The New Inequality of Old Age: Implications for Law

*Anne L. Alstott**

Inequality isn't just for the young anymore. People over age sixty-five face large and growing inequalities in health, wealth, work, and family. The widening gap between better- and worse-off older Americans has begun to undermine legal institutions that once worked to correct inequality, including Social Security, Medicare, private pensions, and family law. In this Article, I briefly document the inequalities that have transformed old age in the last fifty years (or so) and then analyze three common justifications for reform: budget solvency, inequality, and progressivity. I show that each of these falls short of the kind of principled justification that will be needed to justify cutting benefits, raising taxes, or both.

Introduction

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This might seem an odd claim, since media coverage has saturated us with news of the gains made by the elderly. "Sixty-five is the new 45!" we read, and "eighty is the new sixty!"[1] The *New York Times* seems to run a story every week about older people who have rejected the golf course in favor of

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1 *See, e.g.*, Trent Hamm, *Retirement at 65? But It's the New 45!*, Christian Sci. Monitor (June 10, 2011), http://www.csmonitor.com/Business/The-Simple-Dollar/2011/0610/Retirement-at-65-But-it-s-the-new-45%21; *80 Is the New 60: What Is "Old"?*, UBS Investor Watch (2013), https://www.ubs.com/content/news/en/2013/10/21/what-is-old---ubs-investor-watch-report-finds-wealthy-investors-/_jcr_content/par/textimage_0.0047664143.file/bGluay9wYXRoPS9jb250ZW50L2RhbS9XZWFsdGhNYW5hZ2VtZW50QW1lcmljYXMvZG9

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an "encore career," a new business, or charitable work.[2] At the same time, we policy wonks often frame poverty as a more urgent problem for children and working-age families than for the elderly. The familiar statistic is that only ten percent of Americans over sixty-five were poor in 2014, while twenty-one percent of children were poor.[3] It seems reasonable, then, to suppose that Social Security has (mostly) solved the problem of poverty among the elderly: in 2012, for instance, forty-four percent of the elderly would have been poor without Social Security.[4]

These facts are true, and yet they tell only part of the story. The happy averages mask a widening gap in longevity, health, wealth, and retirement options among older Americans. For instance, the longevity gap between high- and low-earning men at age fifty is now thirteen years — meaning that, of all men who reach age fifty, the richest fifth can expect to live thirty-nine more years, while the poorest fifth can expect to live only twenty-six more years.[5] Disability rates, too, show growing inequality, as better-off people capture the lion's share of the gains produced by advances in public health, medical care, and disability accommodations.[6]

And a snapshot of today's elderly population (as in the over-sixty-five poverty statistics) cannot capture the coming effects of growing inequality. Many of today's retirees lived during the mid-twentieth century, an era that — in retrospect — enjoyed relative equality in lifespan, health, earnings, and family configurations. Social Security functions well for that cohort. Fast forward to today, however, and the same rules do not adequately protect low-earning workers who face temporary work, high unemployment, and single parenthood. As inequality grows, Social Security will not only fail to serve the interests of the worst-off — but, more and more, will redistribute toward the best-off.

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jdW1lbnRzL2ludmVzdG9yLXdhdGNoLTRRMjAxMy1yZXBvcnQucGRm/investor-watch-4Q2013-report.pdf.

2 Abby Ellin, *For Some Retirees, A Second Act Is Easier Than Expected*, N.Y. Times, June 7, 2014, at B4, http://www.nytimes.com/2014/06/07/your-money/for-retirees-a-second-career.html.

3 *People in Poverty in 2014 by Selected Characteristics*, U.S. Bureau of the Census, http://www.census.gov/hhes/www/poverty/data/incpovhlth/2014/table3.pdf.

4 Paul N. Van De Water et al., *Social Security Keeps 22 Million Americans Out of Poverty*, Ctr. Budget Pol'y Priorities (Oct. 25, 2013), http://www.cbpp.org/research/social-security-keeps-22-million-americans-out-of-poverty-a-state-by-state-analysis.

5 Nat'l Acad. Sci., Engineering Med., The Growing Gap in Life Expectancy by Income 3 fig. S-1 (2015), http://www.nap.edu/read/19015/chapter/2#2.

6 *See infra* notes 14-16.

