malcolm Sargeant, Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective (1st ed., 2011); Kevin M. Cremin, *Regarding Age as a Disability: Conceptualizing Age Discrimination at Work as (Mis)Perception of Disability Discrimination*, 39 Cardozo L. Rev. 439 (2017).

32 *See*, Sargeant, *supra* note 31, at 7.

33 *Cf*. Israel (Issi) Doron, *25 Years of Elder Law: An Integrative and Historical Account of the Field of Law and Aging*, 21 Theoretical Inquiries L. 1 (2020).

> These unique human experiences cannot be simply reduced to a notion of 'multiple discrimination' or of 'add on' social stigmas. They require the development of a jurisprudence, and law and aging framing, which can provide a better path for the legal analysis and treatment of those older persons who age with other sociocultural elements which challenge their ability to enjoy dignity and human rights in later life.

The integral regulation of discrimination law might therefore help to capture the complexity of the discrimination that elderly employees suffer and may protect them better.

Fifth, from an institutional point of view, universal regulation of discrimination law has efficiency advantages. Plaintiffs often raise several discriminatory causes of action. For example, Jenny claimed that her employer discriminated against her at work due to her being an elderly African–American female employee. She claimed for three discriminatory causes: age, gender and race. If all causes of action are regulated by the same law, the court might decide the case more quickly and in a more efficient way. Moreover, the court might use the same precedents regarding diverse causes.[34] Universal regulation of discrimination law thus saves time for judges and courts. A universal approach to employment discrimination also entails a unified approach to all kinds of discrimination, so the law and its application to specific cases is more unified. It promotes clarity and certainty in the law, to the benefit of litigants, their lawyers and the judges. It will allow plaintiffs to assess their chances of winning their claims better and it will clarify what the requirements are in order to prove their claims. Moreover, a universal approach will provide a stronger basis for protection of each discriminated group, because each will receive the same protection – no group will be protected more than others, and thus there will be are no classes between risk groups.

In contrast, when separate acts regulate distinct discriminatory causes, the courts will not necessarily use the same precedents for each cause. For example, as will be shown below, in the U.S., at the federal level, age discrimination is dealt with in a different act than race and sex discrimination.[35] Courts in the

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See also, Katlyn J. Lynch, *Sex–Plus–Age Discrimination: State Law Saves the Day for Older Women*, 31 ABA J. Lab. & Emp. L. 149 (2015).

34 If all causes of action are regulated by the same law, the law would be similarly applied to all causes of action, rather than applying each anti–discriminatory law separately, and considering different doctrines, approaches and levels of proof.

35 As will be explained below, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination due to "race, color, religion, sex, or national origin." The prohibition on age discrimination is regulated in the U.S. by the Age

U.S. use different precedents when they deal with age discrimination cases and race discrimination cases, respectively.[36] Similarly, in Israel, despite the universal approach to age discrimination, disability discrimination is dealt with in a separate act apart from sex, age, race and other types of discrimination.[37] While currently the Israeli labor courts use similar (but not identical) precedents when dealing with disability and other discriminatory causes,[38] this has not always been the case.[39] In fact, in the first years following the adoption of the Equal Rights for People with Disabilities Law 1998, the courts treated disability in an inferior manner. It took time for the courts to adopt precedents that were previously developed in other cases of discrimination.[40] Even in a particularistic regime, then, the system might regulate itself into treating all kinds of discrimination in the same way, but the Israeli disability example shows that this might take time. A universal regulation of discrimination would therefore save time and costs.

Moreover, under a particularistic regulation of age discrimination, plaintiffs who suffer from several forms of discrimination might sometimes not be able to receive relief. Katlyn J. Lynch provides in her research an example from the U.S. of a fifty–year–old female applicant who did not receive a job. There were two other qualified applicants: a thirty–year–old female and a thirty–year–old male. The young female received the job. The elderly worker will not be able to show disparate treatment under Title VII because another female was selected, and she will not be able to show age discrimination under

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Discrimination in Employment Act (ADEA) of 1967. As in many other areas of the law, states may grant more rights than federal law. In some states a universal approach has been adopted, at least in some contexts. *See* Lynch, *supra* note 33.

36 See discussion in Part II of this article.

37 Equal Rights for People with Disabilities Law, 5758–1998 (Isr.).

38 *See, e.g.*, Labor Court (Tel Aviv) 11813–08 Amir Zion v. Bezek (Jan. 5, 2012), (Isr.). There are still differences in the application of the doctrines between disability and other discriminatory causes that relate to accommodation of the workplace and its proper diverse composition.

39 For an analysis of disability legislation, see, Sagit Mor, *Shivyon Zhuyot Le'Anashim Im Mugbaluyot BeTa'asuka* [*Equal Rights for People with Disabilities in Employment*], 97 Tel Aviv U.L. Rev. (2012) [in Hebrew].

40 For a current view of the Equal Rights for People with Disabilities Law, 5758–1998 (Isr.), see Einat Albin & Sagit Mor, *Yetzug Holem Shel Anashim Im Mugbaluyot BeTa'asuka BeIsrael* [*Appropriate Representation for People with Disabilities in the Israeli Labor Market*], 15 Avoda, Hevra UMishpat [Lab., L. & Soc'y] 75 (2017) [in Hebrew]. *See also*, HCJ 6069/10 Machmaly v. Israel Prison Services (2014).

the ADEA[41] because a younger applicant was also rejected. Lynch shows in her article that sex–plus–age plaintiffs (like the woman in the example) are more likely to prevail under state statutes protecting both sex and age than under federal law, which protects sex and age separately.[42]

Lastly, universal regulation of discrimination might improve the law and the way that judges rule due to the diversity of plaintiffs.[43] Judges like all people might have cognitive biases against people who are different from them.[44] Male judges may have biases against female plaintiffs, and white judges may have biases against African–American plaintiffs.[45] But when judges are required to face a diversity of plaintiffs (some of whom are elderly like them, or of the same gender), they may establish a more just system, especially in the case of a universal regime where judges apply the same law to diverse plaintiffs who claim different types of employment discrimination.

II. Comparative Aspects of Age Discrimination

As mentioned above, legal regimes differ in how they regulate age discrimination in employment (Appendix A). Some regimes specifically ban age discrimination through specially targeted anti–age discrimination legislation (particular approach). Other regimes, mainly in the past, used to permit age discrimination. Other regimes promote equality and ban all (or most) kinds of employment discrimination, including age discrimination (universal approach). Moreover, legal regimes differ in the scope of protection they afford to age discrimination claims. While some regimes provide weaker protection for age discrimination claims (than for other types of discrimination claims), others provide the same protection for all types of discrimination claims. This Part will survey how

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41 The Age Discrimination in Employment Act (ADEA) of 1967. For an explanation about the law, see below section III.

42 Lynch, *supra* note 33.

43 Guy Grossman et al., *Descriptive Representation and Judicial Outcomes in Multiethnic Societies*, 60 Am. J. Pol. Sci. 44 (2016).

