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MINORITY ELDERS: VICTIMS OF DOUBLE DISCRIMINATION IN PUBLIC AND PRIVATE BENEFIT PLANS

Michael Gilfix *

By virtue of their race as well as their age, minority elders face unique legal problems. One of the worst of these is the inequitable treatment afforded minority elders under various types of financial benefit plans. In this Article, the author explores the causes of the disproportionate distribution of benefits and suggests several legal bases on which to challenge such plans as well as several remedial steps which might equalize their impact.

Discrimination against the elderly[1] has been and remains an unfortunate and omnipresent element of American society.[2] Equally unfortunate and persistent is the racism that continues in the United States. While each has been the subject of legislation,[3] litigation,[4] and/or constitutional amendment,[5] virtually no concerted attention has been directed to legal problems of minority elders as they differ—in nature or degree—from legal problems of elders generally.[6] Nor has the problem of effectively delivering legal services to minority elders been viewed as one justifying attention.[7]

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1. The term "elders"—like "senior citizens," "senior adults," "older persons," "mature adults"—most often refers to persons who are 60 years of age or older. In this Article, however, the term is also descriptive of members of minority groups who are, relative to other members of that minority, older. Hence, a 50 year old Indian person is an elder if, for example, life expectancy for Indian persons is 55 years of age.

2. *See* 1 WHITE HOUSE CONFERENCE ON AGING (1961); 1, 2 WHITE HOUSE CONFERENCE ON AGING (1971-1972).

3. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-15 (1970), *as amended,* 42 U.S.C. § 2000e-2000e-17 (Supp. IV, 1974); Older Americans Act of 1965, 42 U.S.C. § 3001 (1970); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1970).

4. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Brown v. Board of Educ., 347 U.S. 483 (1954).

5. U.S. CONST. amend. XIII, XIV, XV.

6. Minority elders face many special legal problems that will not be treated in this Article. For example, Indians have estate planning needs which are common to no other group. They must avoid fractionalization of lands in order to protect tribal ownership.

Particularly in California, there are many older Indians who have ownership interests, but because they are indigent and often ignorant of their rights, these elder Indians to not take steps to control the devise of their property interests upon their deaths. As a result, their lands pass by the laws of intestacy and are likely to be left to blood descendants who do not live on

This Article will focus on the inequitable treatment afforded minority elders under financial benefit plans such as Social Security,[8] Medicare,[9] and private pension plans. While these plans are scrupulously non-discriminatory on their face, they are not racially neutral in operation and impact. Numerous causative factors will be addressed, and several legal theories on which to base a challenge to the discriminatory results of such plans will be suggested. In so doing, the need for revision of certain statutory provisions will become clear, as will the need for the delivery of culturally attuned legal services.

DEFINITION OF THE PROBLEM

For a variety of economic, social and historical reasons, minority elders are more likely than other elders to require the benefits of public and private retirement and income maintenance programs. Yet minorities are far less likely to qualify for benefits because their

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the tribal land. Notwithstanding their Indian blood, these persons may be insensitive to their Indian heritage and may take no steps to insure ultimate tribal ownership.

Currently, legal services programs for elder Indians lack the necessary resources to seek out those with ownership interests and are not equipped to address this estate planning need. If the need is not addressed, a threatened culture will be deprived of the one resource that may be the key to its survival: land.

See CALIFORNIA INDIAN LEGAL SERVICES OF OAKLAND, CALIFORNIA, ESTATE PLANNING PROJECT FOR OLDER CALIFORNIA INDIANS (1976).

7. Philosophy Professor Jeffrie G. Murphy states in his review of S. DE BEAUVOIR, THE COMING OF AGE (1972), that despite the well-publicized plight of elders, "their disadvantaged state is tolerated by society at large with a degree of indifference and callousness that is morally indecent." 17 ARIZ. L. REV. 546 (1975). *See generally*, Gilfix, *Meeting the Legal Needs of Elders*, 2 NEW DIRECTIONS IN LEGAL SERVICES 68 (1977).

8. The Social Security system is governed by the Social Security Act of 1965, 42 U.S.C. §§ 402-432 (1970). Under this system, workers in all but a few exempt occupations pay 5.85% of their salary, up to an income of $16,500 per year, to the Social Security system. This money is placed by the government into two statutorily created trust funds, one for retirement and one for disability benefits. It is this payment of funds during the working years that makes a worker eligible for a retirement income once he or she reaches age 65. One may opt to retire at age 62, but not without suffering a substantial loss of benefits. The amount of income a retired worker receives is based on a formula depending largely on how much money the worker paid into the system during his working years. Social Security is the primary source of retirement income for approximately 90% of the population that is 65 or older.

For a summary of major Social Security benefits and provisions, see M. Gilfix & Wellbery, Social Security: An Overview & Description (1976) (available from Senior Adults Legal Assistance, Palo Alto, California). *See also* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, BLACKS AND SOCIAL SECURITY BENEFITS: TRENDS 1960-1973, PUB. NO. (SSA) 11700 (1975).

9. Medicare is available to persons 65 and over in two forms. Part A is automatically available if such persons are entitled to either Social Security or railroad retirement benefits. 42 U.S.C. §§ 1395c—1395i(2) (1970) as *amended*, (Supp. III 1973). Disabled persons who are under age 65 can also obtain Medicare coverage. 42 U.S.C. § 1395(c)(2) (Supp. III 1973). Part B is available at a monthly fee for persons 65 and over who do not qualify for Part A. 42 U.S.C. § 1395i-(2) (Supp. III 1973).

average life expectancy is too short or because, for cultural, educational, or other reasons, they fail to apply.

Available statistics indicate that minority elders suffer far more poverty than their white age peers.[10] The following table illustrates the difference in economic position between black and white elders in 1973.[11]

Age, Race & Status	Percentage Below Poverty Line
65+, white, head of household	8.4
65+, black, head of household	31.4
65+, white, unrelated individual	29.6
65+, black, unrelated individual	59.2

The data above, however, understate the severity of the problem. First, the table is based on an artificially low definition of poverty[12] and excludes a great many elders who face actual poverty, notwithstanding government guidelines. A more accurate estimate of how many elders face economic hardship can be gained by noting the number of "near poor" as well as "poor."[13]

Age, Race & Status	Percentage Below Near Poor Poverty Line
65+, white, head of household	15.3
65+, black, head of household	47.8
65+, white, unrelated individual	47.1
65+, black, unrelated individual	75.1

Secondly, the table fails to reflect the fact that minorities are not a part of the so-called *nouveau pauvre* or "new poor."[14] This phrase

10. Much of the analysis of minority problems is focused on blacks because they comprise over 90% of the minority population in the United States and more comparative data are available for them. Similarly, limitations in available data will sometimes require a focus on Black and Anglo males to the exclusion of females. Accordingly, care should be taken in applying the statistical information and conclusions to other minority population segments.