In this Article, I briefly document the inequalities that have transformed old age in the last fifty years (or so) and then analyze three common justifications for reform: budget solvency, inequality, and progressivity. I show that each of these falls short of the kind of principled justification that will be needed to justify cutting benefits, raising taxes, or both. The material here draws on the much longer discussion in my book, *A New Deal for Old Age*.[7]

I should say that this Article adopts a progressive perspective without either defining that perspective or defending it as a normative position. We progressives know who we are, and I assume we share some common commitments — notably a commitment to extending to every individual the means to shape a meaningful life of her own choosing. I am certainly sidestepping some important normative issues and burying some potential disagreements among progressives; but for those interested in such things, I invite you to read *A New Deal for Old Age*, which is far more explicit in defining and defending the principles of justice that might motivate an agenda for progressive reform.

In Part I of this Article, I describe the growing inequality in the experience of old age in America, and I contrast the relatively compressed social and economic patterns of the mid-twentieth century. In Part II, I analyze three conventional justifications for reforming Social Security: financial insolvency, economic inequality, and progressive redistribution. Although each of these ideas offers some foundation for progressive reform, I argue that each requires more careful normative elaboration to be a useful guide to reform.

I. Rising Inequality After Age Sixty-Five

When we talk about inequality in America, we often mean income inequality. Income is, of course, a reasonable measure of wellbeing, but money measures can capture only one facet of an individual's capacity to lead a fulfilling life. Particularly for older people, health and (dis)ability come to the fore in determining one's option set, and so money is only one proxy for life options. Accordingly, the following presentation examines a broad set of metrics: lifespan, ability (and disability), retirement options, income, and family structure. Depressingly, the trajectory for each of these measures of wellbeing is roughly similar. The elderly as a group are living longer and experiencing fewer limitations due to disability. As a group, the elderly are richer than ever before and enjoy an unprecedented array of job and retirement options and

7 Anne L. Alstott, A New Deal for Old Age: Toward a Progressive Retirement (2016).

family options. But gains for the elderly as a group have been accompanied, in every case, by rising inequality within the group.

Begin with lifespan. In America in the last hundred years, life expectancy at age sixty-five has increased substantially (though not as dramatically as life expectancy at birth). In 1900, a sixty-five-year-old could expect to live another twelve years. By 1940, he could expect to live another thirteen years — not a major gain. But by 2008, a sixty-five-year-old could expect to live another nineteen years.[8] In just over a century, then, the average American man gained seven extra years of life past the age of sixty-five.[9] (When thinking about the lifespan of older people, it is most useful to measure life expectancy at age sixty-five rather than at birth; otherwise, reductions in infant and child mortality skew the averages.)

But gains in longevity have not been equally distributed. For instance, the National Academies of Science, Engineering, and Medicine studied life expectancy at age fifty for two cohorts of men: those born in 1930 and those born in 1960. The analysis found a thirteen-year gap between the lowest-earning and highest-earning quintiles for the 1960 group. By contrast, the rich-poor longevity gap for the 1930 cohort was just five years.[10] The inequality trend for women is, if anything, worse. The National Academies found a fourteen-year life expectancy gap for rich and poor women in the 1960 cohort (compared to a four-year gap for the 1930 cohort). Strikingly, the study found that the life expectancy of women in the bottom fifth of the earnings distribution had *declined*: poorer women, age fifty and born in 1960, could expect to live only twenty-eight more years (compared to thirty-two more years in the 1930 group).[11]

Longevity by itself is a useful, but still partial, measure of wellbeing. If people live longer but are beset by illness or limited by disabilities, their quality of life may be lower than the raw lifespan figures would indicate. But, with some caveats about data and measures of disability, it seems that the health of older Americans (again, as a group) has been improving over time. For instance, Dora Costa found that rates of heart disease, arteriosclerosis,

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8 Elizabeth Arias, *United States Life Tables, 2008*, Nat'l Vital Stat. Rep., Sept. 24, 2012, at 1, 46 tbl. 21, http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf.

9 Women typically live longer than men, whether measured at birth or at age sixty-five. In 1900, the gender gap was less than one year: a sixty-five-year-old man could expect to live slightly less than twelve years, while a woman would expect to live slightly more than twelve years. By 2008, women had gained eight years of life after age sixty-five, while men had gained just six. *See id.* at 46.