44 Stuart S. Nagel, *Testing Relations Between Judicial Characteristics and Judicial Decision Making*, 15 Western Pol. Q. 425 (1962).

45 *Compare* Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision–Making in the Federal Appellate Courts*, 114 Yale L.J. 1759 (2005); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 Am. J. Pol. Sci. 167 (2013); Elaine Martin, *Men and Women on the Bench: Vive la Difference*?, 73 Judicature 204 (1990), *with* Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 Law & Soc'y Rev. 1197 (1990).

the International Labor Organization (ILO), U.S. federal law and European law regulate age discrimination.[46]

The ILO convention from 1958 does not include a prohibition against age discrimination.[47] According to the convention, "discrimination includes (a) any distinction, exclusion or preference made on the basis of *race, color, sex, religion, political opinion, national extraction or social origin*, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction … as may be determined by the Member concerned."[48]

In the U.S., the Constitution does not explicitly prohibit age discrimination (in contrast to the prohibition against racial and religious discrimination).[49] Moreover, the federal prohibition against age discrimination in employment is regulated separately from the prohibition against discrimination due to race, color, religion, sex or national origin. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination due to "*race, color, religion, sex, or national origin*." Title VII does not prohibit age discrimination.[50] The prohibition on age discrimination is regulated in the U.S. by the Age Discrimination in Employment Act (ADEA) of 1967.[51] The ADEA stipulates: "It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[52] The ADEA protects only workers 40 years of age

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46 As elaborated below and in appendix A, in EU law one law prohibits all types of discrimination including age discrimination, while in the US federal law a specific law prohibits age discrimination. Nonetheless, both systems provide weaker protection to age discrimination in comparison to other types of discrimination.

47 Discrimination (Employment and Occupation) Convention (No. 111), June 25, 1958, 362 U.N.T.S. 31.

48 *Id.* at art. 1.

49 Age Discrimination in Employment 29 U.S.C. §623(a)(1) (1964). For more information about the ADEA, see, e.g., Gillian Lester, *Age Discrimination and Labor Law in the United States*, *in* Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond, *supra* note 2, at 397.

50 Title VII also does not include a prohibition on discrimination due to disability. Discrimination due to disability is regulated in the United States by the Americans with Disability Act of 1990, 42 U.S.C. §12101 (1990).

51 Age Discrimination in Employment Act 29 U.S.C. §623(a)(1) (1964).

52 *Id.* For more information about the ADEA, see, e.g., Lester *supra* note 49, at 397, 413.

and older.[53] It sets a floor of protection. As in many other areas of law, states may grant more rights than federal law.[54] In fact, many states expand Title VII coverage, and most states that do so include age as a protected class.[55]

Nonetheless, at the federal level, the protection against age discrimination in employment in the U.S. is weaker than the protection against other types of discrimination (such as sex and race) in several respects.[56] First, the Mixed Motive doctrine applies differently in age discrimination cases than in other types of discrimination.[57] Under Title VII, an employer is liable so long as discrimination was a motivating factor in the adverse employment action, even if other legitimate reasons also motivated the decision. In its 2009 decision in *Gross v. FBL Financial Services*, the Supreme Court rejected the analogous application of this doctrine to the ADEA.[58] An ADEA plaintiff must now show that age was the reason why the employer decided to act.[59]

Second, the Disparate Impact doctrine applies differently in age discrimination cases than in other types of discrimination.[60] Under the Disparate Impact theory, a company policy that is neutral on its face may be discriminatory if it has a disproportionately adverse effect on workers in a protected class. Unlike Title VII, the ADEA does not expressly codify the disparate impact mode of analysis, but the Supreme Court has made clear that this type of claim is also available under the ADEA, albeit in a weaker form.[61]

In contrast to US federal law, in the EU, Article 21 of the Charter of Fundamental Rights contains a general ban on discrimination concerning, among other grounds, age.[62] After the Lisbon Treaty, the Charter is legally binding and is part of primary law. Article 21(1) of the Charter declares: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other

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53 29 U.S.C. §631(a). Moreover, according to the United States Supreme Court, a person is allowed to discriminate against younger people in the protected class in favor of older workers, see General Dynamics Land Systems, Inc. v. Cline 540 U.S. 581 (2004).

54 Lester, *supra* note 49, at 401.

55 *See*, Lynch, *supra* note 33.

56 *Cf*. Kevin M. Cremin, *supra* note 31, at 452–58.

57 Jack Gross v. FBL Financial Services Inc., 557 U.S. 167 (2009); Sargeant, *supra* note 31, at 12.

58 *Gross*, 557 U.S..

59 *See* Sargeant, *supra* note 31.

60 Lester, *supra* note 49, at 405.

61 *Id*.

62 Charter of Fundamental Rights of the European Union, art. 21, Oct. 2, 2000, 326 O.J. C 2000.

opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."[63] Against this background, the European Council's Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the employment equality directive) was adopted in December 2000. Among other grounds, the Employment Equality Directive covers age. According to Article 1: "The purpose of this Directive 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."[64] In contrast to U.S. federal law, EU law bans age discrimination regardless of the age concerned.[65]

Nonetheless, although all types of discrimination are regulated in the EU under the same legislation, they are not regulated in the same way. The protection against age discrimination at the EU level (as in the U.S.) is weaker.[66] Article 6 of the directive provides specific justifications of differences of treatment on grounds of age.[67] According to Article 6(1),

> Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

This Part has discussed two legal systems: the U.S. legal system (at the federal level) and the European legal system. While the two systems regulate age discrimination in complete different ways, they do share similarities: in both, courts treat age discrimination as inferior to other types of employment discrimination.

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63 Charter of Fundamental Rights of the European Union, art. 21, Oct. 2, 2000, 326 O.J. C 2000.

64 Council Directive 2000/78, 2000 O.J. (L 16–22) 303 (EC) (establishing a general framework for equal treatment in employment and occupation).

65 Ann Numhauser–Henning & Mia Ronnmar, *Introduction*, *in* Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond, *supra* note 2, at 1, 7–8.

66 Ann Numhauser–Henning, *Ageism, Age Discrimination and Employment Law in the EU*, *in* Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons 98 (Israel Doron & Nena Georganzi eds., 2018).

67 Council Directive 2000/78, *supra* note 64, art. 6. *See also*, Numhauser–Henning & Ronnmar, *supra* note 65, at 7–9.

III. The Case Study: Age Discrimination Law in Israel

This Part looks at the case study of Israel – a regime in which one law regulates all types of discrimination and does so in the same way (a universal approach to age discrimination) (Appendix A). It begins with an historical perspective on the Israeli Equal Opportunities at Work Law (sections A and B) and will then turn to the empirical data on the success and failures of age discrimination and employment discrimination litigation in Israel (sections C, D, E and F).

