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10-2017

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Katharine B. Silbaugh
Boston University, silbaugh@bu.edu

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Recommended Citation

Katharine B. Silbaugh, *Aging Policy Design: Building from Anne Alstott*, 97 *Boston University Law Review* 1943 (2017).
Available at: https://scholarship.law.bu.edu/shorter_works/2

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COMMENT

AGING POLICY DESIGN: BUILDING FROM ANNE ALSTOTT

KATHARINE B. SILBAUGH*

In her intriguing lecture, Professor Anne Alstott reminds us that legal scholarship enjoys a unique niche between justice and policy. Political scientists and philosophers evaluate justice, while legal scholars ask where and how justice can be achieved pragmatically. Alstott calls this our comparative advantage, the merging of justice and practicality. This introduction perfectly frames the work Alstott does in evaluating Social Security and other income and savings support programs for the aging and retired population, such as tax benefits given in support of private pensions.

In her excellent work, Alstott invites us to refocus our policy conversations about the Social Security program along two dimensions. First, Alstott shows us that Social Security's design was better suited to a time of lower income inequality, where wages were more compressed over the entire economy. Because Social Security penalizes recipients for taking earlier retirements (or incentivizes later retirements), it discriminates against those with physically demanding work who need to retire earlier. It does not protect contingent workers as well as conventional workers, failing to smooth over the regular labor force entry and exit which characterizes low-wage work today. It disfavors single parents, who are more likely to be low-wage earners. On the other hand, the expensive tax benefits given to private pensions are regressive, excluding almost all low-wage workers. Many of these rules made sense when incomes were more compressed, but they were not designed to perpetuate or exacerbate disadvantage in the way they do now. The policy design itself is aging.

This is where Alstott makes the legal academic's turn from practical to philosophical. In analyzing Social Security this way, Alstott brings to the surface certain commitments that inform her recommendations. What was Social Security supposed to achieve? What has been the consensus that held it together culturally and politically? How are those principles being addressed or ignored in debates over the solvency of the Social Security system? Is the universality of Social Security—that it serves all workers, not only those at the lower end of the income scale—a pragmatic commitment to ensure the political viability of the program, or is it instead a philosophical one? Some features of the program are

* Professor of Law and Law Alumni Scholar, Boston University School of Law.

explicitly progressive. Are those a bow to the reality of income inequality, and are their limits a political hedge against hostility toward the program?

Alstott shows that a program may appear just when aimed at a population with broadly equal circumstances. However, it becomes clear that justice is conditioned on underlying assumptions when the underlying circumstance of common economic standing disappears. Alstott expresses the point perfectly: “The best—and only satisfying—way to gain some purchase on policy direction is to grapple with the values at stake in retirement policy.”¹ Now that we have reached a point of income inequality that exposes questions of the purposes underlying the system, we need to decide whether Social Security is intended to enhance a robust Third Age for middle and upper middle class retirees, even those who are physically able to continue working, or is instead intended to ensure a dignified retirement by insuring against a retirement in poverty for anyone who, after a life of work, finds themselves threatened with that prospect.

Alstott proposes that in addition to existing progressive benefits, we should consider progressive retirement ages. Under this proposal, lower income workers would be penalized less than higher income workers for taking earlier retirements. This proposal redesigns the retirement decision with an eye toward the challenge of income disparity and physically demanding work, without dismantling the system or introducing such a significant structural shift that we doubt our common commitments, abandon universality, or find the program unrecognizable.

In responding to Alstott’s lecture, I appreciate her framework of fusing the insight into the legal academic’s comparative advantage at finding practical solutions together with her attention to the increasing inequality among the aging population and its implications for program design. I wonder what other areas of law would benefit from the same fresh investigation for practical intervention in light of increasing inequality among the aging population. In other words, where Alstott’s work focuses on income supports through Social Security, pension benefits, and private savings, I wonder what in-kind programs or background government decisions would benefit from the same second look? What baselines within the law have depended on a more income compressed population than we currently have?

For example, what housing issues need to be examined in light of increasing inequality among the aging population? Housing policy can include: direct subsidies for senior housing; questions of zoning that might inadvertently work to exclude low-income aging populations from transportation-friendly areas via housing design that cannot adapt to the possibility of disability;² urban planning that does not provide for independence among a low-income aging population; or zoning that does not invite the multi-generational living that enhances relationships, opportunities for independent living, and cost efficiency within

¹ Anne L. Alstott, Lecture, *A New Deal for Old Age*, 97 B.U. L. REV. 1933, 1938 (2017).

² See generally Katharine Silbaugh, *Distinguishing Households from Families*, 45 FORDHAM URB. L.J. (forthcoming 2017).

extended families.³ Transportation policy, too, might need a second look in light of increased income inequality among the elderly. What urban design questions enhance or undermine the physical health of aging populations according to their income, from accessibility of walkable neighborhoods to fresh and affordable food choices? Even workforce training and readiness policy at a much younger stage in the life cycle might seek to minimize the contingent relationship to the workforce that exacerbates income inequality during old age.⁴

In other words, Alstott's twin insights: (1) that our policy for the aging was designed for compressed incomes and has not adapted to income inequality, and (2) when we propose redesigns to policy we should combine evaluation of the underlying purposes and justice of the system with pragmatic design, may create a framework for evaluating all areas of law for their impact on, and efficacy for, aging people. I hope in the coming years legal scholars will bring their attention to questions of distributive justice for aging Americans in a variety of legal fields and contexts, building on Alstott's work.

³ *Id.*

⁴ See generally Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 *FORDHAM L. REV.* 1797 (2007).