10 Nat'l Acad. Sci., Engineering Med., *supra* note 5, at 3 fig. S-1.

11 *Id.* at 5 fig. S-2.

and cerebrovascular disease have fallen substantially in the over-fifty-five population since 1930.[12]

Disability rates, too, have fallen. Eileen Crimmins and her coauthors measured disability-free life expectancy and found that it has increased since the 1980s; a typical seventy-year-old can now expect to live fourteen more years, twelve of those disability-free.[13] Vicki Freedman found that at ages sixty-five to sixty-nine, sixty-seven percent of people are either fully able (forty-five percent) or can successfully accommodate a disability (twenty-two percent). That percentage remains high at ages seventy to seventy-four (sixty-three percent) and drops below fifty percent only at ages eighty to eighty-four (forty-seven percent).[14]

Once again, however, gains in health and ability have not been equally shared. Low earners are more likely to suffer hypertension, obesity, diabetes, early stroke, and heart disease.[15] The Freedman study found that seventy-three percent of Medicare enrollees in 2011 with incomes of $60,000 or more were either fully able or had successfully accommodated a disability. By contrast, only forty-two percent of those with incomes less than $15,000 and forty-eight percent of those with incomes between $15,000 and $30,000 fell into that high-functioning category.[16]

Why are lifespans growing and disability levels falling — but unequally so? Very generally, older Americans are benefitting from advances in medicine, public health, and law. Rates of heart attack and stroke have fallen dramatically. Cancer is now more treatable than ever. Cataract surgery and hip replacement have addressed common physical limitations associated with old age. Reduced rates of smoking, better diets, and physical exercise have allowed older Americans to remain healthier and able longer. But better-off Americans have

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12 Dora L. Costa, The Evolution of Retirement 62-63 (1999).

13 Eileen M. Crimmins et al., *Change in Disability-Free Life Expectancy for Americans 70 Years Old and Older*, 46 Demography 627, 639 tbl. 2 (2009), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831348/.

14 Vicki Freedman et al., *Behavioral Adaptation and Late-Life Disability: A New Spectrum for Assessing Public Health Impacts*, Am. J. Pub. Health, Feb. 2014, at e88, e92 tbl. 3.

15 Mauricio Avendano & M. Maria Glymor, *Stroke Disparities in Older Americans: Is Wealth a More Powerful Indicator than Income and Education?*, 39 Stroke 1533 (2008).

16 Freedman et al., *supra* note 14, at e92 tbl. 3.

(generally) benefitted more, given their greater access to medical care, higher education levels, and lower rates of obesity and smoking.[17]

Retirement options for older people as a group have never been better but — you guessed it — are not equally available to all. Affluent older people can often choose whether to remain in a lifelong job, start an encore career, or combine retirement with volunteer work or part-time work. But lower-paid workers typically face much more limited options. They are more likely to hold physically-demanding jobs; more likely to hold low-paid, fast-paced, stressful jobs in the service sector; and less likely to have the financial capacity to choose work for its interest level rather than its pay.[18] The resulting pattern is that better-off Americans choose their path, while worse-off ones often retire involuntarily due to disability or take part-time, low-paying jobs to make ends meet.

U.S. retirement savings (setting aside Social Security entitlements for the moment) are strikingly unequal. Low-earning workers (and many middle-earners) reach retirement with few pension rights and little personal savings. Only half of retirees now have any pension income at all.[19] Workers with private pensions often have sufficient retirement income (together with Social Security) to retire comfortably, but workers without private pensions often do not.[20] The big picture is that low- and middle-earners often do not accumulate sufficient pension entitlements and private savings for a secure retirement.[21] Once workers reach retirement, the bottom sixty percent rely on Social Security as their primary income source, while the top forty percent (and especially the top twenty percent) can count on substantial income from private pensions.[22]

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17 Nat'l Research Council, U.S., Panel on Understanding Divergent Trends in Longevity in High-Income Countries (Eileen Crimmins et al. eds., 2011), http://www.ncbi.nlm.nih.gov/books/NBK62373/.

18 David M. Cutler, *Declining Disability Among the Elderly*, Health Aff., Nov./Dec. 2001, at 11, http://scholar.harvard.edu/files/cutler/files/declining_disability_among_the_elderly.pdf.

19 Virginia P. Reno & Elisa A. Walker, Nat'l Acad. Soc. Ins., Social Security Benefits, Finances, and Policy Options: A Primer 8 (2013).

