

THE HUMAN RIGHTS OF THE AGED: AN APPLICATION OF THE GENERAL NORM OF NONDISCRIMINATION*

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FACTUAL BACKGROUND

The concept of human dignity covers the entire span of life. The deprivations to which this article addresses itself are those imposed upon individuals because of advanced chronological age.¹ Though the plight of the elderly varies from community to community and from culture to culture,² the deprivations, consciously or unconsciously imposed upon the

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1. The focus here is on the question of discrimination relating to advanced age. On the protection of children, see generally P. ADAMS, ET AL., CHILDREN'S RIGHTS: TOWARD THE LIBERATION OF THE CHILD (1971); D. COHEN, THE LEARNING CHILD (1972); V. DE FRANCIS, CHILD ABUSE LEGISLATION IN THE 1970'S (1970); J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); J. HOLT, ESCAPE FROM CHILDHOOD (1974); S. KEENEY, HALF THE WORLD'S CHILDREN (1957); A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969); H. SIMMONS, PROTECTIVE SERVICES FOR CHILDREN (1968); D. ZIETZ, CHILD WELFARE: SERVICES AND PERSPECTIVES (2d ed. 1969); Coughlin, *The Rights of Children*, 47 CHILD WELFARE 133 (1968); Foster & Freed, *A Bill of Rights for Children*, 6 FAMILY L.Q. 343 (1972); Kleinfeld, *Balance of Power Among Infants, Their Parents and the State*, 4 FAMILY L.Q. 410 (1970), 5 FAMILY L.Q. 64 (1971); Katz, Schroeder, & Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 FAMILY L.Q. 211 (1973); Reznick, *The Rights of Juveniles*, in THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 469 (N. Dorsen ed., 1970); Rodham, *Children Under the Law*, 43 HARV. ED. REV. 487 (1973); Sizer & Whitten, *A Proposal for a Poor Children's Bill of Rights*, PSYCHOLOGY TODAY, Aug. 1968, at 59-63; Wald, *Making Sense Out of the Rights of Youth*, 4 HUMAN RIGHTS 13 (1974); Worsfold, *A Philosophical Justification of Children's Rights*, 44 HARV. ED. REV. 142 (1974).

2. Cruelty in the treatment of the aged is by no means a modern invention as Simone de Beauvoir has documented in her impressive study: S. DE BEAUVOIR, THE COMING OF AGE (P. O'Brian transl. 1972). Nevertheless, Cowgill and Holmes, using modernization as a

elderly, have become increasingly apparent as aged segments in the community continue to expand significantly, especially in highly industrialized societies.³

The unique deprivation of the aged today takes the form of compulsory (involuntary) retirement from active work life, regardless of an individual's actual mental and physical capacities, as enforced by a blanket age limitation.⁴ Alternatively, the deprivation may be imposed by denying employment

central focus, have demonstrated that "the status of the aged is high in preliterate societies and is lower and more ambiguous in modern societies" and that "the status of the aged tends to be high in agricultural societies . . . [while] relatively low in urban, industrial societies." Cowgill & Holmes, *Summary and Conclusions: The Theory in Preview*, in *AGING AND MODERNIZATION* 305, 310, 315 (D. Cowgill & L. Holmes eds., 1972).

3. Though community attention in the past has focused principally on early childhood, there has been a proliferation of research in the field of gerontology. This is vividly exemplified in the United States by the establishment of the National Institute on Aging (NIA) within the National Institutes of Health (NIH). In May 1974, the United States Congress enacted the Research on Aging Act of 1974 authorizing the creation of NIA. The task of NIA is to undertake and coordinate "biomedical, social, and behavioral research and training related to the aging process and the diseases and other special problems and needs of the aged." 42 U.S.C.A. §289k-2 (1974).

For a comprehensive study from a global perspective, see *Question of the Elderly and the Aged* (Report of the Secretary-General), U.N. Doc. A/9126 (1973) [hereinafter cited as *U.N. Study on the Aged*]. For a report on the current state of aging research, see Marx, *Aging Research (I): Cellular Theories of Senescence*, 186 *SCIENCE* 1105 (1974); Marx, *Aging Research (II): Pacemakers for Aging?*, 186 *SCIENCE* 1196 (1974).

See also *AGING AND SOCIAL POLICY* (J. McKinney & F. de Vyver eds. 1966); *AGING AND SOCIETY* (M. Riley, J. Riley, & M. Johnson eds. 1969); Z. BLAU, *OLD AGE IN A CHANGING SOCIETY* (1973); J. BOTWINICK, *AGING AND BEHAVIOR* (1973); M. BRENNAN, P. TAFT, & M. SCHUPACK, *THE ECONOMICS OF AGE* (1967); M. CLARK & B. ANDERSON, *CULTURE AND AGING* (1967); E. CUMMING & W. HENRY, *GROWING OLD* (1961); J. DRAKE, *THE AGED IN AMERICAN SOCIETY* (1958); *GROWING OLD* (A. Stoller ed. 1960); *HANDBOOK OF AGING AND THE INDIVIDUAL* (J. Birren ed. 1959); *HANDBOOK OF SOCIAL GERONTOLOGY* (C. Tibbits ed. 1960); O. KNOFF, *SUCCESSFUL AGING: THE FACTS AND FALLACIES OF GROWING OLD* (1975); M. KOLLER, *SOCIAL GERONTOLOGY* (1968); A. LEVIN, *THE GERIATRIC REVOLUTION* (1968); *MIDDLE AGE AND AGING* (B. Neugarten ed. 1968); *OLD AGE IN AMERICA* (G. Lang ed. 1961); C. PERCY, *GROWING OLD IN THE COUNTRY OF THE YOUNG* (1974); *RESEARCH PLANNING AND ACTION FOR THE ELDERLY: THE POWER AND POTENTIAL OF SOCIAL SCIENCE* (D. Kent, R. Kastenbaum, & S. Sherwood eds. (1972); M. RILEY & A. FONER, *AGING AND SOCIETY* (1968); E. SMITH, *HANDBOOK OF AGING* (1972); *SOCIAL ASPECTS OF AGING* (I. Simpson & J. McKinney eds. 1966); *THEORETICAL ASPECTS OF AGING* (M. Rockstein ed. 1974); *TOWARD AN INDUSTRIAL GERONTOLOGY* (H. Sheppard ed. 1970); *Social Contribution by the Aging*, in *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE* 279 (1952); *Symposium — Problems of the Aging*, 27 *LAW & CONTEMP. PROB.* 1 (1962).