A. Expansion of the Protected Groups over the Years

The Israeli Parliament (the Knesset) enacted the Equal Opportunities at Work Law in 1988.[68] It replaced the earlier Equal Opportunity in Employment Law, 5741–1981 (hereinafter: the Original Law).[69] The Original Law prohibited employers from discriminating against a worker due to his gender, due to his being married or a parent.[70] The Equal Opportunities at Work Law, 5748–1988, left the discrimination causes of action in place. It prohibited an employer from discriminating among workers or jobseekers due to their gender, due to their being married and due to their being parents.[71] Both the Original Law and the Equal Opportunities at Work Law from 1988 did not include a prohibition of age discrimination.

Over the years, Israel's parliament increased the number of protected groups (Appendix B). In 1992 the prohibition was extended to discrimination due to personal status and sexual orientation.[72] In 1995 the prohibition was further extended to discrimination against workers or jobseekers due to

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68 Employment (Equal Opportunities) Law, 5748–1988 (Isr.). For more information about the law, see Guy Mundlak, *The Law of Equal Opportunities in Employment: Between Equality and Polarization*, 30 J. Comp. Lab. L. & Pol'y 213 (2009); Sharon Rabin–Margalioth, *Labor Market Discrimination of Arab Israeli Citizens – Can Something Be Done?*, 36 N.Y.U. J. Int'l L. & Pol. 845 (2004).

69 Equal Opportunity in Employment Law, 5741-1981 (Isr.).

70 The original wording was: "Someone who needs a worker shall not refuse to accept a person to work or to send him to professional training that is a condition for acceptance to work, due to his gender or due to his being married or a parent." *Id.* at art. 1(a).

71 Employment (Equal Opportunities) Law, 5748–1988, § 2 (Isr.).

72 Employment (Equal Opportunities) Law (Amendment No. 1), 5752–1992 (as amended) (Isr.).

their age, race, religion, nationality, country of origin, outlook or party.[73] In contrast to the U.S. ADEA, the Israeli prohibition against age discrimination is not limited to a specific age group. In 1997 a prohibition was added of discrimination against workers or jobseekers due to the duration of reservist service.[74] In 2001 the protection of reservist soldiers from discrimination at work was further broadened.[75]

In 2004 the prohibition of discrimination due to pregnancy was added.[76] In 2007 the prohibition of discrimination was extended to fertility treatments.[77] In 2014 a prohibition was added of discrimination against workers or jobseekers due to their place of residence.[78]

In addition to the many amendments to the Equal Opportunities at Work Law, in 1998 the separate Equal Rights for People with Disabilities Law was enacted,[79] which prohibited discrimination at work against people with disabilities. The bill's explanatory remarks noted that

> . . . [i]ndeed, the natural and worthy anchor for the prohibition of discriminating against a person with a disability is the value of equality that is familiar and accepted in the Israeli judicial system. Nonetheless, the existing large discrepancy in this area between the desirable and the reality in which people with disabilities in Israel live, led, after much thought, to the submission of a proposal for a special Equal Rights for People with Disabilities Law, 1996, as many countries have done, including the U.S., Canada, Sweden and Australia.[80]

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73 Employment (Equal Opportunities) Law (Amendment No. 3), 5755–1995, (as amended) (Isr.). In 1995 when an amendment was brought before the Knesset to amend the law regarding age discrimination, women's rights organizations opposed the amendment – Interview with Israel Doron, Head of Department of Gerontology, in University of Haifa (June 19, 2018) (Isr.).

74 Employment (Equal Opportunities) Law (Amendment No. 4), 5757–1997 (as amended) (Isr.).

75 Employment (Equal Opportunities) Law (Amendment No. 8), 5762–2001 (as amended) (Isr.).

76 Employment (Equal Opportunities) Law (Amendment No. 9), 5764–2004, (as amended) (Isr.).

77 Employment (Equal Opportunities) Law (Amendment No. 11), 5767–2007, (as amended) (Isr.).

78 Employment (Equal Opportunities) Law (Amendment No. 22), 5775–2014, (as amended) (Isr.).

79 Equal Rights for People with Disabilities Law, 5758–1998, § 8 (Isr.).

80 Draft Bill Amending the Equal Rights for People with Disabilities Law, 5756–1996, (Isr.).

B. Expansion of Discrimination Stages (admittance to work, conclusion of work, etc.)

Not only did the number of discrimination causes of action increase in law over the years, but also the stages of discrimination. The Original Law dealt with discrimination only at the hiring process stage.[81] A few years after the Original Law entered into force, the government thought its application should be broadened. In a governmental bill from 1986, it was suggested that the application of the law be broadened to cover also discrimination in promotions and dismissals. The draft law noted that the Original Law does not:

> [A]ddress those cases in which an employer–employee relationship exists, and when the worker, male or female, is done wrong in their promotion in rank or position due to their gender or to their being married or parents. Likewise, the existing law does not address a problem that exists in the Israeli reality of cessation of the employer–employee relationship due to the worker's being of one of the genders or due to his being married or a parent . . . [i]t is proposed to broaden the law's provisions . . .[82]

The year 1988 saw the enactment of the Equal Opportunities at Work Law, which did indeed extend the prohibition of discrimination to the following stages: "(1) the hiring process; (2) work conditions; (3) promotion at work; (4) training or professional enrichment; (5) termination or compensation for termination."[83] In 1995 another stage of prohibited discrimination was added: "(6) benefits and payments to the worker related to retirement from work."[84]

C. Methodology

This Article contributes to the current literature through a study of employment discrimination court decisions (including age discrimination cases) in Israel. First, to provide a broad and comprehensive view of litigation in the field, we carried out quantitative research on all the employment discrimination cases in Israel from the beginning of 2007 (1 January 2007) until the end of 2016 (31 December 2016) – altogether ten years. We searched for citations of the

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81 Draft Bill Amending the Equal Rights for People with Disabilities Law, 5756–1996 (Isr.).

82 Draft Bill Amending the Employment (Equal Opportunities) Law, 5747–1986 (Isr.).

83 Employment (Equal Opportunities) Law, 5748–1988, § 2 (Isr.).

84 Employment (Equal Opportunities) Law (Amendment No. 3), 5755–1995 (as amended) (Isr.).

Equality of Opportunities in Labor Law 5748–1988, article 2. The research includes all cases from the Supreme Court, the National Labor Court and the five Regional Labor Courts (altogether 555 cases). After reading the 555 cases, we found that only 442 were relevant (428 civil cases and 14 criminal cases). Our aim was to explore the differences and similarities between cases that include claims of age discrimination and cases that include claims of other types of discrimination (such as discrimination due to parenthood, sex or race).[85]

Second, following the quantitative research we conducted a qualitative research, analyzing the major doctrines in the field of employment discrimination in general, age discrimination in particular. The aim of the qualitative research was to explore similarities between the doctrines that the courts apply in age discrimination cases and those they apply in other employment discrimination cases. The following sections (D and E) present the results of the quantitative and qualitative research, respectively, thus providing a broad view of litigation in the field of employment discrimination in general, age discrimination in particular.