20 Virginia P. Reno & Joni Lavery, *Social Security and Retirement Income Adequacy*, Nat'l Acad. of Soc. Ins., May 2007, at 1, 8, http://www.ncpssm.org/pdf/nasi-report.pdf.

21 Michael Lind et al., New Am. Found., Expanded Social Security: A Plan to Increase Retirement Security for All Americans 7 fig. 3 (2013), http://growth.newamerica.net/sites/newamerica.net/files/policydocs/LindHillHiltonsmithFreedman_ExpandedSocialSecurity_04_03_13.pdf.

22 *Id.* at 3 fig. 1; Reno & Lavery, *supra* note 20, at 6.

Finally, inequality in family structure is growing as well, and in future decades, elderly Americans will reach retirement having lived radically different family lives. Individuals in (roughly) the bottom half of the income distribution are less likely to marry, more likely to divorce if they do marry, more likely to cohabit, and more likely to be single parents. At the high end of the income spectrum, by contrast, people still marry at high rates, remain married for longer periods, and tend to have children with their spouse (rather than a blended family with children from multiple parental relationships).[23] Future generations of retirees, then, may have an array of family structures: while some will replicate the mid-twentieth-century pattern of stable marriage lasting into old age, many more will have been divorced or unmarried. And many will have been single parents.

The new inequality of old age is particularly striking when we contrast twenty-first century patterns of life with those of the mid-twentieth century. In the 1950s, 1960s, and 1970s, life for most Americans was relatively homogeneous across social classes. The vast majority of Americans married young and married for life. Most workers were men who, on average, held blue-collar jobs, sometimes unionized, and remained employed steadily throughout their lives, often at one or two employers. Most women stayed at home or worked only intermittently, and families relied heavily on the paycheck of the male breadwinner. Mid-twentieth-century Americans also lived fairly homogeneous lives at older ages. Nearly everyone retired in their mid-sixties, and "retirement" meant a permanent exit from the workforce. Death usually followed within a decade or so, usually due to a heart attack or stroke.

Of course, this broad-brush story is neither universally true for all individuals nor normative. Work patterns and gender roles differed by class and by race, and social homogeneity was enforced, in part, by discrimination and heteronormativity. But for present purposes, the point is that, at a high level of abstraction, many people, including both richer and poorer, lived lives according to similar patterns.

Today, by contrast, it is much harder to describe a typical older American. More and more people never marry at all, and those who do marry often divorce. Single parenthood is more and more common. Most women, whether single or married, with or without children, work — typically fulltime. Lifelong jobs with a single employer are rare, and so are union jobs. More people are

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23 Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 Tax L. Rev. 695 (2013); Andrew J. Cherlin, *The De-Institutionalization of American Marriage*, 66 J. Marriage & Fam. 848 (2004).

educated, but those without education earn less (in both absolute and relative terms) than their predecessors.

These life patterns affect different groups to different degrees. The striking — and troubling — result is that the disadvantages of twenty-first-century life tend to fall on the same group. And these tend to cumulate, so that at older ages, some Americans enjoy the fruits of a lifetime of privilege, while others bear the weight of a lifetime of disadvantage.

II. How (Not) to Think About Progressive Legal Reform

How should the law respond to the new inequality of old age? The law both reflects and shapes social conditions, and it isn't difficult to see that Social Security and Medicare should take notice both of the gains in longevity and wellbeing at the top and the lagging (or declining) situation of those at the bottom.

Perhaps less obvious, new patterns of work and retirement (and the unequal availability of good options) should prompt reconsideration of employment law, including unemployment insurance (UI), Social Security Disability Insurance (SSDI), the Americans with Disabilities Act (ADA),[24] and age discrimination protections.[25] Even family law requires a closer look, as families less and less often experience lifelong marriage with joint biological kids. The default rules for inheritance, custody, alimony, medical and financial proxies, and other bedrock provisions should adapt to the new reality of non-marriage, single parenthood, blended families, and aging without a spouse. Social Security itself incorporates an outdated conception of the family: the spousal benefit privileges formal marriage and nonworking spouses — a minority family pattern that, today, is strongly associated with higher incomes.