4. This article builds upon previous studies in which the authors have sought to establish that there has emerged in the world arena a general norm that precludes the differentiation of individuals by group categorizations that have no consistent relation to individual capabilities and potentialities. See note 30 *infra*.

For discussions of constitutionality within the United States, see N. TRONCHIN-JAMES, *ARBITRARY RETIREMENT* (1972); Eglit, *Is Compulsory Retirement Constitutional? Another Name for Discrimination . . .*, *CIV. LIB. REV.* 89-97 (Fall 1974); Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 *S. CAL. L. REV.* 1311 (1974) [hereinafter cited as *Age Discrimination in Employment*]; Note, *Mandatory Retirement — A Vehicle for Age Discrimination*, 51 *CHI.-KENT L. REV.* 116 (1974) [hereinafter cited as *Mandatory Retirement*]; Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans*, 44 *S. CAL. L. REV.* 150 (1971) [hereinafter cited as *Too Old to Work*].

opportunity to individuals over a specified age that may vary according to the occupation. Age-based compulsory retirement tends to precipitate or accentuate the syndromes of aging, generating many value deprivations that could otherwise be avoided or mitigated. "Compulsory retirement," in the words of Eglit, "is just another name for discrimination."⁵

The traumatic impact of the sudden loss of accustomed roles, precipitated by involuntary retirement, is immense and profound. As Rosow has sharply summarized:

[T]he loss of roles excludes the aged from significant social participation and devalues them. It deprives them of vital functions that underlie their sense of worth, their self-conceptions and self-esteem. In a word, they are depreciated and become marginal, alienated from the larger society. Whatever their ability, they are judged invidiously, as if they have little of value to contribute to the world's work and affairs. In a society that rewards men mainly according to their economic utility, the aged are arbitrarily stigmatized as having little marginal utility of any kind, either economic or social. On the contrary, they tend to be tolerated, patronized, ignored, rejected, or viewed as a liability. They are first excluded from the mainstream of social existence, and because of this nonparticipation, they are then penalized and denied the rewards that earlier came to them routinely.⁶

Compulsory retirement in a work-oriented society normally means drastic reduction in income, perhaps resulting in near poverty, even where there is provision for some sort of social security.⁷ A drastic decrease in income compels a significant lowering of the accustomed level and style of living.

The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression.⁸ The ordinary process of aging aside, the psychosomatic condition of the elderly may be brutally and unduly impaired and exacerbated by the shock of involuntary retirement.⁹ Formerly useful skills are consigned to the scrap heap overnight. Access to the accustomed flow of information and other sources of enlightenment are lost or substantially reduced. While the power to vote may continue unaffected, eligibility for office-holding, with minor exceptions, is denied. This implies a concomitant decline in influence upon the making of effective community decisions and a sharpening sense of powerlessness. Condemning

5. Eglit, *supra* note 4, at 87.

6. Rosow, *The Social Context of the Aging Self*, 13 *THE GERONTOLOGIST* 82, 82 (1973) (emphasis original).

7. Cf. S. DE BEAUVOIR, *supra* note 2, at 216-77; J. CORSON & J. McCONNELL, *ECONOMIC NEEDS OF OLDER PEOPLE* (1956); *EMPLOYMENT, INCOME, AND RETIREMENT PROBLEMS OF THE AGED* (J. Kreps ed. 1963); SENATE SPECIAL COMM. ON AGING, 91st Cong., 2d Sess., *LEGAL PROBLEMS AFFECTING OLDER AMERICANS* (A working paper) 1-2 (1970); *Age Discrimination in Employment*, *supra* note 4; *Mandatory Retirement*, *supra* note 4, at 121; *Too Old to Work*, *supra* note 4, at 152-55.