11. ADMINISTRATION ON AGING, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, FACTS & FIGURES ON OLDER AMERICANS, NO. 11, INCOME AND POVERTY IN 1973, at 11 (1975).

12. The average poverty line for an older unrelated individual in 1973 was $2,119. It was $2,662 for a two-person older family. *Id.* at 3.

13. *Id.* at 12. "Near poor" is defined as having an annual income that is less than 125% of the poverty line. *Id.* at 3.

The situation was not much better for the elderly Spanish-speaking. A 1960 study of elderly Spanish surnamed persons in a California urban setting found their median income to be $1,616 as compared with $2,140 for elderly Anglos. Moore, *Mexican Americans*, THE GERONTOLOGIST 31 (Spring, 1971).

14. Alexander, *Foreward: Life, Liberty and Property Rights for the Elderly*, 17 ARIZ. L. REV. 267, 268 (1975).

describes an older working person who is suddenly deprived of a job and status in life. Although applicable to a large number of white males, it rarely holds true for the elder who also happens to be black, Spanish-speaking,[15] Indian or Asian-American.[16] The unfortunate fact is that most older minority persons have always been poor or, at least, experience a far less drastic change in income level upon reaching elder status than do their white counterparts.[17]

As one would expect, the higher incidence of poverty among minority groups is reflected in life expectancy differentials. The following table sets forth life expectancy figures by both color and sex for years ranging from 1900 to 1973.[18]

		White		All other	
	Total	Male	Female	Male	Female
Life expectancy at birth:					
1973	71.3	68.4	76.1	61.9	70.1
1972	71.1	68.3	75.9	61.5	69.9
1970	70.9	68.0	75.6	61.3	69.4
1960	69.7	67.4	74.1	61.1	66.3
1900	47.3	46.6	48.7	32.5	33.5
at age 20:					
1973	53.4	50.5	57.7	44.9	52.6
1900-1902	–	42.2	43.8	35.1	38.9
Percent reaching age 65:					
1973	72.9	67.5	82.2	51.0	68.1
1900-1902	–	39.2	43.8	19.0	22.0

The relatively vast differences in life expectancy between whites and non-whites[19] have far-reaching implications in the context of

15. Spanish-speaking includes Mexican-Americans, Puerto Ricans, Cubans, and Latin Americans.

16. Asian-American includes Chinese, Japanese and Samoan.

17. ADMINISTRATION ON AGING, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, FACTS AND FIGURES ON OLDER AMERICANS, NO. 8, POVERTY BY STATE AND ETHNIC GROUP—1969, at 3 (1973).

18. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, 2 VITAL STATISTICS OF THE U.S. § 5 Table 5-B (1975).

19. Dr. Robert N. Butler, Director of the National Institute on Aging, indicates the following life expectancy figures for American males in the period from 1900 to 1968:

White	67.5 years
Black	60.0 years (in 1968)
Mexican-American	57.0 years
American Indian	44.0 years

benefit plans that have inflexible age eligibility requirements.[20] For example, consider two men in the context of a retirement plan that establishes the normal retirement age at sixty-five. One is white and one is black. Both are age twenty, work at the same job for the same rate of pay, and decide to stay with their employer and retire at age sixty-five with full retirement benefits.[21] The white laborer, with a remaining life expectancy of 50.5 years, will likely receive monthly retirement checks for five and one half years, a period in which he would collect $33,000 if benefits are $500 per month. Because the remaining life expectancy of a twenty year old black male is only 44.9 years, it is more likely than not that the black worker will not survive

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He also states the surprising fact that in the period from 1900 to 1968 the average life expectancy of Black males *declined* by one year. R. BUTLER, WHY SURVIVE? 6 (1975)

20. Another way of looking at the problem is to examine the mortality or death rates of white and minority persons.

Death Rates per 1,000 in 1972

	Men		Women	
AGE	Black & white	other	white	Black & other
15-24	1.7	3.0	0.6	1.2
25-34	1.8	5.4	0.8	2.1
35-44	3.2	9.2	1.8	4.5
45-54	8.7	16.7	4.4	9.6
55-64	21.3	31.8	9.9	18.4
65-74	48.1	54.0	24.4	34.9
75-84	101.7	89.9	65.2	64.2
85 and older	184.2	119.0	157.3	103.3

U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, BLACKS AND SOCIAL SECURITY BENEFITS: TRENDS 1960-1973, at 5, PUB. NO. (SSA) 11700 (1975).

The table reveals that minority groups experience markedly higher mortality rates in all age categories until age 75. The differences are particularly pronounced in the 45-54 and 55-64 categories. These data are entirely consistent with the life expectancy tables and shows proportionally, that many more minority persons die before reaching 65 years of age than do Anglos.

21. Note that a person may opt for the receipt of retirement benefits at age 62, but the monthly payments are lower than if the person waits until age 65 to receive them. Although a widow can receive the same monthly benefits her husband was receiving if she is 60 years old and satisfies other requirements, this factor does not affect the main point in any appreciable way. 42 U.S.C. § 402(e) (1970); 20 C.F.R. § 404 (1977).

The choice of age 65 as America's retirement age has an interesting, if somewhat elusive, history. In the Social Security Act, 65 was adopted as the eligibility age for retirement benefits virtually without debate. The designation of age 65 as the appropriate retirement age apparently dates back to Otto von Bismarck who, in 1868, instituted the world's first old age pension in Germany. See S. DE BEAUVOIR, THE COMING OF AGE (1972). It can well be pondered how many of Bismarck's fellow Germans survived until age 65 in the nineteenth century. America's choice of this age demarcation can be viewed as an act of benign ignorance. The failure to make appropriate adjustments cannot be so beneficently considered.

to receive any benefits whatsoever. Through his contributions to the company retirement fund, he has borne the burden of supporting a fund that is disproportionately and substantially benefiting white retirees to the detriment of black retirees. The result is an unconscionable and ultimately racist approach to the support of our nation's elders.

