
LECTURE

A NEW DEAL FOR OLD AGE

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PREFACE: WHAT IS LEGAL SCHOLARSHIP FOR?

These are strange days. I, like many of you, am still struggling with the enormity of the presidential election. I am trying to comprehend the implications for the future of our country and the world. I fear that we, as a nation, will lose the progressive gains made in the last eight years. And, worse, we may face retrogression in every sphere of public life, from international relations to climate change to domestic economic policy.

The strangeness of these days has a personal dimension. When I wrote the book that serves as the basis for this lecture, I had what now seems the impossible luxury of writing for an audience of progressives in power. Today, I no longer have that luxury. Progressives will soon be decidedly out of power in every branch of government.

I find myself worrying about the role of lawyers in this new world. The rule of law permitted an election in which the winning candidate lied without challenge and made indecent and illegal threats in the guise of campaign promises. The rule of law will endow the winning candidate with unprecedented power over matters foreign and domestic.

So, before I turn to the subject of this lecture, I want to reflect briefly on the role of lawyers and legal scholars. The question I'm struggling to answer is a deep and deeply personal one: what is the point of legal scholarship in such grave circumstances?

A first task, it seems to me, is for us to be bold in asserting the role of lawyers and scholars in this new world. Sadly, we cannot take for granted that elected officials will speak truthfully, interpret the laws faithfully, or perform

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their duties lawfully. So it falls to us to use our talents and our skills for three tasks: to insist on the truth, to demand justice, and to offer constructive solutions.

These three tasks require a few words of explanation. Even in law schools, we sometimes think of lawyers first as litigators. For people with the skill to litigate cases, there are clear paths to follow. Lawyers have a major role to play in ensuring that statutes are interpreted as fairly as possible and that those in power perform their duties under the Constitution.

But lawyers also have three major roles to play in legislation and regulation. First, lawyers are trained to scrutinize the facts: what are facts but evidence to be weighed and tested? We can—and should—vet seriously the factual claims made to support legal changes.

Second, lawyers are uniquely able to reveal what is hidden in the law. Working and studying among lawyers, it is too easy for us to lose sight of the advantage and privilege our training grants us. We need not be daunted by the complexity of the law, and we have a duty to translate for others the meanings hidden in legal jargon and complexity.

Third, and finally, lawyers can craft workable policies that meet the dual demands of justice and practicality. This is perhaps our greatest comparative advantage. Philosophers can craft principles of justice and scrutinize arguments, but they are not trained to follow through the practical implications of those principles. Economists and sociologists can generate sophisticated evidence about the workings of our economy and society, but they are not trained to design and implement laws.

These three tasks shape my lecture to you today. My subject is retirement policy, which is to say, the legal rules and institutions that aim to provide a decent income to older people who can no longer work. Retirement policy is probably not central to the first hundred days of the new administration, but it is definitely on the Republican agenda. In my talk today, I want to accomplish all three tasks I've set out for lawyers and legal scholars.

First, I want to insist on an important truth: rising inequality in America is undermining the lives of vulnerable people during their working years and at retirement. The tide of inequality is so strong that it may swamp the capacity of even our most progressive institutions to ensure a decent retirement for all.

Second, I want to link law explicitly to the cause of justice. Principles of justice between and within generations demand action. It is not enough to defend the status quo. Social Security,¹ in particular, is well worth defending, but in its present form will be too weak a tool to counter rising inequality.

Finally, I want to argue that there are workable policy options that can protect the disadvantaged without unduly burdening younger generations.

¹ Social Security is, of course, a complex program that incorporates retirement, disability, and survivors' benefits. But the lion's share of spending, and my primary focus here, is the retirement program. Accordingly, when I refer to "Social Security," I generally mean the old-age benefits program.

Concretely, it is possible to raise the retirement age for privileged workers able to work longer without also raising the retirement age for those facing disadvantage.