8. S. DE BEAUVOIR, *supra* note 2, at 269. Cf. R. BUTLER & M. LEWIS, *AGING AND MENTAL HEALTH* (1973).

9. It has been suggested that compulsory retirement can be an important source of disease. M. BARRON, *THE AGING AMERICAN* 76 (1961); SENATE SPECIAL COMM. ON AGING, *DEVELOPMENTS IN AGING 1969*, S. REP. NO. 91-875, 91st Cong., 2d Sess. 115 (1970).

the elderly to "an idleness that hastens their decline,"¹⁰ age-based involuntary retirement tends to affect all personal relations and to evoke "the sorrow of parting, the feeling of abandonment, solitude and uselessness."¹¹

In sum, from an active and useful member of society, overnight an aged person is relegated to the club of senior citizens under a thoughtless, inconsiderate system of compulsory retirement and becomes a target of condescension, neglect, and contempt. Instead of embarking upon a new life of enjoyable leisure in the "golden years," people who are forced to retire, except for a fortunate few, are thrust into an agonizing path of doubt, insecurity, emptiness, and futility.¹² They are bluntly "redefined," in the words of Rosow, "as old and obsolete."¹³ He noted: "The norms applied to them change quickly from achievement to ascription, from criteria of performance to those of sheer age regardless of personal accomplishment. People who were formerly judged as individuals are then bewilderingly treated as members of an invidious category."¹⁴

BASIC COMMUNITY POLICIES

The critical policies of honoring freedom of individual choice and of fostering the utmost contribution by individuals to the aggregate common interest should protect the aged as well as other members of a community. To deny or restrict an individual's opportunity to work and to participate in other value processes, purely on the basis of an arbitrary chronological age limit, is not compatible with the overriding policy of human dignity.

Compulsory retirement on the basis of a specified age has commonly been justified on several grounds. First, the elderly on reaching a certain specified age are said to become inefficient workers because of conspicuous deterioration both in intellectual and physical capabilities.¹⁵ Second, it is allegedly impracticable to effect retirement ("to weed out deadwood") on a selective, individualized basis.¹⁶ Third, mandatory retirement guided by chronological age serves the common interest by opening up avenues of advancement (promotion) and job opportunity for the young.¹⁷ Fourth, age-based mandatory

10. S. DE BEAUVOIR, *supra* note 2, at 273.

11. *Id.* at 269. Cf. C. ROSENBERG, *THE WORKER GROWS OLD* (1970).

12. *But see, e.g.*, O. KNOFF, *supra* note 3.

13. Rosow, *supra* note 6, at 82.

14. *Id.* at 82-83.

15. See HANDBOOK OF SOCIAL GERONTOLOGY, *supra* note 3, at 307-08; H. LOETHER, PROBLEMS OF AGING, SOCIOLOGICAL AND SOCIAL PSYCHOLOGICAL 59-60 (1967); *Hearings on S. 830, S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 369-70 (1967); Waldman & Levine, *Is Compulsory Retirement Constitutional? . . . Serves a Valid and Legal Social Purpose*, CIV. LIB. REV. 98-101 (Fall 1974); *Mandatory Retirement*, *supra* note 4, at 118; *Too Old to Work*, *supra* note 4, at 151.

16. See Waldman & Levine, *supra* note 15, at 102; Johnson, *The Superficial Aspect, When's Time to Retire?*, NEW REPUBLIC, July 6, 1959, at 16.

17. See Bernstein, *The Push for Early Retirement*, NEW REPUBLIC, Aug. 22, 1964, at 23; Gordon, *The Older Worker and Retirement Policies*, 83 MONTHLY LAB. REV. 577, 581 (1960); Waldman & Levine, *supra* note 15, at 99.

retirement enables "the prospective retiree to plan ahead with certainty,"¹⁸ instead of being shocked by a sudden retirement that is dictated by haphazard, ad hoc criteria.

Underlying the defense of age-based compulsory retirement there is a blanket assumption, allegedly based upon statistics, about the stereotyped disabilities (mental and physical deterioration) of people reaching a certain age.¹⁹ As gerontological studies accelerate and deepen, such an assumption encounters growing challenge.²⁰ In the light of contemporary knowledge it would appear that no blanket assumption about the incapacity of people over a fixed age can be accepted until it is factually demonstrated. It is obvious that a mere assertion is not an acceptable substitute for fact. The consequences are especially grave when the ends of enlightened policy are not served. Irrebuttable presumptions that preclude individualized determinations based on close contextual scrutiny cannot be tolerated. Actually, individuals both mature and decline at different rates for different capabilities; moreover, research indicates that "[g]eneral intellectual decline in old age is largely a myth."²¹

The argument as to the impossibility of administering a retirement policy on an individualized basis cannot withstand scrutiny. It is no more difficult to make decisions concerning retirement on an individualized basis than to make day to day decisions concerning hiring, discipline, or promotion of individual employees.²² The appropriate criterion should be whether a person is presently capable of performing the task required, not when he or she was born.

To meet the critical job needs of the young by creating more job opportunities is of fundamental importance to sound public policy. Even granting

18. MONRONEY, FEDERAL STAFF RETIREMENT SYSTEMS, S. DOC. NO. 14, 90th Cong., 1st Sess. 73 (1967).

19. Eglit, *supra* note 4, at 92-93.

20. See SENATE SPECIAL COMM. ON AGING, DEVELOPMENTS IN AGING: 1972 AND JANUARY-MARCH 1973, S. REP. NO. 93-147, 93d Cong., 1st Sess. 72 (1973); U.S. DEP'T OF LABOR, THE LAW AGAINST AGE DISCRIMINATION IN EMPLOYMENT (W.H. Pub. 1303, Sept. 1970); WHITE HOUSE CONFERENCE ON AGING, RETIREMENT (1971); 1971 WHITE HOUSE CONFERENCE ON AGING, TOWARD A NATIONAL POLICY ON AGING (1971); *Mandatory Retirement*, *supra* note 4, at 118-19; *Too Old to Work*, *supra* note 4, at 159-61.

