

2007

Musical Chairs And Tall Buildings: Teaching Poverty Law In The 21st Century

Amy L. Wax

University of Pennsylvania Law School

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Legal Education Commons](#)

Recommended Citation

Amy L. Wax, *Musical Chairs And Tall Buildings: Teaching Poverty Law In The 21st Century*, 34 Fordham Urb. L.J. 1363 (2007).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol34/iss4/9>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

MUSICAL CHAIRS AND TALL BUILDINGS: TEACHING POVERTY LAW IN THE 21ST CENTURY

*Amy L. Wax**

I. INTRODUCTION

America has not yet abolished poverty. The definition and proper measure of poverty have long been a subject of controversy, and there is no consensus on how many people in the United States are poor.¹ But no one denies that the poor continue to be with us. This is unlikely to change soon.

It does not follow from this that poverty should be addressed—or will continue to be addressed—as a distinct subject within the law school curriculum. Indeed, the status and future of this area of inquiry within law schools is somewhat in doubt, even as the subject retains some vitality. In the most recent American Association of Law Schools Directory of Law Teachers, this area of teaching and research is denominated “welfare law.”² The names of law faculty listed under this rubric fill about a page and a half, with most individuals indicating that they are not actively teaching a course.³ The “big name” law schools (*U.S. News and World Report* top twenty) are not very well-represented on the list. Although Yale Law School has a disproportionate number of professors who acknowledge interest in this field, no one at Harvard or Chicago is listed as teaching welfare law.⁴

As someone who attended college and law school in the 1970s and 1980s and then went on to teach law in the 1990s, I can attest that welfare law was once a more popular course than it is today. But its position has always been tenuous. Poverty has never been considered a mainstream part of the law school curriculum; nor has it commanded a central place in legal scholarship. There are signs that its popularity has, if anything, recently waned. Michigan, for example, for many years offered a well-attended poverty law class

* Robert Mundheim Professor of Law, University of Pennsylvania Law School.

1. For a recent review, see Nicholas Eberstadt, *The Mismeasure of Poverty*, 138 *POL'Y REV.* 19 (2006).

2. See *AALS DIRECTORY OF LAW TEACHERS: 2006-2007*, at 1427-29 (Association of American Law Schools, Washington, D.C., 2006).

3. *Id.*

4. *Id.*

taught by faculty member and then dean Jeffrey Lehman. He has since left Michigan for Cornell, and that high-profile Michigan course no longer exists.

What accounts for welfare law's current status and continuing marginalization? Because poverty law is not a core part of a traditional legal education, it has no standard, agreed-upon curriculum. What is taught in poverty law is up for grabs and is heavily influenced by the interests and convictions of the faculty instructor. Not surprisingly, courses are highly variable, and their contents have evolved in response to political developments and shifting notions on the causes and cures of economic disadvantage.

Prompted by a heightened concern with the rights of the poor and especially with the dire situation of American blacks, welfare law courses began to appear in law schools in the 1960s. The presentation and design of these initial courses were strongly informed by left-leaning assumptions about the nature of poverty and its origins. On this view, economic deprivation is a product of an unjust economic and social system ripe for reform. Many proponents believed that inequities could be addressed through an agenda of policies, regulations, and programs designed to work fundamental changes in the functioning of government and the structure of society. The ultimate goals were laudable, if somewhat naive: to rectify injustices, procure a better deal for poor people, enhance the power of the disadvantaged, and improve their lives.

The appearance of these courses historically coincided with the enactment of Great Society initiatives and a dramatic expansion of New Deal programs such as Aid for Families with Dependent Children ("AFDC"). The roles these courses envisioned for lawyers included not only pressing for the enactment of new laws and policies designed to protect the interests of the poor, but also advocating for vigorous judicial enforcement of existing ones. In keeping with lawyers' comparative advantage, the legal piece of the project increasingly came to be viewed as a matter of procuring "rights" and maximizing entitlements within a system that, it was thought, systematically worked to undermine them. Thus, although the aspirations expressed in these courses were vaunting and potentially quite far-reaching, the scope of their immediate concerns was, in actual practice, somewhat technical and limited. Many poverty law courses had a clinical focus and were preoccupied with litigation strategies. Meeting the immediate legal needs of poor people within the existing system became the chief priority. Litigation centered around a mix of positive and negative entitlements: pro-

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1365

protecting the poor from landlords and employers, enforcing proscriptions against race and class discrimination, rectifying inequalities in education and other services, and procuring a panoply of government benefits.