I. THE NEW INEQUALITY OF OLD AGE

Let's begin by examining a claim that you will likely hear many times in the coming year or two: "The elderly are well off."²

The problem with this claim isn't that it's false. Older people are, *on average*, better off than ever before. But focusing on the average obscures the critical fact that inequality is high and growing. More and more, old age looks like the rest of America, divided by a steep chasm between the haves and have-nots. And, as we look ahead to the future, Social Security is less and less equipped to bridge that divide.

It is certainly true that the past fifty years have wrought a dramatic change in the experience of old age. Today, the average sixty-five-year-old American can expect to live into her mid-80s, and most of those years will be disability-free.³

So altered is old age in America that sociologists have coined a new term, the Third Age, to describe the range of choices in work, family, and leisure now available to Americans in their 60s, 70s, and 80s.⁴ With longer lives and better health, many older people no longer retire in the classic sense. They remain at work or reinvent themselves, taking on new careers and hobbies.

Every week, the media seem to offer an inspiring story about an older person reaching new heights. We meet Gina, who left Hewlett-Packard to run an after-school program for kids.⁵ And Helen, who got a master's degree at age sixty and runs sports programs for older adults.⁶ Not to mention Marci, who

² Jennifer Rubin, Opinion, *Time to Be Blunt: The Elderly Are Well Off*, WASH. POST (May 16, 2011), https://www.washingtonpost.com/blogs/right-turn/post/time-to-be-blunt-the-elderly-are-well-off/2011/03/29/AFXJdz4G_blog.html [<https://perma.cc/9F46-52DV>].

³ See generally Elizabeth Arias, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 61 NATIONAL VITAL STATISTICS REPORTS: UNITED STATES LIFE TABLES, 2008 (Sept. 24, 2012), https://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf [<https://perma.cc/5ZPD-7EVU>]; Eileen M. Crimmins et al., *Change in Disability-Free Life Expectancy for Americans 70 Years Old and Older*, 46 DEMOGRAPHY 627 (Aug. 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831348/> [<https://perma.cc/YC7K-EDRX>].

⁴ See ANNE L. ALSTOTT, A NEW DEAL FOR OLD AGE: TOWARD A PROGRESSIVE RETIREMENT 23-25 (2016).

⁵ Sarah Kershaw, *Ready for Life's Encore Performances*, N.Y. TIMES, Mar. 19, 2010, at ST1.

⁶ Kerry Hannon, *Over 50 and Back in College, Preparing for a New Career*, N.Y. TIMES, Apr. 4, 2015, at B4.

quit corporate law to become a journalist.⁷ And Rob, who left management consulting to fight malaria around the world.⁸

But the Third Age unfolds very differently for older people of modest means. Lower-earning workers accumulate less wealth than their better-off peers, and so they reach their 60s and 70s with far less financial security. The gap is more than a matter of money: low earners also suffer cumulative disadvantage, which leaves them with a shorter life span, worse health, higher rates of disability, and worse job options.⁹

Retirement and the Third Age are often out of reach for older people in this group. The media tell us the story of Fidelio, an eighty-nine-year-old man selling ice pops in Chicago.¹⁰ And Gwen, the seventy-one-year-old home health aide who works six days a week taking care of a hundred-year-old client.¹¹

This brings us to Social Security. Social Security is a progressive icon, and for good reason. The program established, for the first time, a dignified retirement income for all workers, guaranteed by the federal government. It lifted millions of elderly workers out of poverty and provides a reliable foundation for retirement planning for everyone.

But, like all programs, Social Security reflects the social context of its time. Looking back, the mid-twentieth century was exceptional, because inequality was historically low. Very few workers had college educations and the payoff to college was not large. The earnings distribution was compressed. Family life and health risks were remarkably homogeneous across social and economic classes.¹²

The problem is that Social Security as currently structured is not well-equipped to handle rising inequality. If current trends go unchecked, inequality will swamp the progressive features of Social Security. Without reform, Social Security retirement benefits will be less and less progressive—and, even more important, less and less reliable as a guarantor of dignified retirement for all.