Before presenting the results, we should note the limitations of this type of study as they pertain to the accurate depiction of the litigation in the field. First, in the research we studied only court rulings. As in any type of study of court rulings, this focus leaves out the many cases in which potential plaintiffs decided not to pursue a court option in the first place, as well as cases that were ultimately settled out of court.[86] In our particular study, these two groups may prove sizable. In fact, many victims of employment discrimination do not file a lawsuit because of various barriers.[87] This problem is especially acute with regard to cases of discrimination in the hiring process, in part because victims find it hard to prove these cases and therefore opt out of bringing

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85 We created a database that included the following data with regard to the above 442 cases: 1) whether it was a criminal or a civil case; 2) which court ruled the case; 3) the plaintiff's gender; 4) the defendant's gender; 5) the employment sector (private or public); 6) the year in which the legal process began; 7) the year in which the legal process ended; 8) the length of the legal process; 9) the employment stage of discrimination (during the hiring process, during dismissal, etc.); 10) the type of discrimination (age, parenthood, race, etc.); 11) the number of discriminatory causes of action cited by the plaintiff; and 12) whether the court accepted or dismissed the case. We coded all the data into numbers.

86 Moreover, our data is based on a search in the Nevo website. All cases which were not published in the Nevo website (due to privacy concerns or other reasons) are not part of the research.

87 *Cf.* Pnina Alon–Shenker, *supra* note 21.

them to court.[88] When plaintiffs in cases of employment discrimination do file a lawsuit, they often settle with the employer out of court, so many such cases do not end with a judgment.[89]

Second, in this research we looked at employment discrimination cases in one jurisdiction only, namely Israel, without any type of control group or point of comparison, such as a jurisdiction without universal regulation of age discrimination. Due to this type of focus, we cannot precisely measure efficiency and success, for lack of an external yardstick. In future research it would be interesting to compare jurisdictions and to examine their labor market results. Moreover, an additional study comparing the situation in Israel prior to and after the legislation of employment discrimination laws might be interesting and offer another perspective.

The next two sections (D and E) present the findings, and the last section (F) discusses the findings and their implications for the theoretical argument of this Article.

D. Employment Discrimination and Age Discrimination in the Case Law

The quantitative research of the litigation produced the following findings:

Procedural Types and Jurisdictions: We found that through the ten years that were studied in the research (2007–2016) the courts (five district courts, the National Labor Court and the Supreme Court) ruled in 428 civil cases of employment discrimination. One dominant court (Tel Aviv District Court) ruled in about 50% of all cases of employment discrimination and 56% of all cases of age discrimination in employment. By contrast, even though employment discrimination is a criminal offense,[90] we found that in ten years only 14 cases (out of the 442) were criminal cases. We did not find any criminal case with regard to age discrimination. In other words, the state hardly ever presses charges in cases of employment discrimination, and does not press charges at all in cases of age discrimination. We also found that the average length of the legal civil process (from the date the plaintiff filed the claim until the day of the court ruling) in cases of employment discrimination

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88 William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & Soc'y Rev. 631 (1980); Lauren B. Edelman, Working Law: Courts, Corporations and Symbolic Civil Rights 3–16 (2016).

89 For a study of employment discrimination settlements, see Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 Wash. & Lee L. Rev. 111 (2007).

90 Employment (Equal Opportunities) Law, 5748–1988, § 15 (Isr.).

is about three and a half years. In cases of age discrimination, the length of the process is only a bit shorter. In case of appeal, the length of the whole process is five and a half years on average.

Demographic Characteristics of the Plaintiffs and the Defendants: Most plaintiffs (75%) in cases of employment discrimination were women. In cases of age discrimination, less than half of the plaintiffs (48%) were women and the rest (52%) were men. In contrast to the plaintiff, the defendant was in most cases a business and not an individual.

Employment Sector: Most cases of employment discrimination occurred in the private sector (about 80%). Only 20% of the cases occurred in the public sector. More cases of age discrimination seem to occur in the public sector: 43% of all cases of age discrimination occurred in the public sector, and only 57% of all cases of age discrimination occurred in the private sector.

Employment Stage of Discrimination: In most cases of employment discrimination (about 80%), the discrimination occurred during the end of the employment contract (at the dismissal stage). In cases of age discrimination, the results are similar. In about 80% of the cases of age discrimination, the discrimination occurred at the end of the employment contract. Only 7% of all employment discrimination cases (and 4% of all age discrimination cases) occurred during the hiring process.

Type of Discrimination: The law in Israel includes 17 prohibited causes of action of discrimination. In the research, we found that the most dominant cause for discrimination was pregnancy (47%).[91] The second most common cause for employment discrimination was age (18%). The third was parenthood (8%). The fourth was discrimination due to fertility treatments (7%). The fifth was discrimination due to gender (7%). Very few cases dealt with discrimination due to race (1%), religion (2.5%) nationality (1.5%) and other causes of discrimination (8%).

Number of Discriminatory Causes of Action Cited by the Plaintiff: In 8% of employment discrimination cases, the plaintiff raised several causes of action of discrimination. In 12% of all age discrimination cases,[92] the plaintiff raised several other causes of discrimination (discrimination due to country of birth, discrimination due to gender, and discrimination due to personal status). For example, a school named the 'Shomron Yeshiva' dismissed Keren Gold, a female teacher, after she had worked for 32 years as an English teacher.

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91 As will be explained bellow, in some of these cases the plaintiff raised a number of discriminatory causes.

92 As noted above, age discrimination cases account for 18% of all discrimination cases. Therefore, cases of age discrimination in which the plaintiff raised several causes for discrimination account for 2.16% of all discrimination cases.

The school dismissed two of her elderly female colleagues as well. Instead of the three elderly female teachers, the school hired several young male English teachers (after publishing a job advertisement for males only). Keren Gold claimed that she was discriminated against due to her being an elderly woman – due to her age and due to her sex. The court decided in her favor.[93]

Did the Court Accept or Dismiss the Case? Employment discrimination cases: The court accepted 41% of the claims regarding employment discrimination, rejected 37% of the claims, and partly accepted 22% of the claims. Age discrimination cases: The court accepted 40% of the claims regarding age discrimination, rejected 40% of the claims, and partly accepted 20% of the claims.

E. Application of the major Doctrines of the Equal Opportunities at Work Law to Age Discrimination

Over the years, the Israeli Supreme Court and the labor courts developed several doctrines in the area of equal opportunities at work. The labor courts applied these doctrines, which were developed regarding a variety of discrimination causes of action in the law, also to judicial rulings dealing with age discrimination. Thus, as soon as the cause of action of age discrimination was added to the Equal Opportunities at Work Law in 1995, a broad network of *res judicata* already existed which the courts made use of. In the judicial rulings dealing with age discrimination, the courts applied the doctrines that had already been developed regarding the other discrimination causes (gender, sexual orientation, race, etc.).