Surviving to age sixty-five, however, satisfies but one element necessary for the receipt of equal benefits by minority persons. Still other issues are raised when the over-sixty-five population is considered, since the most significant racial difference in the receipt of cash benefits is found among the sixty-five and older age group.[22] A primary reason for this disparity is that large numbers of minority persons work in occupations that simply are not covered by the Social Security system. Most notable are domestic workers and farm laborers, who were not brought under the Social Security Act until amendments were passed in 1950 and 1954, respectively.[23] These amendments offer little solace to the countless minority persons who today receive no retirement benefits because they were too old to take advantage of the 1950 and 1954 amendments.[24] Moreover, many minority persons work in other fields still not covered by the Social Security Act.[25]

Many minority elders qualify for social security, but at a much lower rate than elder white groups.[26] There are several reasons for this discrepancy. Most obviously, minority elders receive lower benefits because they earn less money in their qualifying quarters. As victims of racial discrimination, minority workers have been denied training and promotion opportunities and tend to be demoted or discharged more quickly than whites.[27] This compels earlier retirement and more sick leave and interferes with the ability to obtain and preserve employment. Earnings as a class are also low because minority

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22. In 1973, for example, 92% of whites in this age group were receiving cash benefits, as compared to 80% of blacks. L. RUBIN, *Economic Status of Black Persons: Finding from the Survey of Newly Entitled Beneficiaries*, SOCIAL SECURITY BULLETIN 2 (Sept. 1974).

23. *See* 42 U.S.C. § 410(j)(3)(C) and 410(f) (1970).

24. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, BLACKS AND SOCIAL SECURITY BENEFITS: TRENDS 1960-1973, at 2 (1975).

25. 42 U.S.C. § 410 (1970).

26. In 1973, for example, retired white males received average Social Security checks in the amount of $185.60 while black retired males received an average of $149.70 per month. DIVISION OF OASDHI STATISTICS, SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY BENEFITS & EARNINGS OF MINORITY GROUPS IN COVERED EMPLOYMENT (1973).

27. *See* note 24 *supra*.

persons, particularly Mexican-Americans, historically have engaged in a great deal of seasonal and casual employment.[28]

Many minority elders are simply ignorant of their rights under the various benefit plans. They tend to be poorer and less educated than white elders and, therefore, less eager to expose themselves to government bureaucracies and a judicial system that demands sophisticated advocacy. These limitations are compounded by language and cultural barriers each of which can create problems at every stage in the process of obtaining benefits.[29] Many offices simply lack bilingual and bicultural personnel who can respond to the needs of such elders. At the same time, the unsophisticated minority elder is most susceptible to consumer fraud and most likely to accept without challenge the unfavorable decisions of such bodies as the Social Security Administration.

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28. Employers often fail to report such employment for Social Security purposes, thereby saving substantial sums of money in withheld contributions. F. Torres-Gil, Los Anuanos De La Raza, A Beginning Framework for Research, Analysis, and Policy 46 (May, 1972) (unpublished, Brandeis University Florence Hiller Graduate School for Advanced Studies in Social Welfare).

29. Consider the plight of the Spanish-speaking elder who does not speak English and who is desirous of applying for Supplemental Security Income. Assuming that s/he qualifies, s/he may have to overcome a series of hurdles to obtain his/her benefits.

Step 1: Application at Social Security Office.

Barriers: language and culture, inertia, ignorance of SSI, transportation, delay, pride, legality of residence.

Step 2: Proof of Age.

Barriers: born in Mexico, language, culture, legality of residence, illiterate.

Step 3: Notification of Determination of Eligibility—Denial.

Barriers: language, illiteracy, ambiguous content of determination, lack of legal assistance.

Step 4: Contact SSA.

Barriers: language, uncertain of reason, individual vs. bureaucracy, SSA does not have a copy of the determination letter—must go to SSA.

Step 5: Visit SSA re Denial.

Barriers: language, culture, transportation, delay, refusal of SSA worker to accept responsibility.

Step 6: Request Redetermination.

Barriers: language, lack of legal assistance, ignorance of standards, delay.

Step 7: Redetermination Denied—Request Hearing.

Barriers: language, lack of legal assistance, ignorance of standard and inaccessibility of information, delay.

Step 8: Hearing.

Barriers: language, culture, lack of legal assistance, transportation.

The elder Spanish-speaking may thus be compelled to combat a system that only the more resolute of Anglos will confront and challenge. Unless bilingual and bicultural workers are available at every stage, and unless transportation and legal assistance is *actually* available, the "right" to Supplemental Security Income benefits becomes an illusory one.

Illegal aliens—typically Mexican-Americans—often actively avoid any government contact for fear of deportation and so may never apply for public benefits of any kind. The same is true of persons uncertain of the legality of their status even if they have worked in this country for twenty or thirty years.[30]

A similar problem exists in the Asian-American elder community, whose members suffer a unique handicap under the Social Security system. Many have been deprived of eligibility or receive lower benefits because of their involuntary and enforced internment in prison camps during World War II.[31] This government action is now commonly condemned. The suggestion that all persons who were incarcerated in the camps receive credit under Social Security and all other federal benefit programs is therefore a modest remedial action that should be taken.[32]

LEGAL BASES FOR CHALLENGES TO DISCRIMINATORY PUBLIC AND PRIVATE RETIREMENT BENEFIT PLANS

A number of legal theories may be employed to challenge discriminatory aspects of Social Security, other governmental programs, and private pension plans. The most promising approaches derive from the constitutional guarantee of equal protection, statutory protections of civil rights and fair representation by unions.

Equal Protection

Federal benefit plans, including primarily the Social Security system, are susceptible to attack under the United States Constitution as a violation of equal protection. While the Fourteenth Amendment contains the Equal Protection Clause that applies to state action, the Due Process Clause of the Fifth Amendment includes an equal pro-

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30. The extent of this problem was revealed in a 1971 study of Mexican-American elders by Dr. Torres-Gil. Drawing from a sample population in a Los Angeles Barrio, he found that 38% of his subjects were not United States citizens. Without exception, the persons who were not citizens had been in the United States a minimum of 15 years. Reasons they had not applied for citizenship reflected their self-perceptions of powerlessness in American society. Many were illiterate, could not speak English and were simply unaware of how to apply for citizenship. F. Torres-Gil, *supra* note 28, at 165-66.