To be sure, Social Security does incorporate a progressive benefits formula. The progressive benefits rule protects low-earners by awarding them relatively generous benefits.¹³ And it marks a major difference between Social Security

⁷ Marci Alboher, *A Switch at Midlife, to Make a Difference*, N.Y. TIMES, Dec. 9, 2012, at BU8.

⁸ Nicholas Kristof, Op-Ed, *Geezers Doing Good*, N.Y. TIMES, July 20, 2008, at WK12.

⁹ See ALSTOTT, *supra* note 4, at 19-23.

¹⁰ *Many Low-wage Workers Can Only Dream of Retiring*, CBS NEWS (Oct. 24, 2016, 8:25 AM), <http://www.cbsnews.com/news/many-low-wage-workers-can-only-dream-of-retiring/> [<https://perma.cc/VG5W-TSQK>].

¹¹ *Id.*

¹² See ALSTOTT, *supra* note 4, at 29-33.

¹³ SOCIAL SECURITY OFF. OF RETIREMENT AND DISABILITY POL'Y, ANNUAL STATISTICAL SUPPLEMENT, 2015, <https://www.ssa.gov/policy/docs/statcomps/supplement/2015/oasdi.html> [<https://perma.cc/W42B-RZFS>].

and private-accounts schemes like the one proposed by Speaker of the House Paul Ryan.

But the progressive benefits formula, by itself, can no longer secure a decent retirement for low earners. Social Security also contains features that, in the present climate, tend to favor the rich and penalize the poor.¹⁴ The system now penalizes workers with physically demanding jobs and shorter lives. It disadvantages single parents. And it does not sufficiently account for job interruptions, unemployment, and other features of the modern low-wage labor market. The result is that low-paid workers too often receive a sub-poverty level benefit.¹⁵

Adding insult to injury, the rules on private pensions are heavily stacked to favor the wealthy. The federal government spends more than a hundred billion dollars a year to subsidize private pension savings. But fully two-thirds of the tax subsidies go to affluent households. And only ten percent of low-earning workers have any private pension at all, compared with seventy percent of higher earners.

But what can—and should—we do about all this?

II. JUSTICE BETWEEN AND WITHIN GENERATIONS

Consider a second political claim you will certainly hear in the near future: “Social Security is going broke.”¹⁶ The implication is that the program is financially unsustainable, and we have no choice but to take drastic action to restore solvency.¹⁷

This claim has a grain of truth but smuggles in a contestable moral claim in the guise of hard financial reality. It is true enough that the aging of the Baby Boomers poses a financial challenge to the Social Security system. Still, standing alone, financial insolvency offers no principled grounds for any policy response.

Congress could restore the solvency of the system by raising taxes or by cutting benefits in many different ways, with widely-varying effects on people of different generations, different occupations, and different genders. Solvency cannot justify any particular approach. Solvency is an accounting concept, a matter of numerical balance, and not a criterion for justice.

¹⁴ See ALSTOTT, *supra* note 4, at 28-42.

¹⁵ *Id.* at 37.

¹⁶ PAUL RYAN, SOCIAL SECURITY, <http://paulryan.house.gov/issues/issue/?IssueID=12227> [<https://perma.cc/FH8L-FY82>] (last visited Sept. 13, 2017).

¹⁷ Paul D. Ryan, *A Roadmap for America's Future, Version 2.0: A Plan to Solve America's Long-Term Economic and Fiscal Crisis* (Jan. 2010), <http://paulryan.house.gov/uploadedfiles/rfafv2.0.pdf> [<https://perma.cc/B5GA-5HJP>] (“As currently structured, however, Social Security is going bankrupt and cannot fulfill its promises to future retirees. Without reform, future retirees face benefit cuts of up to 24 percent in 2037.”).

The best—and only satisfying—way to gain some purchase on policy direction is to grapple with the values at stake in retirement policy. The issue is one of distributive justice: what share of our resources should we decisively set aside to ensure decent lives for citizens in old age?