As remarked previously in the quantitative section, the vast majority of judicial rulings in the area of discrimination at work deal with discrimination due to pregnancy, parenthood, fertility treatments and gender. Hence, major rules were determined in a number of judicial rulings dealing with discrimination due to gender. These rules were later adopted by the Supreme Court and the National Labor Court in suits concerning age discrimination. This was done in the context of a universal approach to employment discrimination. The structure of the law, which separates the definition of discrimination so as to include all relevant types and provide exceptions, made the application of precedents relatively easy. I will now demonstrate how use was made, in judicial rulings dealing with age discrimination, of three doctrines developed with respect to other discrimination causes of action: (1) An objective test

93 Labor Court (Jer.) 7752–04–12 Keren Gold v. Yeshivat Hashomron et al. (Oct. 06, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

for relevant difference; (2) The doctrine of prima facie discrimination; (3) The mixed motive doctrine.

1. Objective Test for Relevant Difference

Section 2(c) of the Equal Opportunities at Work Law provides that "discrimination is not seen … when it is required by the nature or characteristics of the position or job."[94] If the courts were to interpret this clause broadly, they would, in effect, neuter the language of the law, since an employer can almost always point to a difference between one candidate and another for a job. Over the years, therefore, the courts have interpreted this clause narrowly. In a series of decisions, the courts have determined that the test for relevant difference under section 2(c) of the law is determined objectively, the employer's position in this matter not being decisive.

The courts in Israel drew the rule concerning an objective test for relevant difference from comparative law and applied it, at first, to adjudication dealing with discrimination due to gender.[95] In the *Sharon Plotkin* case (from 1999), an employer told a female work candidate interested in a job as a salesperson that "women aren't suited for this job outside the office . . . It's a matter of hours . . . There's a problem . . . asking a woman to work after four o'clock."[96] Subsequently the employer even explained in court that "work outside the office requires long work hours and lifting loads . . . something that doesn't suit a woman."[97] The National Labor Court rejected the employer's arguments and determined that the employer had discriminated against the candidate due to her gender. It ruled that no relevant difference exists between women and men as regards being suited for a job as salesperson, and that the test regarding the existence of a relevant difference is objective and not subjective:

> The wrongful behavior is then objective, and we don't examine the intent of its perpetrator, whether he did not intend to discriminate, also whether his intention was good. Therefore [the employer's] statement, according to which he meant well for the worker in suggesting she will not work outside the office, because this work is hard for a woman, carries no weight for either good or bad.[98]

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94 Employment (Equal Opportunities) Law, 5748–1988 (Isr.).

95 Labor Court 51/3–8 State of Israel v. Gestetner Israel Ltd., PD 24(1) 65 (1992) (Isr.) (in Hebrew) (numerous judicial decisions referenced).

96 Labor Court 56/3–129 Sharon Plotkin v. Eisenberg Brothers Ltd., PD 33 481, 486 (1999) (Isr.) (in Hebrew).

97 *Id*. at 486-87.

98 *Id*. at 492; the National Labor Court also references, among others, the decision in HCJ 104/87 Dr. Neomi Nevo v. Nat'l Labor Court, PD 44(4) 749 (1990) (Isr.)

In the *Gestetner* case, an employer publicized a "wanted" ad for a salesperson that was directed at men only.[99] The employer argued before the labor court that the work, which includes lifting heavy weights, is not suited for women and that "women who in the past were employed in the proposed job were unable to bear the burden."[100] The National Labor Court rejected the employer's arguments and determined: "It is not the opinion of the person offering the job that is decisive, but an objective test." The Court also emphasized: "In determining objective tests stereotypes should be avoided, for these are never objective, but stem from views that have become rooted in society, without having any solid factual basis."[101]

These decisions, which concerned discrimination due to gender, seeped into and influenced decisions of the Supreme Court and the National Labor Court in discussing suits regarding age discrimination.[102] One of the Supreme Court's first decisions dealing with age discrimination was the *El–Al Airlines* judgement (from 2000).[103] The petitioners argued that the collective agreement at El–Al, which set the retirement age for air stewards at 60, while the retirement age for land crew stood at 65, discriminated against air stewards due to their age. The Supreme Court allowed the petition and declared the discriminatory provision in the collective agreement unlawful. In its decision, the Supreme Court made use of doctrines that had concerned discrimination due to gender (including the decisions in the *Gestetner* case and in the *Plotkin* case), citing them explicitly.[104]

In the wake of the decisions in *Gestetner* and in *Plotkin*, the Supreme Court determined in the *El–Al Airlines* case that the test for relevant difference under section 2(c) of the Law is objective, with the employer's position in this matter not being decisive: "This test is of an objective nature. The question is not whether the employer thinks (subjectively) that the job requirements are

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(in Hebrew).

99 *Gestetner*, PD 24(1), at 65.

100 *Id.* at 69.

101 *Id.* at 79.

102 *See*, *e.g.*, Labor Court (HI) 12657–12–13 Amalya Sima Raipen v. Community Centers Network (Nov. 18, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

103 HCJ 4191/97 Efraim Recanat v. National Labor Court, PD 54(5) 330 (2000) (Isr.).

104 Labor Court 51/3–8 State of Israel v. Gestetner Israel Ltd., PD 24(1) 65 (1992) (Isr.) (in Hebrew) (numerous judicial decisions referenced); Labor Court 56/3–129 Sharon Plotkin v. Eisenberg Brothers Ltd., PD 33 at 481 (1999) (Isr.); HCJ 104/87 Dr. Neomi Nevo v. Nat'l Labor Court, PD 44(4) 749 (1990) (Isr.) (in Hebrew). These three decisions were referenced in *Recanat*.

dictated by the essence of the job. The question is whether the job requirements are dictated in a reasonable manner by the essence of the job. . . . See (In re) Plotkin. . . . See (In re) Gestetner."[105]

It is no coincidence that the Supreme Court makes use of the decisions in *Plotkin* and in *Gestetner* in its decision in *El–Al Airlines*, since similarity obtains in the circumstances of the decisions, mainly in the employers' arguments in the different cases. In all three, the employers argued that the work is not suitable for either women (*Plotkin* and *Gestetner*) or older people (*El–Al*), because it involves physical effort and lifting heavy weights. In all three cases the courts ruled that the employer is not allowed to conduct statistical discrimination or to rely on stereotypes, but must assess the skills of the workers before him in an individual manner. The courts continued to apply this rule in many additional decisions dealing with age discrimination, in which employers raised arguments concerning the need to set an early retirement age for workers or, alternatively, to set a maximum age for taking in new workers. The courts rejected these arguments, continuing to rely on the decisions in *Gestetner*, in *Plotkin* and in *El–Al*.[106]

2. The Doctrine of Prima Facie Discrimination

A second doctrine that was applied at first in suits of discrimination due to gender, and at a later stage in suits of age discrimination, is the rule concerning proof of *prima facie* discrimination and reversal of the burden of proof. Section 9(a)(1) of the Equal Opportunities at Work Law provides:[107]

> In a suit by a job applicant or worker due to infringement of the provisions of section 2, it shall be the employer's obligation to prove that he did not act contrary to the provisions of section 2 – (1) in the matter of admittance to work, promotion at work [. . .] if the employer as regards them set conditions or skills, and the work applicant or worker as the case may be proved they meet the said conditions or have the said skills; (2) in the matter of dismissal from work – if the worker proved that there was no reason for his dismissal in his behavior or actions.

