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Poverty Law 101: The Law and History of the U.S. Welfare State

Cover Page Footnote

I thank Ezra Rosser and Jeff Selbin for offering generous feedback on a draft of this response.

**POVERTY LAW 101: THE LAW AND HISTORY OF
THE U.S. WELFARE STATE**

Karen M. Tani*^φ

A Response to Amy L. Wax, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363 (2007).

I doubt that most professors of poverty law would challenge Professor Amy Wax's opening observations: "poverty law is not a core part of a traditional legal education"; "it has no standard, agreed-upon curriculum"; and its glory days appear to have come and gone.¹ There is room, to be sure, for disagreement about the actual marginality of poverty law in the twenty-first century.² And personally, I would quibble with

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1. Amy L. Wax, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363, 1364, 1366-69 (2007).

2. First, it is hard to know what to make of Professor Wax's Association of American Law Schools (AALS) data, since she does not include data from previous years. See *id.* at 1363 & n.2. If self-reporting of teaching and research interest is the best metric available, change over time in the membership of the AALS section on Poverty Law would also presumably be relevant. Second, clinical education is robust today: most law schools have clinics, and, according to recent estimates, over thirty percent of law students participate in a clinic before graduating. Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 77-78 (2009). Since many clinics expose students to the legal needs of the poor, we should ask whether poverty law's

Professor Wax's characterization of the "old welfare law framework,"³ as well as her account of what happened to it.⁴ But like her, I would not advocate a return to a court-centered, advocacy-oriented approach. We may laud the intentions of Ed Sparer and his generation while also recognizing that the world looks different today.

I also have no doubt that Professor Wax's course on welfare law and policy is powerful and worthwhile. Professor Wax is interested in why people end up on the "lowest rung." Once we know that, we may evaluate what government can and should do for them - and what the poor must instead do for themselves. In other words, from a rigorous, empirical study of poverty and inequality, Professor Wax proceeds to law.⁵ This is a sensible approach, and I would not begrudge it a place in a law school curriculum.

trajectory is best characterized as one of decline or whether instead we have witnessed a "change of venue."

3. Wax, *supra* note 1, at 1367. Although Professor Wax does not imply that all poverty law courses looked alike, she suggests that they all shared a set of basic goals: "to rectify injustices, procure a better deal for poor people, enhance the power of the disadvantaged, and improve their lives." *Id.* at 1364. Historical research on this topic, limited as it is, suggests the need for greater nuance. For example, Martha Davis has found that, even in the heyday of poverty law, there was no agreed-upon curriculum and that "concepts of poverty law" were "wide-ranging." Martha F. Davis, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 *FORDHAM URB. L.J.* 1391, 1393 (2007).

4. In Professor Wax's view, "the old welfare law framework got mugged by reality," the reality revealed by empirical studies of poverty. Wax, *supra* note 1, at 1367. In my view, Murray, Magnet, and the perceived failure of War on Poverty initiatives were part of the equation; but so, too, were a less sympathetic Supreme Court, a besieged federal legal services program, and a widespread demonization of the poor. In other words, proponents of "the old welfare law framework" did not simply retreat in the face of irrefutable social scientific evidence, they reconsidered their enterprise in light of that research and other factors political, institutional, and professional. *Id.*

5. See *id.* at 1415.

I teach poverty law differently. (In fact, I call it something else—"social welfare law"—for reasons that will become clear.) My goal is for students to understand the origins and evolution of legal responses to poverty in the United States and to thereby develop an understanding of how social welfare law works today.⁶ Some countries attach minimum subsistence grants to citizenship. Why does the United States instead have a system of tax credits, temporary need-based assistance to families, old-age and disability insurance, and unemployment insurance, to name just a few features of our complicated welfare state? Why do states administer some programs and the federal government others? Why do some beneficiaries get unrestricted cash benefits and others receive benefits in kind? Why are some benefits tied to behavioral conditions and criminal sanctions, while others are not?