Once we frame retirement policy as a matter of distributive justice, we can see that it has implications for justice between age groups: the more resources we set aside for older people, the less we will have for other age groups, including children and working-age adults. We can also see that retirement policy has implications for justice within age groups as well: looking just at the elderly as a group, we have a responsibility to direct resources to, as John Rawls might put it, “the least advantaged.”¹⁸

These are some of the deepest and most contested questions in political philosophy. I won’t assert that there is just one correct point of view, and in my book, I consider the issues at length.¹⁹ Today, I want to connect some relatively abstract principles of justice to workable and constructive policy reforms.

We might begin with the principle of life-cycle fairness. A just society should allocate resources fairly across the life cycle, ensuring adequate resources for education in childhood, equal opportunity in adulthood, and basic security in old age. Concretely, social insurance should provide for those who cannot work due to old age or early disability. But life-cycle fairness suggests that it should be the inability to work, and not one’s chronological age, that serves as the criterion for entitlement to social assistance.

We might add a second principle: A fair society should *recognize cumulative disadvantage*. Inequality is growing in America today in nearly every sphere of life—health, education, work opportunity, and family life. These inequalities should be of special concern for justice because they tend to affect the same group of people and to cumulate over a lifetime. So less educated workers not only earn low wages while working but also experience shorter lives, higher rates of disability, higher rates of unemployment, and greater family disruption than their better educated and more affluent peers.

So, I ask again—what should we do about all this?

III. FROM PRINCIPLES TO PROPOSALS

This election has reminded us (as if we needed reminding) that politics can be an ugly spectacle. Politics too often descends into cronyism and personal insults. But we can—and should—insist on a better way. We can—and should—insist on what John Rawls would call “public reason,”²⁰ an ideal that means that we should ground our politics in the giving of reasons that could be reasonably acceptable to people of widely different situations.

¹⁸ JOHN RAWLS, A THEORY OF JUSTICE 98 (1971).

¹⁹ ALSTOTT, *supra* note 4, at 43-91.

²⁰ JOHN RAWLS, POLITICAL LIBERALISM 10 (2005).

Consider, for example, proposals to raise the Social Security retirement age. A number of Republican elected officials have suggested, in the words of Governor Chris Christie: “You’re gonna have to raise the retirement age for Social Security.”²¹ The typical rationale is that the elderly are well-off and living longer.

But an across-the-board increase in the retirement age ignores the growing inequality in old age. It might well be fair, in terms of life-cycle justice, to delay Social Security benefits for lifetime high-earners. As a group, these workers enjoy better health and better job options. Many could work longer or could fund their own retirement if they wanted to leave the workforce before claiming Social Security. Social Security should function to replace lost wages for those no longer able to work. But, today, Social Security paid to this group in their mid-60s has become essentially a basic income—a cash grant from the government that the recipients can use to supplement their budget, underwrite part-time work, or fund ambitious travel and leisure plans.

It would be unfair, however, to raise the retirement age for lower-earners. Cumulative disadvantage burdens this group not only with low wages and minimal savings but also with high rates of disability and poor health. Many lower earners struggle to stay in the workforce to age sixty-five. Many others face unemployment and poor job options.²²

Indeed, the current Social Security rules already disadvantage low-earners. The key point, as economist Alicia Munnell notes, is that Congress has stealthily raised the real Social Security retirement age to seventy.²³ Although the program, confusingly, terms age sixty-six (rising soon to sixty-seven) the “full retirement age,” anyone who claims before age seventy pays a large financial penalty.²⁴ Thus, for instance, a worker who would receive \$1000 at age seventy would receive less than \$600 at age sixty-two. This forty percentage point penalty is the same for a highly-educated, highly-paid college professor as for a low-earning construction worker. But because the low earner typically lacks a private pension and relies mostly on Social Security, the total income hit is substantial, and it lasts for the rest of her life. (That is, the benefit doesn’t bounce back to \$1000 once the worker reaches seventy—she is stuck with \$600 no matter how long she lives.)