In accordance with the Supreme Court's and labor courts' interpretation of section 9(a) of the Law, it suffices that the plaintiff (the worker) bring "*prima*

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105 *Recanat*, PD 54(5), at 348–451.

106 *See, e.g.*, HCJ 1268/09 Leah Zozal v. Prisons Service Commissioner (Aug. 27, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 6778/97 Israeli Civil Rights Association v. Internal Security Minister, PD 58(2) 358 (2004) (Isr.).

107 Employment (Equal Opportunities) Law, 5748–1988, art. 9(a) (Isr.).

facie evidence" or "initial evidence" of discrimination for the burden of proof to shift onto the defendant (the employer) to prove that discrimination did not occur. The labor courts have implemented this doctrine with respect to various discrimination causes of action, thus developing the laws prohibiting discrimination in Israel. In each and every decision the court has referenced previous decisions in which other discrimination causes of action were discussed. Here, too, the initial decisions in the framework of which the doctrine became established were decisions dealing with discrimination due to gender, including in the *Sharon Plotkin* case mentioned above.

In the *Sharon Plotkin* case, the National Labor Court determined: [108]

> After the plaintiff has established *a prima facie* cause the burden shifts to the employer to rebut the arguments . . . [t]he initial burden lies upon the worker's shoulders, but once the worker has brought initial evidence, this suffices to shift the burden upon the employer's shoulders. . . . Let us remind ourselves. Respondent's manager said to the appellant that the work outside the office is not suited for a woman in that it entails work hours past four o'clock as well as carrying loads . . . . Respondent's manager's statements suffice to establish *prima facie* evidence of a discriminatory and stereotypical attitude. That suffices to shift the burden onto respondent's shoulders.

The doctrine of shifting the burden of proof after the presentation of *prima facie* evidence was adopted also in later jurisprudence dealing with discrimination due to gender, such as the decision in the *Orit Goren* case.[109] Orit Goren worked at a Home Center shop. After working for several months, Orit found out that her coworker Stephan, who was doing the same work as she, was receiving higher pay. Orit sued Home Center. The Supreme Court ruled:[110]

> In view of the difficulty of proving the considerations that underlay one or another decision made in the matter of the worker, the burden of proof need be shifted onto the employer when the worker has been able to present *prima facie* evidence that the employer had discriminated against him/her. . . . Once a female employee has shown that a male employee at the same job (or a generally equal job or a job of equal value) for the same employer and in the same workplace receives a higher pay than her . . . the burden is shifted onto the employer to

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108 *Plotkin*, PD 33 at 481, 496–97.

109 HCJ 1758/11 Orit Goren v. Home Center (Do It Yourself), Ltd. (May 17, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

110 *Id*. at ¶¶ 22–23.

> demonstrate there is no causal connection between the pay gap and the sex of the female employee.

With the amendment of the Equal Opportunities at Work Law and the addition of the prohibition of age discrimination, the doctrine of "*prima facie* discrimination" was adopted in many judicial decisions dealing with age discrimination.[111] For example, in the *El–Al Airlines* case mentioned above, the Supreme Court determined: [112]

> As a rule, the burden of persuasion lies upon the worker arguing that the employer discriminated against him. The worker takes up this burden when he proves that at his employer's a norm obtains that sets different ages for mandatory retirement of different workers (direct discrimination) . . . [b]y just proving the existence of the rule . . . the worker has taken up the burden of persuasion that lies upon him. . . . Needless to say, this proof is only *prima facie*. . . . At this stage . . . the burden of persuasion shifts . . . onto the shoulders . . . of the employer…

A later decision, in which the doctrine of "*prima facie* discrimination" was also in practice adopted, is in the *Bank Leumi* case.[113] Yosef Mutzafi was employed at Bank Leumi in accordance with the conditions of an agreement called the "Old People's Agreement," which set reduced work conditions for workers who joined Bank Leumi at the age of 55 and above. Mutzafi argued before the National Labor Court that the Old People's Agreement discriminated against him due to his age. Bank Leumi tried to argue that in practice nonprofessional workers of various ages were employed under the agreement, and not necessarily workers over the age of 55. The National Labor Court allowed Mutzafi's suit, determining: "In light of the explicit language of the agreement and the inclusion of the age criterion, we have satisfied ourselves that the bank . . . has been unable to take up the burden of proving that in employment according to the agreement . . . there is no discrimination on the basis of age." Over the years, the doctrine of shifting the burden of proof after the presentation of *prima facie* evidence was adopted by the courts also

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111 HCJ 1268/09 Leah Zozal v. Prisons Service Commissioner (Aug. 27, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.), at ¶ 13; HCJ 10076/02 Yuri Rosenbaum v. Prisons Service Commissioner, PD 61(3) 857, at ¶ 14 (2006) (Isr.).

112 HCJ 4191/97 Efraim Recanat v. National Labor Court, PD 54(5) 330, 352 (2000) (Isr.).

113 Labor Court 14705–09–10 Yosef Mutzafi v. Bank Leumi (May 16, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

in decisions dealing with discrimination due to pregnancy and origin.[114] The universal regulation of age discrimination has been helpful to Israeli courts in providing the same protection for all types of employment discrimination.

3. The Mixed Motive Doctrine

A third doctrine first established by the courts in decisions dealing with discrimination due to gender, and later applied also in decisions dealing with age discrimination, is the doctrine dealing with cases in which only one of the elements in the employer's action is discriminatory. In keeping with the doctrine, it suffices that the plaintiff shows that one of the elements in the employer's action is discriminatory for the action as a whole to be considered discriminatory.

As noted above, the courts developed this rule at first in decisions dealing with discrimination due to gender (in reliance on comparative law). In the *Plotkin* case mentioned above, the court determined that it sufficed that one of the considerations was discriminatory for the decision to be tainted as discriminatory:[115]

> It does not matter that there are other reasons for not accepting a worker to work . . . . It need not be checked whether the employer did not accept the worker for additional or even other reasons. His wrongful behavior suffices... in order to render wrongful the employer's behavior . . . . Even if the plaintiff ultimately failed to get work at the defendant's for reasons related to her personality and professional skill, and not in particular due to her gender, she was entitled not to have the fact that she's a woman be considered at all . . . . Only thus would the legislator's objective be achieved of giving women equal opportunity to become integrated in commercial and working life in Israel.