31. *See* Korematsu v. United States, 323 U.S. 214 (1944). In *Korematsu*, the Supreme Court held that the mass imprisonment of Japanese-Americans during World War II was justified on grounds of national security.

32. 1971 WHITE HOUSE CONFERENCE ON AGING, ADMINISTRATION ON AGING, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, REPORT OF SPECIAL NEEDS SESSION ON ELDERLY ASIAN-AMERICANS 5 (1971).

tection element that provides similar constraints on actions of the federal government.[33]

Federal courts have been presented with many equal protection challenges to employment practices which neutral on their face have produced a racially disproportionate impact.[34] Nearly every court found statistical proof of the discriminatory impact of a particular employment practice sufficient to establish a prima facie case of an equal protection violation.[35] The defendant employer was then required to prove that the rule or practice bore a demonstrable relationship to successful performance on the job.[36] If defendants failed to show job-relatedness to the satisfaction of the court, the plaintiffs prevailed on the basis of the discriminatory impact alone,[37] regardless of any good faith intentions on the part of the employer.[38] However, if such job-relatedness were demonstrated, the rule or practice was sustained despite its disproportionate impact.[39] These courts recognized the obvious difficulties inherent in proving subjective intent as well as the fact that arbitrary or even innocent policy decisions by employers can have unacceptable discriminatory results.

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33. Washington v. Davis, 426 U.S. 229, 239 (1976).

34. Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Arnold v. Ballard, 390 F. Supp. 723 (N.D. Ohio 1975); United States v. City of Chicago, 385 F. Supp. 543 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126 (N.D. Miss. 1974); Harper v. Mayor of Baltimore, 359 F. Supp. 1187 (D. Md. 1973), *aff'd in pertinent part sub nom.*, Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972), *rev'd on other grounds*, 498 F.2d 143 (8th Cir. 1974).

35. Note, *Discriminatory Purpose: What It Means under the Equal Protection Clause—Washington v. Davis*, 26 DEPAUL L. REV. 650, 654 n.23 (1977).

36. *See* Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975); Davis v. Washington, 512 F.2d 956, 960-61 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1335, 1337 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972); Arnold v. Ballard, 390 F. Supp. 723, 736, 737 (N.D. Ohio 1975); United States v. City of Chicago, 385 F. Supp. 543, 550 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126, 140, 142 (N.D. Miss. 1974); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1201, 1204-05 (D. Md. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (D. Minn. 1972).

37. Davis v. Washington, 512 F.2d 956, 961-65 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1177 (2d Cir. 1972); United States v. City of Chicago, 385 F. Supp. 543, 561 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv., 372 F. Supp. 126, 143 (N.D. Miss. 1974); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1201 (D. Md. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (D. Minn. 1972).

38. Davis v. Washington, 512 F.2d 956, 960-61 (D.C. Cir. 1975).

39. Arnold v. Ballard, 390 F. Supp. 723, 733 (N.D. Ohio 1975).

In the recent case of *Washington v. Davis*,[40] the United States Supreme Court reversed this seemingly well-established line of authority to the extent that it "rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation. . . ."[41] A showing of racially discriminatory impact, however, may still shift the burden of proof so that the offending entity will be required to show permissible neutral motivations behind the provision that is being challenged.[42] The Court also acknowledged that:

> [n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may . . . demonstrate unconstitutionality because . . . the discrimination is very difficult to explain on non-racial grounds.[43]

In short, disparate impact may be a directly relevant factor in determining purpose.[44]

This Article has established that minority persons as a class receive far less in Social Security benefits than elder white groups. It is not suggested here that Congress had any racial motives in enacting the Social Security Act in 1935. Notwithstanding *Washington v. Davis*, this does not end the inquiry.

The substantial imbalances in retirement benefits have been known to the Social Security Administration and to Congress at least since 1975 when the Social Security Administration published an analysis of benefits as a function of race.[45] In 1971, the Special Needs Session

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40. 426 U.S. 229 (1976). Justices Rehnquist, Burger, Blackmun and Powell joined Justice White in his opinion. Mr. Justice Stewart joined only in the first two of the three sections of the opinion. Mr. Justice Stevens concurred in the result and expressed disagreement on certain key points. Justices Brennan and Marshall entered a spirited dissent. For an excellent analysis of *Washington v. Davis* and its implications, *see* Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). *See also* Note, *Discriminatory Purpose: What It Means under the Equal Protection Clause—Washington v. Davis*, 26 DEPAUL L. REV. 650 (1977).

41. 426 U.S. 245. Note that Mr. Justice Stevens, in his concurring opinion, specifically expressed disagreement with the majority's explicit rejection of the many cases cited in note 34 *supra*. *Id.* at 256.

42. *Id.* at 241, *citing* Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

43. Washington v. Davis, 426 U.S. at 242.

44. In his concurring opinion, Justice Stewart stated: "Frequently the most probative evidence of intent will be objective evidence of what actually happened . . . for normally the actor is presumed to have intended the natural consequence of his deeds." *Id.* at 253. He also expressed concern that a legitimate government action may be invalidated because one of many legislators expressed an improper motive.

45. *See* note 24 *supra*.

of the White House Conference on Aging called for lowering the eligibility ages for minority elders for purposes of Social Security retirement benefits. Yet, absolutely no efforts—either administratively or legislatively—have been undertaken to eliminate or ameliorate a patently discriminatory system.

When inequitable results of government action have been identified, there exists a duty to rectify those inequities. Even under *Washington v. Davis*, the totality of factual circumstances may establish a violation of equal protction even though original unlawful intent may not have existed. In the Social Security context, the circumstances reflect: (1) the establishment of a system, non-discriminatory on its face, to provide economic support to all persons who have made a minimum level of contributions to it; (2) disparate impact, in that minority elders receive far less retirement benefits than Anglo elders and, in effect, support benefits to Anglos; (3) knowledge of such disparate impact on the part of the Social Security Administration and the United States Congress; and (4) refusal by inaction to rectify major and demonstrable inequities in the system.

Washington casts some doubt on the concept that actors are presumed to intend the natural results of their actions. However, while it will excuse disparate impacts where racially neutral motives can be established, it gives no indication that inequities are to be accepted and excused forever. In other words, there must come a time when knowledge plus inaction constitute a discriminatory motivation.[46] When that motivation results in the perpetuation of a discriminatory system, it should be constitutionally suspect.

Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964[47] provides a viable statutory basis for challenging both public and private pension plans.[48] It

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46. An "affirmative duty" to remedy unlawful discrimination has been held to exist in the context of formerly *de jure* segregated school systems. *See* Green v. County School Board, 391 U.S. 430, 437 (1968). While the existence of a *de jure* discriminatory system is absent in the Social Security Act, the principle is precisely the same.

47. 42 U.S.C. §§ 2000e-2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e-2000e-17 (Supp. IV 1974). An excellent overview of Title VII and its utility is contained in Specter & Spiegelman, *Employment Discrimination Action Under Federal Civil Rights Acts*, 21 AM. JUR. *Trials* § 1 (1974).

48. Prior to 1972, Title VII contained a clause specifically exempting "the United States, a corporation wholly owned by the Government of the United States . . . , or a State or political subdivision thereof." Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)(1) (1970). Congress deleted that government exemption in the Equal Employment Opportunities Act of 1972, 42 U.S.C. § 2000e-16 (Supp. IV 1974).

prohibits an employer from discriminating against any individual with respect to the conditions of employment on the basis of race, color, religion, sex, or national origin. It is well settled that pension and retirement plans do constitute a condition of employment within the meaning of Title VII.[49]

The fact that a pension plan appears racially neutral on its face does not preclude the possibility that it violates Title VII. Proof of racially disproportionate impact alone may be sufficient to establish a violation of Title VII regardless of the good faith intentions of the employer. This fundamental proposition was firmly established in *Griggs v. Duke Power Co.*[50] In *Griggs*, the United States Supreme Court held that hiring practices, neutral on their face, which exclude a disproportionate number of blacks constitute a violation of Title VII unless the employer can show a direct relationship between the practice and job performance.[51] The *Griggs* opinion stressed that Title VII proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation.[52] It follows from *Griggs* that a facially neutral pension plan could be held to violate Title VII if it is shown to distribute materially fewer benefits to minorities than to whites.

The emphasis in Title VII litigation on the impact of employment policies has led to heavy reliance on statistical evidence[53] to identify under-representation of minorities in an employer's work force[54] and thereby establish a prima facie case.[55] Use of statistical evidence to reveal an under-representation of minorities among retirees receiving retirement benefits could be equally effective.

The life expectancy figures presented earlier in this Article could be offered as statistical proof that a particular pension plan is discriminatory. However, because they pertain to the general population, rather than a distinct workforce, their relevance is arguably limited. Ideally, a study of the present and past work force of larger

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49. EEOC v. Colby College, 15 FEP 1363, 1365 n.2 (D. Me. 1977); Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976); Peters v. Missouri-Pacific R.R., 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3rd Cir. 1973); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

50. 401 U.S. 424 (1971).

51. Job relatedness or test "validity" is the key criterion in ascertaining the legality of tests that are preconditions of employment. *See* 29 C.F.R. §§ 1607.2, 1607.5(A) (1976).

52. 401 U.S. at 431.

53. *See* Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975).

54 *See, e.g.*, Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1974).

55. *See* note 35 *supra*.

employers should be made to ascertain life expectancies for whites and minority persons who are directly affected by a particular type of pension plan.

Certain difficulties, however, limit the availability or usefulness of such data. Years of racial and ethnic discrimination in virtually every major industry have radically limited employment opportunities for non-whites.[56] While changing attitudes and successful litigation have resulted in substantial gains, the progress is too recent to allow any significant analysis of death rates and life expectancies for minority workers. It is essential, therefore, that general population figures be accepted as the only figures extant and that reliance be placed upon them. Otherwise, whole industries would be rewarded for their past discriminatory practices.

The propriety of relying on general population statistics in individual cases or class actions is supported by *Griggs* and its progeny. In *Griggs*, the Court considered statistics regarding the limited educational opportunities for blacks as a whole to be relevant in determining the legitimacy of the hiring and transfer standards of one particular company.[57] A subsequent Ninth Circuit decision[58] invalidated an employer's policy of rejecting job applicants who had an arrest record, on the basis that blacks were statistically more likely to have arrest records. For similar reasons, a policy that resulted in the automatic discharge of an employee whose wages were garnished was held to be a violation of Title VII by the Eighth Circuit.[59] Life expectancy is as clearly affected by socioeconomic and educational factors[60] as the ability to pass standard intelligence tests, the likelihood of an arrest record, and the likelihood of wage garnishment.[61] In each context, there is a confluence of societal factors and employment practices that result in unlawful discriminatory impact.

Allegedly discriminatory disability benefit and pension plans have been the subject of three recent notable cases, *General Electric Co. v. Gilbert*,[62] *EEOC v. Colby College*,[63] and *Manhart v. City of Los*

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56. W. GOULD, BLACK WORKERS IN WHITE UNIONS (1977).

57. 401 U.S. 430 (1971).

58. Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972).

59. Wallace v. Debren, 494 F.2d 674 (8th Cir. 1974).

60. These and other factors as they affect minority workers are discussed in N. GLAZER & D. MOYNIHAN, ETHNICITY 11-15 (1975); H. GUTMAN, WORK, CULTURE & SOCIETY IN INDUSTRIALIZING AMERICA (1975).

61. While "job relatedness" was a key factor in *Griggs*, *Gregory* and *Wallace*, the concept has no bearing on the retirement benefits issue.

62. 429 U.S. 125 (1976).

63. 15 FEP 1363 (D. Me. 1977).

Angeles.[64] The pattern that emerges from these cases, all of which involve charges of sex discrimination in violation of Title VII, is not an entirely consistent one. Yet it provides no basis for rejecting the proposition that racially discriminatory retirement plans violate Title VII.

General Electric Co. v. Gilbert[65] involved a charge by several women employees that the company's disability plan violated Title VII's prohibition of sex discrimination by excluding from coverage all disabilities resulting from pregnancy. Obviously only women were affected by that exclusion, yet the Court found no violation of Title VII.[66] The Court was swayed by the fact that men were not explicitly treated favorably and did not receive a disproportionate share of disability benefits.[67] Rather, it was shown only that certain risks were selected for inclusion in the plan and that certain other risks were excluded.[68] Said Justice Rehnquist, "we start from the indisputable baseline that 'the fiscal and actuarial benefits of the program . . . accrue to members of both sexes.' "[69] Because there was no proof that the package was in fact worth more to men than to women, the Court felt it impossible to find any gender-based discriminatory effect in the scheme.[70]

The principle to be extracted from *Gilbert* then is that a violation of Title VII may be established if it can be shown that a benefit plan operates to the substantial detriment of a protected class. In other words, had it been shown in *Gilbert* that because of the pregnancy exclusion the plan paid out 170% more in benefits for men than for women, a gender-based discriminatory effect would likely have been established.

