THE LIMITED UTILITY OF HISTORY IN POVERTY LAW EDUCATION

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Professor Karen Tani’s comments are insightful and thought-provoking.1 They point to some important differences in our respective approaches to law school courses addressing poverty, welfare, government benefits programs, and redistribution.2 Tani stresses history. She states that, before we teach students “how the problems of deprivation and inequality should be addressed,” we should first explore how the status quo emerged over time.3 She suggests that this focus on the historical lead-up to our current situation is necessary to determine “what is responsible, what is fair, what is possible, and what is acceptable.”4

I have some problems with this position. First, I believe that my relatively a-historical course does a good job of engaging the question of “what is fair.”5 Indeed, Tani admits earlier in her Essay that among the “weaknesses” of her course’s focus on historical materials is that it fails to “engage the concept of ‘social justice’ as explicitly as it arguably should.”6 In contrast, my course begins by addressing the main theories of social justice within the Western tradition. Although not

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2. See id. at 1-6.
3. Id. at 7 (quoting Amy L. Wax, Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century, 34 Fordham Urb. L.J. 1363, 1384 (2007) (emphasis added)).
4. Id. at 8.
5. See id.
6. Id. at 7.
receiving anything like a comprehensive treatment, the ideas of John Rawls, Ronald Dworkin, Robert Nozick, John Locke and Michael Walzer are accorded respectful attention and methodical consideration. In focusing on these thinkers’ theories, history receives short shrift. How things used to be is not the central concern. Rather, the question of how resources should be distributed is pondered in a forward-looking fashion, which takes into account the resource constraints that our society currently confronts.

Tani claims that history is an “essential item[] in the instructor’s toolkit”7 because the past has much to teach us. Curiously, she never tells us exactly what those teachings are. What aspects of the story of how poverty and inequality arose and were addressed in the past does she want us to learn, and what lessons are we to draw? Tani states that her course equips her students to “come to the table with a deep knowledge of what poverty law is really about in this country.”8 But, she never tells us what that knowledge is or how that knowledge should inform our answers to the specific legal and policy questions that we confront today. As with so many discussions of the significance of history, Tani’s insistence on the usefulness and importance of historical perspectives is advanced at a high level of generality. There are no real particulars or specifics, and no policy payoff or bottom line. We are left guessing why we should care what happened fifty or a hundred years ago. How does history tell us whether we should require single mothers to work, whether public funding of medical care should be means tested, whether and how much the retirement age for receiving social security benefits should be raised, or whether childless men should receive the earned income tax credit? I submit that all these questions can be meaningfully addressed without knowing one whit of history. Perhaps there are burning questions in public welfare and benefits programs on which historical facts or events can enlighten us, but Tani’s Essay provides no examples.

My final concern about Tani’s Essay is that the word “desert” does not once appear. The politics of poor relief over the past two centuries in this country have been dominated by the question of who deserves public assistance and who does not. The categories of the deserving and the undeserving poor hold strong resonance with voters. That is because the category of desert is central to our moral life and is grounded in fundamental notions of fairness, what we owe

7. Id. at 8.
8. Id.
each other, and what the government owes all of us. Certainly our ideas of desert have evolved historically in quite interesting ways, and I have written of that evolution in other contexts. But the most pressing question we face now is what is fair today. From whom shall we take, and to whom shall we give? Once again, the centrality of these questions means that any poverty law course worthy of the name must encompass some consideration of liberal political theory, at least on some level. But such a course must also engage heavily with economics because “ought” implies “can.” If the obligations we identify are not feasible under our budget constraints or in light of the resources available, then those obligations are simply a chimera with no moral force. In fact, today we are confronting the imminent bankruptcy of our mammoth federal Medicare and Medicaid entitlements. Social Security is also in trouble, and the costs of disability programs are growing by leaps and bounds. All these programs appear headed off a cliff within the next ten years. It is difficult to say how history is going to help with that.