The regional labor courts have adopted this doctrine in several decisions dealing with age discrimination.[116] For example, in the *Bela Dubriansky* case,

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114 *See* Labor Court 627/06 Orly Mori v. M.D.P. Yellow Ltd. (Mar. 16, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Labor Court (BS) 2858–08, Avraham Shai v. Arad Religious Council, at ¶ 187 (July 04, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Labor Court (TA) 28707–10–13 Omri Kiss v. Café on the Sea, at ¶ 21 (July 05, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

115 Labor Court 56/3–129 Sharon Plotkin v. Eisenberg Brothers Ltd., PD 33 481, 496–97 (1999) (Isr.).

116 Labor Court (TA) 52347–02–13 Bela Dubriansky v. Bnei Aish Local Council, at ¶ 21 (Mar. 12, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.);

Dubriansky sued her employer in the regional labor court for having forced her to retire upon reaching the age of 63 (lower than the mandatory retirement age).[117] After the suit was filed, the employer argued that the worker had been laid off also because her position wasn't necessary. The Court held that the employer must return the worker to work, explaining: [118]

> The employer's argument has not escaped my eye according to which . . . the worker was laid off only because her position is not necessary . . . . In this context, I would note that the presence of one wrongful consideration in the framework of the decision to terminate employment suffices to 'taint' it in such a way as to be considered discriminatory.

Also, in its decision in the *Bathsheba Simchi* case, whose employer laid her off at the age of 63.5, claiming downsizing as the reason, the Court ruled that the dismissal was tainted by age discrimination, emphasizing: "It suffices that the discriminatory consideration was one of the considerations in making the decision to taint the entire decision."[119]

In addition, in its decision in the *Bar–Ilan University* case, where lecturers from Bar–Ilan University argued that their promotion had been denied only because of their age, the regional labor court determined:[120]

> It emerges that the very weighing of a wrongful consideration, regardless of its measure of influence on the employer's decision, constitutes a distinctive expression of unequal treatment of workers or job candidates, and that this consideration's 'tainting' of the decision–making process suffices to attest to the existence of wrongful discrimination.

Over the years, the courts have adopted this doctrine also in decisions dealing with discrimination due to pregnancy or origin.[121]

Labor Court (TA) 49821–01–16, Bathsheba Simchi v. Maabarot Products Ltd., at ¶ 15 (Dec. 04, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).; Labor Court (TA) 7170/03 Tzemach Keisar v. Bar–Ilan University, at ¶ 34 (Dec. 12, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

117 Mandatory retirement age in Israel is 67, The Retirement Age Law 5764–2004, art. 4 (Isr.).

118 *Dubriansky*, at ¶ 21.

119 *Simchi*, at ¶ 15.

120 *Tzemach Keisar*, at ¶ 34.

121 Labor Court 627/06 Orly Mori v. M.D.P. Yellow Ltd. (Mar. 16, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Labor Court 363/07 Sharona Arbiv v. Poemics, Ltd. (May 26, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Labor Court (TA) 28707–10–13 Omri Kiss v. Café on the

IV. Discussion

The presentation of the litigation and doctrines in the field of employment discrimination makes it possible to better understand the advantages and flaws of a universal approach to age discrimination. In Israel, the Equal Opportunities at Work Law regulates all types of employment discrimination (including age discrimination) in the same manner.[122] The above presentation has shown how the courts in Israel decide in employment discrimination cases in general, in age discrimination cases in particular.

A. Efficiency

In Israel the universal regulation of employment discrimination (as opposed to the separate regulation of age discrimination) does indeed offer an efficiency advantage. As shown above, in eight percent of all employment discrimination cases (over the ten years examined), plaintiffs claimed that they suffered from several types of discrimination. Twelve percent of the plaintiffs who claimed they suffered from age discrimination claimed they also suffered from discrimination due to country of birth, discrimination due to gender, or discrimination due to their personal status. So even though in most cases the plaintiff raised only one cause of discrimination, the number of plaintiffs who raised several causes is not negligible. The universal regulation of employment discrimination in Israel enables courts to discuss together all types of discrimination causes, which were raised by the plaintiff, through the same legal doctrines. This universal approach to discrimination therefore saves expensive judicial time.

Legal systems in many countries, including Israel, suffer from judicial overload. Judicial systems have to cope with a shortage of judges along with a growing number of legal cases.[123] Due to the major judicial overload, every

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Sea, at ¶ 21 (July 05, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

122 But not including discrimination due to disability.

123 Boaz Shnoor & Eyal Katvan, *Court's Precious Time*: *Transparency*, *Honor and Judicial Scarce Resources*, 7 Oñati Soc.–Legal Series 825 (2017); Bruce Green, *The Price of Judicial Economy in the US*, 7 Oñati Soc.–Legal Series 790 (2017). The labor court system in Israel is a case in point. For example, as shown above, one dominant court, the Tel Aviv District Court, has ruled in about 50% of all cases of employment discrimination and 56% of all cases of age discrimination in employment. Official data shows that Tel Aviv's Labor Court suffers from a major judicial overload. During 2016, plaintiffs submitted 26,391 new cases to the Tel Aviv Regional Labor Court. *See* Israel's Cts. Admin.,

saving in judicial time – through the universal regulation of employment discrimination – allows judges to invest more time in each case and to judge more quickly (although not that quickly; as shown above, the average length of the legal process in cases of employment discrimination is about 3.5 years). Moreover, there are judicial gains in terms of resources saved by not having to develop each doctrine separately for each discrimination type.

B. Justice (Including Intergenerational Justice)

The universal regulation of all types of discrimination in Israel enables courts not only to be more efficient, but also to produce better judgments. In contrast to other legal regimes, such as the U.S. (at the federal level) and Europe (at the European Union level), where the courts provide weaker protection against age discrimination than against other types of discrimination (such as sex and race), the presentation of the litigation in Israel has shown that the courts in Israel provide equal protection against all types of discrimination.[124]

As outlined above, the Israeli courts use similar legal doctrines with regard to age discrimination as in other employment discrimination claims. More specifically, the Israeli labor courts have adopted three legal doctrines, used in the past in cases of employment discrimination due to gender, and applied them to age discrimination cases: the objective test for relevant difference doctrine, the doctrine of *prima facie* discrimination, and the mixed motive doctrine. Furthermore, a plaintiff's chances of succeeding in an age discrimination case in Israel are the same as the chances of succeeding in employment discrimination cases due to other types of discrimination (in all

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Israel's Judiciary Annual Report 2016 (2016), https://www.gov.il/BlobFolder/reports/statistics_annual_2016/he/annual2016.pdf. The report does not mention the number of employment discrimination cases which were opened in 2016. The court has 29 sitting judges. *See* Judges' Personal Information and CV, The Israeli Judicial Authority, https://judgescv.court.gov.il/ (last visited Aug. 25, 2019). Therefore, each judge in Tel Aviv's labor court has to deal with 910 cases on average each year.