I approach these questions historically. In my course, students learn about the localized systems of poor relief that are the bedrock of our system, the inauguration of state and federal pensions for particularly "deserving" categories of Americans in the late nineteenth and early twentieth centuries, the development of nationwide unemployment and old-age insurance programs during the New Deal, and the birth of controversial federal-state public assistance programs.⁷

Moving into the post-World War Two years, the students chart the rise of a parallel "privatized" welfare state (subsidized by the federal government, but by no means open to all

6. This is hardly a new approach. *Cf.* STEFAN A. RIESENFELD & RICHARD C. MAXWELL, *MODERN SOCIAL LEGISLATION* (1950).

7. *See generally* MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (Basic Books rev. ed. 1996) (1986); SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* (1998); JILL S. QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE* (1988); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

Americans), the operation of a generous and unevenly administered G.I. Bill, and the steady expansion of Social Security.⁸ And they read about the deepening suspicion, in a time of both great prosperity and great social upheaval, of those who relied on need-based income support. Punitive, restrictive, and blatantly racist welfare policies accompanied these changes, which included denials of aid to illegitimate children and selectively enforced work requirements, to name a few.⁹

In the 1960s, the students learn, a welfare rights movement mobilized to contest these rules and practices.¹⁰ Meanwhile, President Johnson's "war on poverty" —though hardly the behemoth that we remember—peppered poor communities with "opportunities" to join prosperous, mainstream America.¹¹ In the courts, federal legal services attorneys and their allies demanded fuller legal protections for the poor and provoked the Supreme Court to dramatically re-interpret the Social Security Act of 1935.¹²

8. See generally EDWARD D. BERKOWITZ & KIM MCQUAID, *CREATING THE WELFARE STATE: THE POLITICAL ECONOMY OF TWENTIETH-CENTURY REFORM* (1980); JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* (2002); JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE* (2006); SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* (2005); Margot Canaday, *Building a Straight State: Sexuality and Social Citizenship Under the 1944 G.I. Bill*, 90 J. AM. HIST. 935 (2003).

9. See generally WINIFRED BELL, *AID TO DEPENDENT CHILDREN* (1965); ELLEN REESE, *BACKLASH AGAINST WELFARE MOTHERS: PAST AND PRESENT* (2005); ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* (2009).

10. See generally FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007).

11. See generally MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989); *THE WAR ON POVERTY: A NEW GRASSROOTS HISTORY, 1964-1980* (Annelise Orleck & Lisa Gayle Hazirjian eds. 2011).

12. See generally MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993); R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994).

This, the landscape that poverty law professors looked out upon in the late 1960s and early 1970s, is just the mid-point of our journey, however. In the following years, students learn, anti-poverty programs and judicially-enforced "welfare rights" inspired hostility. Egregious instances of welfare abuse had much to do with this public response, but, writ large, it was about mistrust of the federal government, disaffection with the tone of the civil rights movement, and anger toward the agents of unwelcome change. Citing fraud, waste, and political mayhem, policymakers attempted to roll back entitlement programs, community-based anti-poverty initiatives, and government-funded legal services.

The law changed accordingly—but not completely. Although President Richard Nixon attacked poverty programs and those who depended on them, his administration supported the expansion of social welfare programs (Medicaid, Social Security, Head Start, food stamps) and the creation of new ones (Pell Grants, the Earned Income Tax Credit).¹³ In the 1980s, as many Americans rallied around the notion that "government is the problem" and that the War on Poverty failed, lawmakers eliminated or starved some of the most controversial social welfare programs.¹⁴ But lawmakers continued to fund many policies designed to alleviate or prevent deprivation, including ones born of the New Deal and the Great Society.¹⁵ These survive today.¹⁶

13. See Annelise Orleck, *Conclusion: The War on the War on Poverty and American Politics Since the 1960s*, in *THE WAR ON POVERTY*, *supra* note 11, at 439-44.