Such a showing can be made in the context of retirement plans where whites receive more than minority persons. For example, a showing that such a plan pays out $1.50 for every white and only $1.00 for every black establishes a race-biased discriminatory effect. Such statistics would be particularly persuasive if a retirement plan involves contributions from employees, since the cost is then carried by the individual minority person as well as the company.

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64. 13 FEP 1625 (9th Cir. 1976), *rehearing denied*, 553 F.2d 581 (9th Cir. 1977).

65. 429 U.S. 125 (1976).

66. In so doing, the Court carefully followed the reasoning of Geduldig v. Aiello, 417 U.S. 484 (1974), in which a challenge brought under the Equal Protection Clause to a similar disability exclusion was rejected.

67. In *Gilbert*, the defendant introduced evidence indicating that the plan paid 170% more for females than for males even with the pregnancy exclusion. 429 U.S. at 131 n.10.

68. *Id.* at 137.

69. *Id.*

70. *Id.*

Another reason for the decision in *Gilbert* stemmed from a conflict in opinion between the EEOC and the Department of Labor as to the legality of plans that differentiate between men and women. While the EEOC opined in its guidelines that unequal benefits of this nature violate Title VII,[71] the Wage and Hour Division of the Department of Labor stated in its regulations that they did not violate the Equal Pay Act.[72] The United States Supreme Court in *Gilbert* stated that, because of Section 703(h) of Title VII,[73] the regulation enacted under the Equal Pay Act was controlling.[74]

Soon after the *Gilbert* decision, a federal district court in Maine was faced with determining the propriety of a pension and annuity plan administered by Colby College which treated men and women differently.[75] Under the plan in question, males and females made equal contributions into the plan. Employer contributions were made on an equal basis as well. Female annuitants, however, received lower monthly payments than did men because women in the plan were shown to live longer than men. Conversely, dependents of males received lower death benefits than did dependents of females.[76]

Relying on *Gilbert*, the *Colby* court found no violation of Title VII.[77] As in *Gilbert*, the court held that the Department of Labor's regulation stating that such plans constitute no violation of the Equal Pay Act is controlling. In addition, the *Colby* court deemed it highly significant that the operation of the plans was based on the "essential

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71. The Commission issued guidelines on sex discrimination in 1972. 29 C.F.R. § 1604.9(f) (1976) states in pertinent part:

> It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement age based on sex, or which differentiates in benefits on the basis of sex.

72. The Wage and Hour Administrator issued a regulation, 29 C.F.R. § 1604.9(f) (1976), which states in pertinent part:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other.

73. 42. U.S.C. § 2000e 2(h) (1970), also known as the Bennett Amendment, provides in pertinent part:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29 (the Equal Pay Act).

74. 429 U.S. at 136-37.

75. EEOC v. Colby College, 15 FEP 1363 (D. Me. 1977).

76. *Id.* at 1365.

77. *Id.*

proposition" that neither the annuity nor the death benefit funds be depleted before all covered annuitants die.[78]

The facts of *Colby* are closely analogous to the situation dealt with in this Article—i.e. pension plans, public and private—that are neutral on their face but which give rise to a racially discriminatory impact. However, the *Colby* finding of no Title VII violation should not preclude a Title VII challenge to pension plans that discriminate against minority elders on the basis of race. In the latter situation, there would be no conflict between an Equal Pay Act regulation and a Title VII guideline because there would be no allegations of sex discrimination. Additionally, neither *Colby* nor *Gilbert* involved evidence of unequal receipt of benefits by men and women.[79] In the minority elder context, however, it would be possible to offer statistical proof that, although the plans are not facially discriminatory in their contribution requirements, their benefits do not accrue equally to minorities and whites. Moreover, no adjustments are made to achieve or even approach the equal receipt of benefits.

A variation on *Gilbert* and *Colby* was considered by the Ninth Circuit in *Manhart v. City of Los Angeles*.[80] Relying on actuarial tables which indicated that women live substantially longer than men, a city-operated pension plan required women employees to contribute fifteen per cent more into the pension plan than similarly situated men. The court held that the plan violated Title VII because the differential treatment was based on sex rather than longevity as claimed by the city defendant. The policy failed to treat female employees as individuals and based its contribution schedule on membership in a minority group. To require larger contributions from women because they "'on the average' live longer than men is just the kind of abstract generalization . . . which Title VII was designed to abolish."[81] The court held, in essence, that because the City of Los Angeles could not predict which women would live longer, unequal contributions were unlawful.

At first glance, the *Manhart* situation differs from the minority elder problem. In *Manhart*, women were required to contribute

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78. *Id.*

79. Note that even with the pregnancy exclusion in *Gilbert*, women received no less than did men under the disability plan.

80. 13 FEP 1625 (9th Cir. 1976), *rehearing denied*, 553 F.2d 581 (9th Cir. 1977). A rehearing had been sought in light of the Supreme Court's decision in *General Electric Company v. Gilbert*, 429 U.S. 125 (1976).

81. 13 FEP 1628. As a general matter, overgeneralizations that detrimentally affect protected individuals are suspect. *E.g.* Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3rd Cir. 1973); Schaefer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972).

more to the fund to receive equal benefits, whereas in the minority elder context, minority elders contribute equally with Anglos but receive fewer benefits. In other words, the plan in *Manhart* appears to be discriminatory on its face whereas the public and private pension plans in question carefully avoid facial discrimination but do give rise to a racially disproportionate impact. In fact, however, these plans are discriminatory on their face if one considers that, on an actuarial basis, blacks are paying into the system at a higher rate than Anglos when the contribution rate is related to benefits received.

Manhart is consistent with the purpose of Title VII in that it strikes down sex-based generalizations that operate to the detriment of a protected class[82] even when the generalizations are statistically based. The *Manhart* court condemned the use of general "average" life expectancy tables to determine benefit plan contribution rates because they fail to consider individuals and thereby operate to the detriment of a protected class. *Manhart* is not inconsistent, however, with the use of statistical averages as evidentiary proof of illegal discriminatory impact against minorities in the operation of retirement plans. The two approaches are not only consistent, but in fact they complement one another.