For an interesting study that compares different ages at which peak performance is achieved in various professions and occupations, see H. LEHMAN, AGE AND ACHIEVEMENT (1953). See also World Health Organization, *Health Concerns of the Elderly and the Aged* in *U.N. Study on the Aged*, *supra* note 3, Annex III, at 6-7.

21. Baltes & Schaie, *Aging and I.Q.: The Myth of the Twilight Years*, *PSYCHOLOGY TODAY* 35 (March 1974). See also G. MATHIASSEN, CRITERIA FOR RETIREMENT 88, 92 (1952); THE NATIONAL COUNCIL ON THE AGING, UTILIZATION OF OLDER PROFESSIONAL AND SCIENTIFIC WORKERS 9 (1961); REPORT: SEMINAR ON EMPLOYABILITY OF OLDER PERSONS 11 (J. Biten ed. 1963); U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS: INDUSTRIAL RETRAINING PROGRAMS FOR TECHNOLOGICAL CHANGE 6 (1963); Kutscher & Walker, *Comparative Job Performance of Office Workers by Age*, 83 MONTHLY LAB. REV. 39 (1960); Walker, *Job Performance of Federal Mail Sorters by Age*, 87 MONTHLY LAB. REV. 296 (1964); Weinberg, *Older Workers' Performance in Industrial Retraining Programs*, 86 MONTHLY LAB. REV. 935 (1963); *Too Old to Work*, *supra* note 4, at 159-61.

22. Eglit, *supra* note 4, at 92.

that the absorbing capacity of the job market is limited at any given time, the policy of making room for the young at the expense of active older bread earners—completely disregarding actual capability and fitness—is nothing more than “the shifting of the problem of insufficient jobs from one age group to another.”²³ The challenge of “distributive justice” remains unresolved by the body politic. Extravagant and ruthless waste of enormously useful talents and skills, seasoned by years of practical experience, is scarcely the way to augment the aggregate common interest.

It may further be observed that the knowledge that one is about to receive a declaration of instant obsolescence and uselessness on the authority imputed to the calendar is no key to a smooth, anxiety-free transition from one role or status to another.²⁴ If anything, a keen sense of deprivation and injustice may become so overwhelming as to engulf the involuntary retiree in a sea of nameless emptiness and chronic trauma.²⁵ Human beings, it may be reiterated, are not appropriately treated “by category” rather than as persons. Human dignity is best achieved by treating each person according to his or her unique capability and potential. Chronological age is but one of multiple indices of individual capability and potentiality. “You cannot,” wrote Eglit, “consign people to the arbitrary, inflexible fate of forced retirement without at the same time offending fairness and the concept of equality which are fundamental to our society.”²⁶ Unlike discriminations on the ground of race or sex, discrimination on the basis of advanced chronological age has keen personal implications for every member of the community because aging is a process common to everyone.

Thus, the quality of society and the degree to which human dignity values are fulfilled may be measured by the treatment accorded to the aged members of the population. The treatment of the elderly concerns not only the elderly; it involves the identity system of the self and of the whole society of which the self is a part. In primitive societies the elderly were highly prized largely because of their rarity.²⁷ In the contemporary world, because of

23. *Id.*

24. L. KUTNER ET AL., FIVE HUNDRED OVER SIXTY 88-89, 253 (1956); *Too Old to Work*, *supra* note 4, at 155-58.

25. “All gerontologists agree that living the last twenty years of one’s life in a state of physical fitness but without any useful activity is psychologically and sociologically impossible. Those who live on must be given some reason for living: mere survival is worse than death.” S. DE BEAUVOIR, *supra* note 2, at 272-73.

In the words of the American Medical Association Committee on Aging: “Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to, and who has a minimum of meaningful goals or interests in life, job-related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him foundering in a motivational vacuum with no frame of reference whatever.” *Hearings Before the Senate Subcomm. on Retirement and the Individual of the Senate Special Comm. on Aging*, 90th Cong., 1st Sess., pt. 1, at 307 (1967).

26. Eglit, *supra* note 4, at 88.

27. See AGING AND MODERNIZATION, note 2 *supra*. See also M. BARRON, *supra* note 9, at 25-26; Donahue, Orbach, & Pollak, *Retirement: The Emerging Social Pattern*, in HANDBOOK OF SOCIAL GERONTOLOGY, *supra* note 3, at 330, 334-36.

advances in science and technology, the life expectancy of humankind continues to grow, and this planet is endowed with ever increasing numbers of people living well beyond the years that were formerly thought possible.²⁸ As the life sciences continue to flourish, especially in gerontology, there is every indication that this trend will continue, barring unforeseeable catastrophies. Whether the longevity made possible by the cumulative heritage of humankind will become an advantage or a curse in disguise presents a critical test for modern civilization. The resulting important community task is that of devising criteria and procedures appropriate for appraising individual capabilities and potentialities at every chronological age. To maximize the self-fulfillment of individuals and their contributions to the common interest, it is imperative that individual potential receive the fullest possible expression at all stages of life.²⁹

TRENDS IN DECISION

The United Nations Charter and its ancillary human rights prescriptions do not specifically include "advanced age" among the impermissible grounds of differentiation; yet, the general prescriptions on nondiscrimination are, as repeatedly indicated, designed to be illustrative rather than exhaustive.³⁰ The transnational prescriptions barring discrimination are broad and far reaching. Further, the United Nations Charter, the Universal Declaration of Human Rights, the two International Covenants on Human Rights, and other related human rights prescriptions are explicitly worded to protect "everyone," presumably including every human being regardless of chronological age.³¹ Recently, this general policy of nondiscrimination has been emphatically reiterated as a major objective of the Declaration on Social Progress and Development, adopted by the General Assembly in December 1969:

28. See *U.N. Study on the Aged*, *supra* note 3, at 16-28.

29. Curtin observed: "[O]ur culture does not have a concept of the whole of life. Instead, life is divided into childhood, adulthood, and old age. Instead of a cycle, a vision of unity, we have a vision of stages, in which only one—adulthood— has the possibility of being lived productively, independently, and vigorously. Old age is viewed as a childlike state, but without the charm and promise. It is as if we wanted to finally view our lives as totally devoid of meaning, where the dependency and childishness of old age wipe out the accomplishments of adulthood. The experiences of a lifetime disappear in the feeling of being useless and passed by." S. CURTIN, *NOBODY EVER DIED OF OLD AGE* 227 (1972).

30. See McDougal, Lasswell, & Chen, *The Protection of Aliens From Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432 (1976); McDougal, Lasswell, & Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497 (1975); McDougal, Lasswell, & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919, 1034-86 (1975); McDougal, Lasswell, & Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Non-Discrimination*, 74 MICH. L. REV. No. 5 (April 1976); McDougal, Lasswell, & Chen, *Freedom From Discrimination in Choice of Language and International Human Rights*, 1976 So. ILL. U.L.J. 151 (1976); McDougal, Lasswell, & Chen, *Non-Conforming Political Opinion and Human Rights: Transnational Protection Against Discrimination*, 2 YALE STUDIES OF WORLD PUBLIC ORDER No. 1 (1975).

31. *Id.*

Social progress and development shall aim at the continuous raising of the material and spiritual standards of living of all members of society, with respect for and in compliance with human rights and fundamental freedoms, through the attainment of the following main goals:

. . . .

The elimination of all forms of discrimination and exploitation and all other practices and ideologies contrary to the purposes and principles of the Charter of the United Nations. . . .³²

The growing worldwide concern for the protection of the aged prompted the United Nations to undertake a timely study on the "Question of the Elderly and the Aged,"³³ culminating in the adoption by the General Assembly of a resolution on this subject in December 1973.³⁴ Emphasizing "respect for the dignity and worth of the human person" enunciated in the Universal Declaration,³⁵ reiterating that "the protection of the rights and welfare of the aged is one of the main goals of the Declaration on Social Progress and Development,"³⁶ and underscoring "the growing interest for developing and developed societies alike in the fuller participation of the elderly in the mainstream of national societies,"³⁷ the General Assembly urged member states to "enhance the contribution of the elderly to social and economic development"³⁸ and to "discourage, wherever and whenever the overall situation allows, discriminatory attitudes, policies and measures in employment practices based exclusively on age."³⁹

Though the relevant human rights prescriptions are silent on the question of age-based mandatory retirement, it would appear that the more general norm of nondiscrimination,⁴⁰ conjoined with the protected right to work, must outlaw such an invidious practice and policy. The right to work is well protected under transnational prescriptions; the Universal Declaration of Human Rights enunciates in Article 23(1) that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."⁴¹ The International Covenant on Economic, Social, and Cultural Rights in Article 6 fortifies the right to work in these affirmative terms:

1. The States' Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to

32. G.A. Res. 2542, pt. 2, art. 12(b), 24 U.N. GAOR Supp. 30, at 49, 50-51, U.N. Doc. A/7630 (1969). The text of this resolution is reproduced in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS 97, 98-99, U.N. Doc. ST/HR/1 (1973) [hereinafter cited as U.N. HUMAN RIGHTS INSTRUMENTS].

33. *U.N. Study on the Aged*, *supra* note 3.

34. G.A. Res. 3137, 28 U.N. GAOR, Supp. 30, at 80, U.N. Doc. A/9030 (1973).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 81.

39. *Id.*

40. See note 30 *supra*.

41. U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 2.

gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.⁴²

The contracting states not only recognize the right to work but also pledge to "take appropriate steps to safeguard" this right. Similarly, the Declaration on Social Progress and Development of 1969 in Article 6 proclaims that "[s]ocial development requires the assurance to everyone of the right to work and the free choice of employment"⁴³ and that "[s]ocial progress and development require the participation of all members of society in productive and socially useful labour"⁴⁴

Prevention of discrimination is only one facet of the protection of persons of advanced age. They may have special infirmities requiring special measures of assistance.⁴⁵ This critical need is well recognized in various transnational prescriptions. For instance, the Universal Declaration of Human Rights in Article 25(1) states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control.⁴⁶

Similarly, this concern is evident in the resolution on the "Question of the Elderly and the Aged" adopted on December 14, 1973, by the General Assembly of the United Nations.⁴⁷ More specifically, in its separate resolution on "Social Security for the Aged" adopted on the same date, the General Assembly urged Member Governments to provide the aged "adequate social security payments," "sufficient institutions for the care of aged persons. re-

42. *Id.* at 4.

43. *Id.* at 98.

44. *Id.* On the right to work, see INTERNATIONAL LABOUR OFFICE, THE I.L.O. AND HUMAN RIGHTS 76-84 (Report Presented by the International Labour Organization to the International Conference on Human Rights, (1968)); C. JENKS, THE COMMON LAW OF MANKIND 255-99 (1958); C. JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS 119-23 (1960); Jenks, *Work, Leisure and Social Security as Human Rights in the World Community*, 9 J. INT'L COMM. JURISTS 49 (1968).