14. See, e.g., MARISA CHAPPELL, *THE WAR ON WELFARE: FAMILY, POVERTY, AND POLITICS IN MODERN AMERICA* 199-210 (2010); KATZ, *supra* note 11, at 137-66.

15. See Orleck, *supra* note 13, at 444-50.

16. See MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 369-400 (Univ. of Pa. Press updated ed. 2008) (2001).

Toward the end of the course, we finally discuss the Personal Responsibility and Work Opportunity Act (PRWORA) of 1996¹⁷ and contemporary, state-run income-support programs (what most people think of when they hear "welfare" or "poverty law"). By then, the students are capable not only of understanding the technical provisions of the law, but also of analyzing why lawmakers drew the lines where they did, why certain administrative structures and enforcement mechanisms were preferred over others, and why benefits carry with them a particular bundle of rights¹⁸ and responsibilities. Students also gain an appreciation for how Temporary Aid to Needy Families—high profile program—fits into a larger system of social welfare provision, much of which is not visible to the untrained eye.¹⁹ "Welfare" is one piece of "welfare law," not the whole.

My approach has its weaknesses.²⁰ For one, it does not produce technicians. Students do not leave this class capable of representing poor clients with day-to-day problems, or maneuvering reform legislation through Congress. It is geographically bounded, at a time when students may gain more from placing poverty law in a global

17. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

18. I refer here mainly to procedural protections. The PRWORA eliminated from the law many of the guarantees that had previously given welfare benefits the character of a right.

19. For more on the concepts of visibility and invisibility in American social welfare provision, see generally CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* (1997); CHRISTOPHER HOWARD, *THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY* (2007); SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011).

20. For other approaches, consult the Poverty Law Syllabi collection at the blog *POVERTY LAW*, <http://maximinlaw.wordpress.com/2011/08/17/poverty-law-syllabi-fall-2011/> (last visited Dec. 22, 2011).

or transnational context.²¹ It does not engage the concept of "social justice" as explicitly as it arguably should.²²

The course captures, however, what I most valued in my own legal education. Professor Wax, coincidentally, taught me civil procedure. She was an effective teacher because she taught us to think about why we have the set of rules that we do and how different rules work together to further several basic goals. With this foundation, we were equipped to ask civil procedure's harder questions—about winners and losers, about the proper allocation of benefits and burdens, and, ultimately, about what the federal court's role can and should be in resolving disagreements. These are hard questions, about which reasonable people may disagree. Some students may choose to answer them by reference to social scientific evidence, while others may employ critical theory or philosophy. Still others may defer to the political process or the lessons of their own upbringing. Students of poverty law benefit from the same approach. Before we teach them "how the problems of deprivation and inequality *should* be addressed"²³—an important subject, to be sure—let us teach them what the law does now and how it got this way. This, in my view, is Poverty Law 101.

To be clear, I am not implying that Professor Wax ignores history in her welfare law course. To the contrary, I know that she includes it. This is a conversation about emphasis, content, and priority. Professor Wax wants her students to investigate the sources of social and economic disadvantage, and then move on to consider the role of law. History is relevant to this inquiry,

21. See Davis, *supra* note 3, at 1406-14.

22. See Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM. MITCHELL L. REV. 1057, 1060 (2009).

23. Wax, *supra* note 1, at 1384 (emphasis added).

but it does not make her list of essential items in the instructor's tool kit.²⁴ When I look at our social welfare laws, I am not confident that lawmakers have ever been concerned, first and foremost, with the sources of social and economic disadvantage. I also believe that just as ideas about the sources of criminality change over time, so, too, do ideas about the sources of poverty and inequality. We would do well to acquaint our students with the latest research, but we should pause before making that research the focus of a course on poverty law, which is a body of statutes and judicial decisions that, if anything, reflects multiple generations of "poverty knowledge."²⁵

To put this more concretely, when a student contemplates how lawmakers ought to address the problems of deprivation and inequality, she *should* consider, as Professor Wax puts it, "what works."²⁶ After taking my class, a student faced with that question would also ask what is responsible, what is fair, what is possible, and what is acceptable. By no means do those questions imply more liberal policy answers. As my students have shown me, there are many ways to read the history of U.S. social welfare law. And history, of course, is not the only body of knowledge that students should draw upon when answering. The point is that these students come to the table with a deep knowledge of what poverty law is really about in this country. They are aware of (1) the diverse, complex, and often divisive ways in which this country has used law to address poverty; and (2) the set of concerns and constraints that affected, and continue to affect, those choices.