This short Article isn't the place to analyze all the details of legal reform. (*A New Deal for Old Age*[26] goes into some detail regarding Social Security, including the spousal benefit, and employment law.) Instead, the point I'd like to make here is that, even for progressives, the policy implications of growing inequality are not immediately apparent. The fact of inequality, standing alone, cannot motivate a principled agenda for reform. Instead, we need to search for — and hammer out — progressive principles for action.

Popular debates, and even scholarly discussions, often rely on three normative shortcuts, which gloss over the hardest questions. First is the argument that

24 42 U.S.C. §12101 et seq.
25 *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.
26 Alstott, *supra* note 7.

the coming financial insolvency of the Social Security system justifies reform. But insolvency is simply a budget imbalance: at some point, Social Security expenditures will exceed available revenues, unless the rules of the program change. The critical normative questions, by contrast, are whether to raise taxes or cut benefits, and for which groups, and on what justification. Second is the claim that economic inequality justifies reform. But this too is a shortcut that avoids the central questions of distributive justice: when, and on what grounds, the state is justified in seeking to remedy inequalities. Third and last is the progressivity argument. Empiricists debate whether Social Security remains progressive. (The answer is that much depends on how you define the program.) But progressivity, like insolvency and inequality, is too curt a shorthand to justify any particular pattern of redistribution. The next three sections discuss each in turn.

A. The Insufficiency of Insolvency

Begin with the solvency concern, which motivates many policy-wonk discussions of Social Security. Critics worry, with some reason, that present tax receipts will not suffice to fund current benefit levels as the Baby Boom ages.[27] Defenders of Social Security, for their part, typically reply that modest changes in taxes and benefits could put the system on a secure financial footing.[28] The problem with this debate is that both sides adopt a technocratic metric (budget balance) that sidesteps the important normative issues. But the solvency criterion is ultimately inadequate to motivate legal reform. After all, even if we concede that solvency is critical, there are two ways to achieve solvency: raising taxes and cutting benefits. "Solvency" provides no account of why it would be fair for the state to do either (or both).

We need, instead, an account of fairness grounded in principles of justice. The core question that the solvency criterion avoids is what Norman Daniels calls the problem of justice between age groups.[29] Social Security, like any public old age pension, deploys resources toward the old at the expense of

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27 *See, e.g.*, William Baldwin, *Social Security Insolvency: When and What to Do*, FORBES, June 9, 2016, http://www.forbes.com/sites/baldwin/2016/06/09/social-security-insolvency-when-and-what-to-do/#6434a9925822 (expressing concern over Social Security's budget imbalance).

28 *See, e.g.*, Virginia P. Reno, *What's Next for Social Security? Essential Facts for Action*, *in* NAT'L ACAD. OF SOC. INS. (2013), https://www.nasi.org/research/2013/whats-next-social-security-essential-facts-action (emphasizing the importance of Social Security benefits for older Americans and reporting poll evidence that Americans prefer to increase taxes to ensure the solvency of the system).

29 NORMAN DANIELS, AM I MY PARENTS' KEEPER? (1988).

the young. (Even though the younger people ultimately will be older people themselves, the state is mandating a redistribution of resources from younger life stages to older ones.) We need some deeper account of what resources are owed to the old and to the young — and when the state is (and isn't) justified in overriding individuals' decisions.

For example, the present Social Security system offers "retirement" benefits to everyone at age sixty-two, and the vast majority (three quarters) of people claim benefits before age sixty-six. Many of these people do not need to retire: the majority of Americans, data suggest, could continue to work into their late seventies.[30] To defend this state of affairs, one needs a theory of justice between age groups: why should younger people, as a group, make do on less so that older people can enjoy leisure time or (if they keep working while collecting Social Security) a top-up to their household budget? Why are older people, if capable of working, more deserving than, say, working-age families with children or college students?

By the same token, any reform of Social Security should be grounded in an account of justice between age groups. If the claim is that older people are getting too much, the baseline should be articulated and defended: how much should older people receive, and to what degree should state mandate (rather than individual choice) determine the distribution of resources across age groups?