45. See *U.N. Study on the Aged*, *supra* note 3, at 38-54; STAFF OF SENATE SUBCOMM. ON AGING OF THE COMM. ON LABOR AND PUBLIC WELFARE AND THE SPECIAL COMM. ON AGING, 93d Cong., 1st Sess., POST-WHITE HOUSE CONFERENCE ON AGING REPORTS—1973 (Joint Comm. Print 1973).

46. U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 32, at 2-3 (emphasis added).

47. G.A. Res. 3137, *supra* note 34.

quiring medical treatment," and adequate "architectural facilities" and "housing."⁴⁸

The question of protecting the aged is beginning to receive increased attention within many national communities whose principal efforts relate to special assistance in terms of income (social security), housing, and medical care.⁴⁹ In addition, efforts have increasingly been directed to challenge the policy and practice of age-based mandatory retirement. Recent developments within the United States exemplify this new endeavor.⁵⁰

WEISS, LAFLEUR, AND MURGIA

After repeated attempts beginning in the 1950's, the United States Congress finally, in 1967, adopted the Age Discrimination Employment Act.⁵¹ The act is designed to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁵² Its proscription of discrimination extends to discharging practices as well as hiring practices, encompassing such matters as "hiring, job retention, compensation, promotions, and other conditions and privileges of employment."⁵³ The act bars employers, employment agencies, and labor organizations from practicing age-based discrimination against "individuals who are at least forty years of age but less than sixty-five years of age."⁵⁴ The act authorizes an aggrieved individual or a group of persons under its protective umbrella to bring a civil action for "such legal or equitable relief as may be appropriate to effectuate the purposes" of the act, "including

48. G.A. Res. 3138, 28 U.N. GAOR, Supp. 30, at 81, U.N. Doc. A/9030 (1973).

Worthy of special notice also is the important role played by the International Labor Organization. See generally E. HAAS, HUMAN RIGHTS AND INTERNATIONAL ACTION (1970); INTERNATIONAL LABOUR OFFICE, THE ILO IN THE SERVICE OF SOCIAL PROGRESS (1969); INTERNATIONAL LABOUR ORGANIZATIONS, CONVENTIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE, 1919-1966 (1966); C. JENKS, LAW, FREEDOM AND WELFARE 101-36 (1963); C. JENKS, SOCIAL JUSTICE IN THE LAW OF NATIONS: THE ILO IMPACT AFTER FIFTY YEARS (1970); E. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE (1966); Jenks, *Human Rights, Social Justice and Peace: The Broader Significance of the I.L.O. Experience*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 227 (A. Eide & A. Schou eds. 1968).

49. The authors propose to deal with this question under *Claims Relating to Special Assistance*, in a forthcoming book HUMAN RIGHTS AND WORLD PUBLIC ORDER.

50. See Agatstein, *The Age Discrimination in Employment Act of 1967: A Critique*, 19 N.Y. L. FORUM 309 (1973); Brennan, *State Legislation Prohibiting Discrimination in Employment Because of Age*, 18 HASTINGS L.J. 539 (1967); Halgren, *Age Discrimination in Employment Act of 1967*, 43 LAB. BULL. 361 (1968); Serwer, *Mandatory Retirement at Age 65 - A Survey of the Law*, INDUSTRIAL GERONTOLOGY 11 (Winter 1974); *Age Discrimination in Employment*, *supra* note 4; *Mandatory Retirement*, *supra* note 4; *Too Old to Work*, *supra* note 4.

51. 29 U.S.C. §§621-34 (1970).

52. *Id.* §621(b).

53. See U.S. DEP'T OF LABOR, THE LAW AGAINST AGE DISCRIMINATION IN EMPLOYMENT (1970); *Improving the Age Discrimination Law, A Working Paper*, prepared for use by the Special Committee on Aging, United States Senate, 93d Cong., 1st Sess. (1973).

54. 29 U.S.C. §631 (1970).

without limitation judgments compelling employment, reinstatement or promotion."⁵⁵ The right of recourse to civil action ceases, however, on the commencement of suit by the Secretary of Labor to enforce the right of the aggrieved party.⁵⁶ The Secretary of Labor is entrusted with the primary responsibility of enforcement.⁵⁷ Criminal sanctions are to be imposed upon those who "forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary," while performing his duties under the act.⁵⁸

It is unfortunate, as commentators have repeatedly pointed out, that this act protects only those who are between ages 40 and 65.⁵⁹ Substantial opinion urges removal of this age limitation and the extension of protection against age-based discrimination to those who are below 40, and especially to those who are over 65. Despite this shortcoming and other inadequacies, such as the limited scope of coverage in terms of employers⁶⁰ and "superficial enforcement,"⁶¹ the Age Discrimination Employment Act represents a giant step toward protection against age-based discrimination.

Meanwhile, litigation has gone forward to challenge the constitutionality of the age sixty-five employment barrier by invoking the due process clauses of the fifth and fourteenth amendments and the equal protection clause of the fourteenth amendment. *Weiss v. Walsh*,⁶² decided in 1971, marked the first important challenge. The plaintiff, Paul Weiss, a renowned philosopher, complained that Fordham University had offered him the Albert Schweitzer Chair in Humanities only to withdraw the offer later simply because of the "eleventh-hour" objection⁶³ by the New York State Department of Education that he had passed age 65. Dismissing the plaintiff's claim that the act of withdrawing the offer was in violation of the first, fifth, and fourteenth amendments of the Constitution, Judge Tyler observed that: "[B]eing a classification that cuts fully across racial, religious, and economic lines, and one that generally bears some relation to mental and physical capacity, age is less likely to be an invidious distinction."⁶⁴ He added:

Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished

55. 29 U.S.C. §626(b) (1970).