In conclusion, *Gilbert* provides sound precedent for the result urged here. In addition to conceptual support from *Gilbert*, *Colby* gave specific support to the use of actuarial tables in the context of Title VII and private pension plans.[83]

Other Bases for Challenging Retirement Plans

Section 1981 of the Civil Rights Act of 1866[84] is a remedy against private employers that is independent of Title VII.[85] It imposes fewer procedural prerequisites to bringing an action in federal court,[86] but the questions and standards of proof are similar to those under Title VII. At the same time, it can provide a basis for relief

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82. *See also* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (1969), which invalidated a discriminatory hiring policy based on a belief that, on the average, women cannot do heavy lifting and work long hours.

83. 14 FEP at 1237. Also, Judge Kilkenny in his dissenting opinion in *Manhart* II approved of the use of actuarial tables to achieve equity in the distribution of benefits.

84. 42 U.S.C. § 1981 (1970). *See* Larson, *The Development of § 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RTS.-CIV. LIB. L. REV. 56 (1972).

85. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 466 (1975).

86. *See, e.g.*, Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971).

that is more immediate[87] and broader[88] than that available under Title VII.

Executive Orders 11,114[89] and 11,246[90] provide another avenue of challenge to private plans. These orders prohibit racial discrimination on the part of federal contractors. With enforcement lodged in the Office of Federal Contract Compliance (OFCC), a non-complying employer can face cancellation of its federal contracts.

Private plans might also be challenged as violations of the "duty of fair representation." By statute,[91] some unions are held to a judicially enforceable duty to exercise their powers on behalf of all those they represent, without hostile discrimination.[92] This duty extends to all union actions in the negotiation, administration and enforcement of collective bargaining agreements.[93] It includes direct action by the union and discriminatory actions by an employer that are caused, influenced or unchallenged by the union.[94]

Courts have found breaches of this duty of fair representation where unions used their influence to discharge black employees who were in a different union,[95] prevented the advancement of black workers into certain fields,[96] and failed to pursue all necessary procedural steps to enforce and protect the rights of an aggrieved employee.[97] Failure to seek and obtain equitable retirement benefits for minority employees may also constitute a breach of duty of fair

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87. Most courts require the satisfaction of numerous filing and notice requirements before they will issue emergency or preliminary relief under Title VII.

88. There are restrictions on the awarding of relief for periods prior to the enactment of Title VII in 1965. Back pay, for example, may be ordered retroactively for a longer period of time under Section 1981. *See* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (5th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972).

89. Exec. Order No. 11,114, 28 Fed. Reg. 6845 (1963).

90. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

91. Labor Management Relations Act (LMRA), 29 U.S.C. § 141-197 (1970); Railway Labor Act (RLA), 45 U.S.C. § 151-188 (1970).

92. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (1944). *Steele* was brought under the RLA and was the first Supreme Court decision to uphold the duty and private cause of action in a race discrimination context. These same concepts, although not always in race discrimination cases were read into the LMRA in Vaca v. Sypes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Syres v. Oil Workers Int'l, Local 23, 350 U.S. 892 (1956); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Jurisdiction in federal courts has been based on 28 U.S.C. §§ 1331, 1337 and 1343 (1970).

93. Brady v. Trans World Airlines, Inc., 401 F.2d 87, 94 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

94. *See, e.g.*, Dillard v. Chesapeake & Ohio Ry. Co., 199 F.2d 948, 951 (4th Cir. 1952).

95. Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

96. Dillard, note 94, *supra*.

97. *See* Vaca v. Sypes, 386 U.S. 171 (1967).

representation, particularly if the union in question is aware of racial discrepancies in the receipt of benefits.[98]

Section 302(c)(5) of the Taft-Hartley Act[99] is another possible basis for challenging discriminatory retirement plans. This section requires union trustees of pension funds to operate the fund for the "sole and exclusive benefit" of all of its beneficiaries. Accordingly, eligibility standards and other policies that tend to limit the rights of or discriminate against minority persons may constitute a violation of Section 302(c)(5).[100]

Once identified, discrepancies in the distribution of benefits may be so large as to stimulate litigation under any or all of these approaches. The wiser, more compatible and less costly approach is to alter eligibility requirements and/or levels of payments to minority persons before litigation becomes necessary. While this may demand modification of collective bargaining agreements in some cases, such modification is the duty of both management and unions to minority workers.

RECOMMENDATIONS FOR REMEDIAL ACTION

The discriminatory distribution and under-utilization of public and private benefits must be remedied to help alleviate the economic plight of many minority elders. It is sometimes asserted that economic and related hardships encountered by members of minority groups—particularly Asian and Mexican-Americans—are ameliorated by filial piety or the attention and support received from adult children.[101] Unfortunately, filial piety is increasingly a victim of a cul-

98. *See* Martinez v. Ivers, No. C-75-6198 RHS (N.D.Cal.). This class action was filed on behalf of retired seasonal cannery workers, the vast majority of whom are of minority background. Named plaintiffs allege, in essence, that a pension trust fund managed and maintained by the Western Conference of Teamsters operates primarily for the benefit of truck drivers, or "long term" employees, most of whom are Anglos. It alleges that short term workers who are disproportionately minorities receive virtually no benefits. It cannot be disputed that short term or seasonal cannery workers are and have traditionally been Mexican-Americans and women.

Martinez alleges a breach of fiduciary duty under Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5) (1970), and a breach of the duty owed union members of fair representation. It seeks damages and modification of all pension fund provisions that interfere with the ability of minorities to qualify for their fair share of benefits.

99. 29 U.S.C. § 186(c)(5) (1970).

100. *See* Martinez v. Ivers, note 98, *supra*. The plaintiffs in *Martinez* base one cause of action on this provision.

101. The Special Concerns Session on the Asian-American Elderly decried the myth that the "Asian-American aged do not have any problems, that the Asian-Americans are able to take care of their own, and that Asian-Americans do not need or desire aid in any form." The session

ture and a value system that are, at best, inhospitable. Extensive migration to urban environs, non-traditional education in white-operated school systems, and economic hardship that limits the ability of an extended family to live together are all factors contributing to its erosion.

Because so many minority elders have virtually nowhere else to turn for economic support, the courts, Congress, employers, unions and the legal community each must take responsibility for ensuring that minority elders receive their fair share of retirement benefits.