Insolvency, then, is a poor guide to justice in reform. We could, for instance, ensure the solvency of the Social Security system by raising the retirement age, immediately, to eighty. (This kind of reform might overshoot the solvency target, but — once again — the solvency argument doesn't tell us how accurate or cautious we should be.) But raising the retirement age dramatically and suddenly would disadvantage present and future generations of older people and would place the heaviest burden on those who are ill, have a work disability, or have limited work options. At the other end of the policy spectrum, we could guarantee budget balance in Social Security by doubling the combined payroll tax rate, immediately, from 12.4% (6.2% on employers and on workers) to 24.8%. But that change would saddle young workers now and in the future with a heavy tax payment that would worsen their life options. Neither option is appealing, and insolvency cannot tell us which to choose — or even how to find a principled middle ground.

30 Alstott, *supra* note 7, at 93-95.

B. Fair and Unfair Inequalities

Along similar lines, the observation of high and growing inequality in old age cannot — standing alone — justify any particular set of legal reforms. It might seem that the obvious response should be to redistribute from the top and toward the bottom. But, even for progressives, inequality isn't always objectionable. A fair society might generate inequalities as people take their fair share of resources and make different life choices. In a perfectly fair society, for instance, the state would provide a baseline of financial security. But, beyond that, some people might choose to surf while others accumulate money, and (at least arguably) there would be nothing wrong with the resulting financial inequality.[31] A principled case for reform should begin by laying out why particular inequalities are unjust and why particular redistributions would be fairer.

One striking feature of the new inequality of old age is that the burdens of short lifespan, disability, poor working conditions, and family instability often fall on the same people. Low-paid workers reach their late fifties and early sixties with a cumulative set of disadvantages: they have poorer health, higher rates of disability, and worse working conditions and are (more) likely to be single parents. By contrast, high-paid workers, on average, can treat their fifties and sixties as functional middle age: they are likely to remain fully able for another two or three decades. They have (on average) plenty of savings, topped up by Social Security and Medicare, and they are more likely to be able either to remain in their career jobs as long as they like or to choose an encore career.

The bare fact of inequality, however, cannot — by itself — justify any particular reform in Social Security. We need a theory of fairness, indeed a theory of equality, to justify why the better-off should cede resources to the worse-off. Many people feel that their secure financial situation in old age is a product of their own prudence and thrift, and they might object to sacrificing their hard-earned position for people who (in their view) lack these virtues. On a libertarian view, these people are quite right: equality consists in equal freedom and equal treatment before the law and offers no ground for redistribution to the disadvantaged.

Justifying progressive reform in Social Security, then, requires us to challenge the libertarian baseline. For instance, we might point out that cumulative disadvantage is strongly determined by the structure of U.S. society. From birth onward, the disadvantaged encounter poor education, limited college access, and stressful working conditions. They earn little and

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31 *See* Philippe Van Parijs, Real Freedom for All (1998).

can save little — a severe handicap in a capitalist system in which earning power and wealth determine access to everything from housing to schooling to nutrition to healthcare.

A lifetime perspective on disadvantage might suggest a range of reforms. Focusing just on retirement policy, cumulative disadvantage might support reforms like a minimum Social Security benefit and progressive pension reform (e.g., government subsidies to enable lower-paid workers to accumulate private savings). Reforms in the early retirement rules could enable lower-paid workers, who are more likely to face early disability, to retire with smaller penalties.[32]

Looking beyond retirement policy, a concern for cumulative disadvantage could justify a broader challenge to existing social structures. Reforms in housing, early education, working conditions, childcare, and so on might help reduce lifelong inequality. Choosing the right policies, once again, requires an account of justice both within and between age groups. At every life stage, we should be able to envision what the state owes to the group and how the state should respond to inequality within the group.[33]

C. The Limitations of Progressivity

It might seem obvious that progressives should embrace progressivity. But, in fact, the technocratic criterion of progressive distribution does not offer a normative principle robust enough to motivate progressive policymaking. To see why, take a quick detour into tax terminology. A proportionate tax distribution is one in which each taxpayer pays the same percentage (say, ten percent) of her income in taxes. A progressive distribution, by contrast, imposes a higher tax rate (say, twenty-five percent) on people with higher incomes than on people with lower incomes (who might pay, say, five percent). We can apply exactly the same analysis to a spending program. A spending program is progressive if it awards higher benefits to poorer recipients than to richer ones. When the spending program is financed by taxes, we can and should put the two sides together: a proportionate (non-redistributive) program would award every person a constant ratio of benefits to taxes. A progressive program would award a higher ratio of benefits to taxes to poorer participants.