56. 29 U.S.C. §626(c) (1970).

57. 29 U.S.C. §§624-28 (1970).

58. 29 U.S.C. §629 (1970).

59. See, e.g., *Age Discrimination Employment*, *supra* note 4, at 1331-52; *Mandatory Retirement*, *supra* note 4, at 135-47.

60. Initially, the act confined "employer" to "a person engaged in an industry affecting commerce who has twenty-five or more employees." 29 U.S.C. §630(b) (1970). Government employees, federal and state, did not come within the protection of the act. *Id.* Subsequently, in 1974 the act was amended to apply to government employees as well as industries with twenty or more employees. H.R. REP. No. 93-953, 93d Cong., 2d Sess. 21-23 (1974).

61. *Mandatory Retirement*, *supra* note 4, at 135.

62. *Weiss v. Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971).

63. *Id.* at 76.

64. *Id.* at 77.

capacity or longevity is still future. It cannot be said, therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall unjustly in the individual case.⁶⁵

Although this reasoning was less than convincing,⁶⁶ the decision was affirmed without opinion in 1972 by the Second Circuit⁶⁷ and was denied certiorari in 1973 by the United States Supreme Court.⁶⁸

One year later the Supreme Court addressed an equal protection challenge to school board mandatory leave regulations in an opinion that suggested parallels to mandatory retirement laws. In *Cleveland Board of Education v. LaFleur*,⁶⁹ the Court held unconstitutional the regulations of two school boards, one in Cleveland, Ohio, and the other in Chesterfield County, Virginia, requiring pregnant teachers to take unpaid maternity leave several months in advance of the expected childbirth. The Court outlawed these regulations as an unwarranted infringement upon "freedom of personal choice in matters of marriage and family life,"⁷⁰ which is protected by the due process clause of the fourteenth amendment. The two school boards contended that "firm cut off dates are necessary to maintain continuity of classroom instruction,"⁷¹ and to allow sufficient time to find and hire a qualified substitute. Finally, the Board noted that "at least some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy."⁷² Dismissing the arguments of the school boards, Mr. Justice Stewart, writing for the majority, declared that:

[T]he provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor — or the school board's — as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.⁷³

The Court concluded that "the mandatory termination provisions of the Cleveland and Chesterfield County maternity regulations violate the Due Process Clause of the Fourteenth Amendment, because of their use of un-

65. *Id.*

66. *Cf. e.g.,* Eglit, *supra* note 4, at 92-96; *Age Discrimination in Employment, supra* note 4, at 1336-52; *Mandatory Retirement, supra* note 4, at 137-46.

67. 461 F.2d 846 (2d Cir. 1972).

68. 409 U.S. 1129 (1973). Invoking *Weiss* a United States district court in Nebraska subsequently decided that the mandatory retirement at age 65, prescribed by the Douglass County Civil Service Act, is "a permissible means of accomplishing a rational and reasonable objective" and therefore not in contravention of the United States Constitution. *Armstrong v. Howell*, 371 F. Supp. 48 (D. Neb. 1974).

69. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

70. *Id.* at 639.

71. *Id.* at 640.

72. *Id.* at 641.

73. *Id.* at 644.

warranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty."⁷⁴

The implications of the Court's holding for the outlawing of age-based mandatory retirement were keenly, and perhaps prophetically, perceived by Justice Rehnquist in his dissenting opinion. Since "the right to work for a living in the common occupations of the community," as enunciated in *Truax v. Raich*,⁷⁵ is "presumably on the same lofty footing as the right of choice in matters of family life,"⁷⁶ "the Court," observed Justice Rehnquist, "will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees."⁷⁷

The incisive intimation of Justice Rehnquist found expression, shortly afterwards, in *Murgia v. Massachusetts Board of Retirement*.⁷⁸ The case challenged the constitutionality of a Massachusetts statute prescribing mandatory retirement of state police officers at 50 years of age. In response to the argument that such age-based mandatory retirement "enhances the morale of the younger members" and facilitates "rapid promotion," the three judge court urged that "the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement."⁷⁹ After analyzing the objective of rapid promotion, the court concluded that this statute was simply an example of per se age discrimination.⁸⁰ The court then declared the statutory provision at issue "unconstitutional and void" holding that:

[M]andatory retirement at age 50, where individualized medical screening is not only available but already required, is no more rational, and no more related to a protectable state interest, than the mandatory suspension or discharge of school teachers upon reaching their fourth or fifth month of pregnancy.⁸¹

On appeal, the Supreme Court reversed and held that the statute was rationally related to the state objective of protecting the public by "assuring physical preparedness of its uniformed police."⁸² Recognizing that "physical ability generally declines with age,"⁸³ the Court concluded that mandatory retirement of police officers at age 50 removed from the service policemen "whose fitness for uniformed work presumptively has diminished with age."⁸⁴ While admitting that treatment of the aged in this country has not been

74. *Id.* at 651.

75. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

76. 414 U.S. at 659.

77. *Id.*

78. 376 F. Supp. 753 (D. Mass. 1974).

79. *Id.* at 754.

80. *Id.* at 755.

81. *Id.* at 756.

82. *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562 (1976).