Undeniably, an instructor's preferences are based on her "interests and convictions," as

24. See *id.* at 1368.

25. See generally ALICE O'CONNOR, *POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH CENTURY U.S. HISTORY* 4 (2001).

26. Wax, *supra* note 1, at 1378.

Professor Wax notes.²⁷ The poverty that I am interested in includes the entrenched poverty that Professor Wax studies, but also the poverty that most Americans, at one point in their lives, will experience.²⁸ It is the poverty not only of employable adults, but also of children and the elderly. It is the poverty that other groups would experience but for government intervention, past and present: veterans' benefits, unemployment insurance, Social Security, minimum wage laws, workmen's compensation, Medicare, disability insurance, and tax breaks for employer benefit programs. The last time I taught this class, I asked the students to think of three ways in which social welfare laws affected them. Most students struggled to think of more than one. Some believed that their only connection was the taxes

27. *Id.* at 1364.

28. Americans' use of need-based benefit programs demonstrates this. Drawing on thirty years of longitudinal data, sociologists Mark Rank and Thomas Hirschl found that two-thirds of Americans between the ages of twenty and sixty-five will turn to a means-tested program (food stamps; Medicaid; Supplemental Security Income; Aid to Families with Dependent Children, which is now called Temporary Aid to Needy Families; or other cash welfare) for assistance at least once during their adulthood. See Mark R. Rank & Thomas A. Hirschl, *Welfare Use as a Life Course Event: Toward a New Understanding of the U.S. Safety Net*, 47 Soc. WORK 237, 241-43 (2002); see also Daniel A. Sandoval et al., *The Increasing Risk of Poverty Across the American Life Course*, 46 DEMOGRAPHY 717, 733 (2009) (extending their previous research and finding that the risk of acute poverty increased in the 1990s). Ten years hence, changes in eligibility rules might lead to different results. Other studies, however, suggest that poverty is on the rise and that it is not merely the long-term poor who will experience it. See CARMEN DE NAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 4, 14 (2011), available at <http://www.census.gov/prod/2011pubs/p60-239.pdf> (finding that in 2010, 15.1 percent of Americans fell below the official poverty line, up from 12.5 percent in 2007, and that "[a]pproximately 31.6 percent of the population had at least one spell of poverty lasting 2 or more months during the 4-year period from 2004 to 2007.").

that they paid.²⁹ Professor Wax asks, "What accounts for welfare law's current status and continuing marginalization?"³⁰ This narrow vision is surely part of it. Poverty law will move closer to the "core" of legal education when students recognize how very likely it is that they, their families, and their clients have used it or will need it. Poverty law will remain marginalized so long as we confine it to a population that we and our students understand as marginal.

29. I deliberately used the vague word "affected," hoping that students might also consider how their parents and grandparents had benefited from social welfare programs. Scientific research confirms that many Americans are unaware of even their current use of such programs. See Suzanne Mettler, *Reconstituting the Submerged State: The Challenges of Social Policy Reform in the Obama Era*, 8 *PERSP. ON POL.* 803, 809 (2010). Mettler reports that in a nationwide survey of 1400 Americans, the percentage of program beneficiaries who reported that they "have not used a government social program" varied by program, but ranged from a striking 25.4 (food stamp beneficiaries) to an even more striking 64.3 (529 or Coverdell accounts). See *id.* I thank Christina Green for bringing this data to my attention.

30. Wax, *supra* note 1, at 1364.