The United States Supreme Court has stated that courts "have not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.[102] In exercising this power, some courts have modified collective bargaining agreements.[103] Modification of payment schedules or age eligibilities of pension or retirement plans certainly goes no further. An appropriate remedy might take a monetary form in an effort to make whole the minority persons. Difficulties inherent in ascertaining an award prospectively, which would be necessary on a class basis to achieve equitable adjustment of retirement benefits, can be overcome by a coordinated actuarial and economic analysis.

Private employers must ensure that contributions by or for minorities accrue to the benefit of those minorities rather than support or subsidize payments made to white workers. The problem might be solved by giving minority workers an option to retire early with full benefits. Although minority workers cannot be compelled to accept and may well reject an option for earlier retirement, this proposal presents the most direct method of obtaining benefits for the millions of minority workers whose life expectancy is less than sixty-five years.

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report pointed out that the suicide rate among Asian-American elders in some areas is triple the national average and that a disproportionate number of elderly Asians were in mental institutions. *See* Kii, Status Changes of Japanese Elderly in the Legal Family, and Economic Institutions (1976) (unpublished).

Similar patterns emerge in the Mexican-American population, particularly in rural areas where patriarchal family structures are traditionally strongest. *See* Leonard, *The Older Rural Spanish-Speaking People of the Southwest* in YOUMANS, OLDER RURAL AMERICANS, at 251 (1971).

At the same time, Torres-Gil and others report the survival of traditional family ties in many instances notwithstanding the divers impeding factors. F. Torres-Gil, *supra* note 28, at 7.

102. Louisiana v. United States, 380 U.S. 145, 154 (1965).

In addition to possible remedies delineated in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), the 1972 amendment to that provision enables a court to order "any other equitable relief as the court deems appropriate."

103. *See, e.g.*, Rios v. Enterprise Ass'n Steamfitters, 501 F.2d 622, 631 (2nd Cir. 1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).

Also, increasing monthly benefits for minority persons who have reached retirement age but who have a shorter life expectancy than white workers could be effective. Given reliable actuarial information and/or government figures, this can be done consistently with developing case law. Alternatively or in addition, minority workers could receive payments from the appropriate retirement fund as a supplement to their wages or salaries as they grow older.

Other alternatives appear less attractive. Increasing payments for whites or decreasing them for minorities would result in facially discriminatory contributions and might be susceptible to a challenge based on *Manhart*. Decreasing benefits for whites is politically unfeasible and the creation of a separate retirement fund for minority employees would be both unnecessary and burdensome.

Unions have a responsibility at least as great as that of employers. Unions should endeavor to modify the terms of pension plans—both unilaterally and through collective bargaining procedures—to eliminate the unconscionable inequities that have been identified in this Article.

The United States Congress also must take remedial steps. It recently enacted major legislation primarily designed to shore up the failing economic base of the Social Security system,[104] but included no provisions which address the problems raised here. Nevertheless, congressional action does present the most reasonable approach.

In 1961, the Social Security Act was amended to lower the eligibility age of male workers to age sixty-two from age sixty-five.[105] This helped to alleviate the hardships faced by those men who, because of ill health, automation, or other technological changes, are forced into premature retirement before age sixty-five. More help is needed, however, for those workers in depressed areas where economic forces beyond their control lower their actual retirement age to under sixty-five,[106] and for minority elders who face the total loss of benefits because of premature death.

Support for this proposition came from the 1971 White House Conference on Aging, which recognized that functional rather than chronological aging concepts must be utilized. The Special Needs Session on Elderly Blacks called for an eight-year reduction of age

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104. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (1977).

105. 42 U.S.C. § 402(a) (1970); 20 C.F.R. § 404.303 (1977). Note again that eligibility at age 62 is only available to those who affirmatively choose it. A small minority opt for lower benefits at age 62.

106. *See* UNITED STATES CODE CONGRESS & ADMINISTRATIVE NEWS, 87th Cong., 1st Sess. 1858 (1961).

eligibility for blacks under Social Security.[107] A sister report called for lowering eligibility to age fifty-five for Spanish-speaking elders in urban areas[108] and to age forty-five for the Spanish-speaking who were rural farmworkers.[109]

The need for remedial action of this nature cannot be more clear. Life expectancy rates for minority persons are not undergoing appreciable increases. The manifest inequalities in the Social Security system will not materially change unless amending legislation modifies eligibility and benefit computation provisions.

The legal community must also take responsibility. Traditional legal services programs have failed to provide adequate legal services to the elderly poor. A 1969 study conducted by the Office of Economic Opportunity revealed that elders constituted some twenty per cent of the nation's poor but accounted for only about six per cent of the clientele of those programs studied. The result of this study has spurred the formation in recent years of a system of legal services for elders.[110] There are now well over 150 such programs, mostly funded under the Older Americans Act of 1965.[111] While our nation's elders as a whole are now surely receiving more effective services, it is questionable whether minority elders are benefiting to the same extent as whites.

The special and sometimes unique legal needs of minority elders cannot be met unless services are expanded and adapted to cultural differences. Providers of legal services must be appropriately bilingual and bicultural. Services must be available in minority communities and information about legal rights must be disseminated in all represented languages. Perhaps most importantly, lawyers and legal workers who themselves have a minority background must become more involved in the provision of legal and advocacy services to minority elders.

The scope of legal services must also be broader than is typically the case. It must include a vigorous educational component in order to increase awareness among minority and service communities of the special needs and problems of minority elders. For example, because many minority elders are unsure or mistaken about their immigrant status, such information must be dispersed as widely as possible.

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107. 1971 WHITE HOUSE CONFERENCE ON AGING, ADMINISTRATION ON AGING, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SPECIAL NEEDS SESSION ON ELDERLY BLACKS 9 (1971).

108 *Id.* at 5.

109. *Id.*

110. *See* Nathanson, *Legal Services for the Nation's Elderly*, 17 ARIZ. L. REV. 275 (1975).

111. 42 U.S.C. § 3001 (1970).

CONCLUSION

Minority persons in this nation face numerous and severe difficulties, most of which are rooted in racial discrimination and educationally limited backgrounds. Similarly, elders encounter a broad range of problems that are more a function of age than of any other identifiable factor.

This Article has shown that the combination of elder and minority status has a compounding effect on such fundamental issues as economic security and the delivery of basic health care. It has identified certain policies in both the private and public sectors that demand remedial attention. It is, above all, a stimulus to the movement to provide improved and more equitable support to America's ever growing elder population.