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32 *See* ALSTOTT, *supra* note 7, at 95-105.

33 *See, e.g.*, Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008).

Take Social Security as an example. Social Security's rules redistribute in complex and inconsistent fashion.[34] All else equal, the retirement program favors (among others) steady work, low earnings, formal marriage, traditional gender roles in marriage, and long lives.[35] The retirement program disfavors (among others) the unmarried, temporary work, unemployment, two-earner married couples, and short lives.[36] These built-in biases result from the structure of Social Security, which was designed for mid-twentieth century workers. As I explain in detail in *A New Deal for Old Age*,[37] features like the progressive benefits formula, the thirty-five-year earnings average, the spousal benefit, and the life annuity all served a progressive function in that earlier era but, today, can exacerbate inequality.

Is Social Security progressive overall? The answer is far from obvious. Studies that lump in disability benefits with survivors' and retirement benefits find that Social Security is "modestly" progressive overall.[38] But disability and survivors' benefits are highly progressive, because lower earners are far more likely to die early or to experience disability. Thus, the retirement system standing alone is far less progressive.[39] What is clearer is that the progressivity of the Social Security retirement program is declining as retirees who lived in the mid-twentieth century give way to Baby Boomers and their successors, who live very different lives.[40]

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34 C. Eugene Steuerle, Karen E. Smith & Caleb Quakenbush, *Has Social Security Redistributed to Whites from People of Color?, Brief No. 38*, at 2, Urb. Inst. (Nov. 2013), http://www.urban.org/UploadedPDF/412943-Has-Social-Security-Redistributed-to-Whites-from-People-of-Color.pdf.

35 C. Eugene Steuerle, Adam Carasso & Lee Carasso, *How Progressive Is Social Security and Why?*, Urb. Inst. (May 1, 2004), http://www.urban.org/publications/311016.html.

36 *Id.* at 1-2.

37 Alstott, *supra* note 7.

38 Andrew G. Biggs, Mark Sarney & Christopher R. Tamborini, *A Progressivity Index for Social Security* (SSA Issue Paper No. 2009-01, 2009), https://www.ssa.gov/policy/docs/issuepapers/ip2009-01.html.

39 *Is Social Security Progressive?*, Cong. Budget Office (Dec. 15, 2006), https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/12-15-progressivity-ss.pdf (finding that retirement benefits are less progressive than OASDI as a whole; the progressivity of the benefits formula is offset, but not entirely, by the shorter lives of low earners, which reduce the value of the life annuity); Liquin Lu, Andrew J. Rettenmaier & Thomas R. Saving, *Lifetime Income, Longevity, and Social Security Progressivity* (Nat'l Ctr. Pol'y Analysis, Policy Report No. 342, 2012), http://www.ncpa.org/pub/st342 (finding that income-related differentials reduce but do not eliminate the progressivity of Social Security retirement benefits).

40 *See* Biggs, Sarney & Tamborini, *supra* note 38.

The deeper problem is that "progressivity" is too flat to capture the dimensions of inequality that now characterize old age in America. Progressivity measures only whether a tax or transfer system effects an overall redistribution of money compared to the initial baseline distribution. It cannot tell us whether the baseline distribution or the final distribution is fair or unfair. Put another way, a progressive system probably moves in the right direction, if our goal is to redistribute money, but progressivity alone cannot tell us what kinds of redistributions matter, or whether sufficient resources have reached the disadvantaged. We could, for instance, make Social Security payroll tax rates progressive (by introducing a zero bracket or graduated rates). That sort of change would increase the overall progressivity of the Social Security system but would not address the financial position of retirees who have little savings and receive sub-poverty benefits from Social Security.

Conclusion

The new inequality of old age presents a burden and an opportunity for progressives. The burden is that we do not have the luxury of attending mostly to the situation of working-age people and their children. Progressives should not suppose that Social Security has taken care of the disadvantaged elderly: as inequality grows, Social Security itself will reward privilege and penalize disadvantage.

The opportunity is that the necessity of reform invites, even mandates, a reconsideration of justice between and within age groups. Social Security marked, in its time, what was widely considered a fair bargain between and within age groups. But that bargain rested on a degree of social and economic homogeneity that, in retrospect, was short-lived. It is time for progressives to stop reflexively defending Social Security and to come forward with proposals that can implement a fair distribution for our new age of inequality.