124 As explained above (and in Appendix A), Israel is an example of the universal approach to age discrimination (one law regulates all types of discrimination and regulates them in the same way). The U.S. on the federal level is an example of the particularistic approach – age discrimination is regulated in a separate law and in an inferior way. Europe is an example to a regime that regulates all types of discrimination in the same law, although age discrimination is regulated in an inferior way.

employment discrimination cases the court accepted 41% of the claims, and in age discrimination cases the court accepted 40% of the claims).[125]

The universal approach towards employment discrimination and age discrimination in Israeli law enables Israeli courts to decide comprehensively and equally, using the same doctrines, in all discriminatory causes cited by plaintiffs. Labor courts will treat alike young female workers who claim discrimination due to pregnancy and elderly workers who claim discrimination due to their age.

The universal regulation of discrimination in Israel improves the law and the way that judges rule due to the diversity of plaintiffs. As noted above, judges like all other people might have cognitive biases against people who are different from them.[126] When judges face a diversity of plaintiffs (some of whom are elderly like them,[127] or of the same gender) a more just system is produced. This is especially the case when judges apply the same doctrines to all types of employment discrimination and when the chances of succeeding in an age discrimination claim are the same as in other types of employment discrimination claims.

As the litigation snapshot above shows, due to the universal regulation of discrimination in Israel (and the fact that all types of discrimination are treated under the same law), the demographic characteristics of employment discrimination plaintiffs are diverse. As seen in the litigation in the field of employment discrimination, age discrimination plaintiffs have different demographic characteristics than plaintiffs who claim for other causes of employment discrimination. While most plaintiffs (75%) in cases of employment discrimination were women, in cases of age discrimination only half of the plaintiffs (48%) were women and the rest (52%) were men. Moreover, while the plaintiffs in age discrimination cases were elderly workers, the plaintiffs

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125 For a comparative view, see Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. (2009); Richard A. Posner, *Employment Discrimination: Age Discrimination and Sexual Harassment*, 19 Int'l Rev. L. & Econ. 421, 426 (1999).

126 Kenneth L. Manning, Bruce A. Carroll & Robert A. Carp, *Does Age Matter? Judicial Decision Making in Age Discrimination Cases*, 85 Soc. Sci. Q. 1 (2004).

127 It should be noted that in common law systems judges tend to be older than most other professionals. In Israel, for example, the average age of entrance to the judiciary is around 43, and to district court around 51. *See* Alon Jasper, A Place at the Table: On the Social Composition of the Israeli Judiciary 69 (Sep. 5, 2018) (unpublished LL.M thesis, Tel Aviv University) (on file with author).

in cases of pregnancy discrimination were relatively young workers. Thus, the universal regulation of employment discrimination in Israel provides the judges with a more diverse palette of plaintiffs than they would face with separate regulation of age discrimination.

Concluding Remarks

This Article has sought to examine in depth a universal regulatory approach to combating ageism in the workplace. Instead of targeting age discrimination in employment in particular, Israel has opted for a universal approach, banning age discrimination alongside other types of discrimination in employment. This Article has demonstrated in detail the universal character of Israel's case law regarding antidiscrimination in employment. The comprehensive, broad and in–depth study of the litigation in the field of employment law in general, and age discrimination law in particular, underscores the great advantages of this universal approach.

First, the courts are constantly deciding on multiple discrimination causes of action, including age discrimination, in the same cases, utilizing the same legal doctrines. The universal approach therefore gives rise to efficiency advantages. Second, the universal approach of the courts grants elderly workers facing discrimination the same strong protection granted to other types of workers facing discrimination due to other causes. Courts thus decide in a comprehensive and equal manner, promoting intergenerational justice. Third, the universal approach adopted by courts is better suited to negating the cognitive biases of judges, thus arguably producing a more just system for all.

This study of the universal approach to discrimination law in Israel suggests that it is well suited to promoting justice (including intergenerational justice) and efficiency as regards fighting age discrimination. Yet this study is suggestive rather than conclusive. Future research may provide more robust conclusions, by providing a comparison to other systems that implement a particularistic approach to age discrimination. A similarly comprehensive, broad and in–depth study of such systems will allow a comparison among universal and particularistic systems, making it possible to draw conclusions that are better grounded and more definite as to which approach is better suited to combating age discrimination.

As the world grows older, many more people need to work longer and longer. The number of elderly workers is increasing. Yet despite their increasing numbers, research shows that these elderly workers face ageism and discrimination in employment. These discriminatory practices are liable to marginalize elderly workers, reduce them to poverty, or even drive them

away from the labor market altogether. They not only infringe the rights of individuals to employment and to equal opportunities and human dignity, but also hurt society in general, turning otherwise flourishing individuals into marginalized and welfare–supported paupers.

This phenomenon is therefore not only immoral and disgraceful, but also economically unsound. As Western societies grow older, and as their welfare systems strain to bear the load, it is necessary to think of ways to help these elderly workers combat discrimination and to make the labor market friendlier towards them. The labor market must become friendlier towards the diverse modern workforce, including the growing segment of elderly workers. Otherwise, both discriminated–against elderly workers and society as a whole will suffer. This Article has sought to advocate for a universal architecture of anti–age discrimination law as a way to arrive at an elderly–friendly labor market.

Appendix A: Types of Legal Regimes

		I	II	III
		No Prohibition on Age Discrimination	Specific Anti–Age Discrimination Prohibition	A General Ban on all Kinds of Employment Discrimination
A	No Prohibition of Age Discrimination	(Past)		
B	A Weaker Protection against Age Discrimination		US	EU
C	Same Protection against all kinds of Discrimination			Israel

Appendix B: Expansion of the Protected Groups

Year	Law	Prohibited discrimination cause of action
1981	Equal Opportunity in Employment Law, 5741–1981	Gender, marriage, parenthood
1988	Equal Opportunities at Work Law, 5748–1988	Gender, marriage, parenthood
+1992	Equal Opportunities at Work Law, (amendment) 5752–1992	Personal status, sexual orientation
1995	Equal Opportunities at Work Law, (amendment no. 3) 5755–1995	Age, race, religion, nationality, country of origin, outlook or party
1997	Equal Opportunities at Work Law, (amendment no. 4) 5758–1997	Duration of reservist service
1998	Equal Rights for People with Disabilities Law, 5758–1998, § 8	Disabilities
2001	Equal Opportunities at Work Law, (amendment no. 8) 5762–2001	Reservist service
2004	Equal Opportunities at Work Law, (amendment no. 9) 5764–2004	Pregnancy
2007	Equal Opportunities at Work Law, (amendment no. 11) 5767–2007	Fertility treatments, extracorporeal fertilization treatments
2014	Equal Opportunities at Work Law, (amendment no. 22), 5775–2014	Place of residence