83. *Id.* at 2567. The Court, however, did note that the "testimony also recognized that particular individuals over 50 could be capable of safely performing the functions of uniformed officers." *Id.* at 2566.

84. *Id.* at 2567-68.

"wholly free of discrimination," the Court declined to recognize age as a suspect classification.⁸⁵

In dissent Justice Marshall argued that previous decisions had recognized that an individual's right to work was a liberty interest guaranteed by the fourteenth amendment and that the State of Massachusetts must show "a reasonably substantial interest" in preserving the validity of the statute in question.⁸⁶ Since policemen over 40 years of age had to undergo annual physical examinations to remain on the force, the automatic termination of these officers from the force at age 50 seemed the "height of irrationality."⁸⁷

Notably absent from either the per curiam or dissenting opinions was any reference to *LaFleur*. The failure to distinguish or to discuss this case is inexplicable since the lower court found this analogy to be compelling.

Although noting that the problems of retirement are "beyond serious dispute,"⁸⁸ the *Murgia* Court declined to hold mandatory retirement laws for policemen unconstitutional. This decision should not, however, preclude other challenges to these laws in jobs where physical stamina is relatively unimportant.⁸⁹ As data accumulates on the relationship between aging and

85. *Id.* at 2566-67. Unlike persons discriminated against on the basis of race or national origin, the elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Id.* The dissenting opinion found it indisputable that the elderly constitute a class subject to "repeated and arbitrary" employment discrimination, regardless of whether the group constituted a suspect class. *Id.* at 2572 (Marshall, J., dissenting).

86. *Id.* at 2572. Mr. Justice Marshall has consistently advocated abandoning the rigid two-tier equal protection analysis still adhered to by a majority of the Court in favor of a flexible sliding scale approach that considers "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification." *Id.* at 2569. (Marshall, J., dissenting).

The reasons for holding the group categorization of individuals in terms of advanced age to be impermissible discrimination are eloquently stated by Justice Marshall. "While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement poses a direct threat to the health and life expectancy of the retired person, and these consequences of termination for age are not disputed by appellant. Thus, an older person deprived of his job by the government loses not only his right to earn a living, but, too often, his health as well, in sad contradiction of Browning's promise, 'The best is yet to be/The last of life, for which the first was made.'" *Id.* at 2571-72 (footnotes omitted).

87. *Id.* at 2573 (Marshall, J., dissenting). In this situation, since annual physical examinations were required from age 40 on, there would be no additional administrative burden required if physically fit officers were allowed to continue working past age 50. See text accompanying note 22 *supra*.

88. 96 S. Ct. at 2568 (footnote omitted).

89. "The Court's conclusion today does not imply that all mandatory retirement laws are constitutionally valid. Here the primary state interest is in maintaining a physically

productivity,⁹⁰ and as the life span of the average American lengthens,⁹¹ courts will find it increasingly difficult to find any rational basis behind mandatory retirement laws.

FUTURE DEVELOPMENTS

Among the policy questions that should receive greater attention in the next few years are the questions that relate to treatment of the aging. Research has stimulated decision makers to recognize the cumulative importance of the elderly. In industrializing societies the alleged resistance of the old to technical modernization has generated conflict in societies where age traditionally has been treated with great deference. In advanced industrial societies the discovery that, barring catastrophe, people will live even longer has spread confusion, uncertainty, and conflict among the policy makers in both public and civic order.

The policy of excluding the aged from significant social roles is open to so much adverse criticism that categorical declarations of obsolescence are not likely to survive. Our world is accustomed to mobilizing scientific knowledge and creative ingenuity, and it seems probable that these assets will be increasingly directed to problems connected with aging. The most fundamental approach is likely to be in terms of the overriding goal of finding social institutions that optimize the opportunities open to human beings at all levels of chronological aging. Assume, for instance, that we are on the brink of acquiring the knowledge necessary to lengthen every productive life some 100 years. It will be urgent that these capacities be utilized to improve the functioning of all institutions, so that value shaping activities are successfully expanded in both the material and the symbolic sectors of society. Enough has been accomplished already, though on a diminutive scale, to project the expectation that our civilization can continue to reconstruct itself in terms of its aspirations and capabilities.

Unlike problems specialized to some other forms of freedom, the immediate future of the human rights of the aged will focus on the intelligence, promotional, and prescriptive components of community decision making. The world community has not yet explicitly formulated the relevant general prescriptions or provided the structures of authority and procedures necessary to the effective application of these prescriptions. Our national community might appropriately reaffirm its commitment to the concept of human dignity.⁹²

fit police force, not a mentally alert or manually dexterous workforce. . . . Accordingly, a mandatory retirement law for all government employees would stand in a posture different from the law before us today." *Id.* at 2573 n.8 (Marshall, J., dissenting).

90. See notes 19-21 *supra* and accompanying text.

91. See text accompanying note 28 *supra*.

92. In a sequence of articles the authors have discussed separately the claims relating to discrimination based on the grounds of race, sex, religion, political or other opinion, language, alienage, and advanced age. See note 30 *supra*. A policy pervading so many different grounds of impermissible differentiation amply establishes that the contemporary norm of nondiscrimination is broad in reach. Studies of other grounds remain to be made.

A brief itemization might include: possession of property, birth (legitimate or illegitimate child), homosexuality (sexual orientation), marital status, health (mental defect or illness), derivation of nationality (by birth or by naturalization), moral character, behavior (criminal record), literacy, occupation (profession), nonidentification (disloyalty), and culture. Community prescriptions about these bases of differentiation are in the process of development.