²¹ John McCormack, *Full Transcript of Christie’s AEI Speech: “It’s Time To Do Big Things,”* THE WEEKLY STANDARD (Feb. 17, 2011, 12:54 PM), <http://www.weeklystandard.com/chris-christie-right-now-im-not-ready-be-president/article/550252?nopager=1> [<https://perma.cc/3RDM-UBC6>].

²² ALSTOTT, *supra* note 4, at 35-37.

²³ Alicia H. Munnell, *Social Security’s Real Retirement Age is 70*, CTR. FOR RETIREMENT RES. AT B.C. (Oct. 2013), http://crr.bc.edu/wp-content/uploads/2013/10/IB_13-15-508x.pdf [<https://perma.cc/2T7X-T7QG>].

²⁴ SOCIAL SECURITY, RETIREMENT PLANNER: FULL RETIREMENT AGE, <https://www.ssa.gov/planners/retire/retirechart.html> [<https://perma.cc/986X-4K6Y>] (last visited Sept. 13, 2017).

Framed this way, it might seem that we face a policy impasse. Raising the retirement age unfairly disregards cumulative disadvantage. Failing to raise the retirement age devotes too great a share of society's total resources to old age.

But we could alter Social Security's retirement timing rules to mitigate the impact of growing inequality. The key is to adopt what I call progressive retirement timing.²⁵ Every worker would be offered a range of retirement ages, from early retirement at sixty-two to full retirement at a much older age, perhaps (eventually) in the mid-70s. But early retirement would be on relatively favorable terms for lifetime low-earners. That is, low-earners would pay a much smaller penalty for early claiming than would their high-earning peers.

Progressive timing rules could—and, I argue, should—improve the retirement options for lifetime low-earners. For instance, we might change the formula so that the low-earner who, today, receives only \$600 at age sixty-two might receive \$900 or more instead.

Progressives might worry that a sliding scale for early retirement penalties would undermine Social Security's promise of universality. After all, Social Security has been politically sustainable, in part, because it appears to provide a dignified retirement for all—and not a means-tested benefit for the poor.

But Social Security already incorporates provisions that differentiate between high- and low-earners.²⁶ The progressive benefits formula replaces ninety percent of the average earnings of a low-earner, but much less for a high-earner. High-earners also pay the progressive income tax on a portion of their benefits. Along similar lines, progressive retirement timing rules could be incorporated into the benefits formula, so that workers would simply see their own range of timing options.

An immediate objection springs to mind: If older workers remain in their jobs, won't there be fewer opportunities for younger workers, already hard-pressed by the Great Recession? Economists have studied the issue, and, in a rare bit of happy news from the dismal science, they have found that there is no necessary tradeoff, because the labor market is plastic enough to expand to accommodate a larger pool of workers.²⁷ It isn't like a musical chairs game with a fixed number of seats.

Updating Social Security for our age of inequality is a critical task. Fixing early retirement penalties would be a first step. But we should also consider additional progressive reforms. A minimum benefit would ensure that workers can count on a decent standard of living. Tax changes could increase financial contributions from high-earners and from wealth-holders. We could also revise tax rules on retirement savings to improve options for low-earners, and we could fund new initiatives by reducing tax benefits that go mostly to high-income savers.

²⁵ ALSTOTT, *supra* note 4, at 98-111.

²⁶ *Id.* at 30-31.

²⁷ *Id.* at 58-62.

CONCLUSION

We no longer have the luxury of supposing that progressive proposals like this will fall on receptive ears in Washington. But we should not abandon the field to the politicians. We should insist on public reason instead—whether the subject is Social Security, the environment, or world affairs.

And we can—and should—demonstrate the constructive role that lawyers and legal scholars can play in policy debates. We have lost the luxury of a progressive audience in power. But we still have the luxury of academic freedom. We have ample time, and ample opportunity, to use our training, our talents, and our position to insist on truth, to demand justice, and to offer constructive solutions.