To the extent that some courses were more analytical, conceptual, and critical in their approach, strong assumptions were often at work. Students were invited to ask how the system could better be designed to protect the poor and improve their lot through redistribution or other measures. A consensus emerged that the system was at fault. The poor were the victims of unjust structures and social arrangements. It followed that the system was in dire need of reform. The focus was on what could be done for and to people. The immediate priority was meeting the poor's most pressing needs and giving them the resources they were lacking. The broader agenda was to produce a more fundamental change so that the poor could acquire more power, more money, and more of the good things in life. The strategy that emerged relied heavily on governments, with a panoply of new official programs proposed to transfer resources and transform the lives of the least well off.

II. THE EVOLUTION OF WELFARE LAW

During the 1970s and 1980s, the problem of poverty failed to yield to programmatic efforts and, in some ways, actually got worse.⁵ These decades were a period of increasing awareness of and impatience with inner city poverty, especially among the black population. The perceived failure of many War on Poverty initiatives created political polarization, with calls to “do something” about the dramatic increase in out-of-wedlock childbearing, family disintegration, racial unrest, crime, drug dealing and use, educational failure, and other developments associated with economic and social deprivation. The continued expansion of entitlements like AFDC and the food stamps program became “hot button” issues on which the electorate was sharply divided.⁶ Some saw these initiatives as contributing to social disorder, while others saw them as essential to the just treatment of an increasingly deprived population.

5. See, e.g., CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984) (describing explosive growth in the number of fatherless families below the poverty line receiving federal welfare benefits between 1960 and the mid-1980s).

6. *Id.* at 124-26, 196 (calling “no topic . . . more controversial” and the debate “vigorous”).

The political salience of poverty fueled activity within academia and the policy community. What to do about continuing deprivation became a widespread and well-funded pre-occupation. A cottage industry, extending to non-profit policy organizations, government agencies, and think tanks across the political spectrum, sprung up to deal with poverty's stubborn persistence and the inadequacy of existing programs. Although left-leaning thinkers had long been concerned with these issues, analysts on the right began to get into the act. In particular, the idea that welfare assistance programs were not the solution to the problem of poverty but actually part of the problem gained currency.

Charles Murray's influential 1984 volume *Losing Ground* argues, in effect, that welfare causes poverty.⁷ Welfare, maintains Murray, robs the poor of initiative and breaks up families by encouraging men not to marry the mothers of their children but instead to abandon them.⁸ Welfare provides an incentive for women to obtain benefits by bearing children outside of wedlock. It discourages work by providing cash and non-cash benefits that amount to better compensation than could be earned through employment.⁹ For Murray, the best way to lessen poverty is to abolish all welfare programs.¹⁰

A few years later, Myron Magnet, in *The Dream and the Nightmare*, advanced a broader cultural theory to explain the persistence of poverty.¹¹ Like Murray, Magnet believes that the poor's lack of drive and determination and their unwillingness to work hard were crucial.¹² But unlike Murray, Magnet located the source of these behaviors not primarily in economic incentives but in culture.¹³ For Magnet, the chief job of any civilization is soulcraft: the transmission of the bedrock values of mature, educated, honest, hardworking, caring, and responsible people.¹⁴ The poor represent society's failures, those who have not inherited the central "bourgeois" values of the mainstream culture.¹⁵ Those values came under attack by the liberationist ethos and ideas of the

7. *Id.* at 9.

8. *Id.* at 157-59.

9. *Id.* at 162-64; compare *graph id.* at 158 with *graph id.* at 161.

10. *Id.* at 219-23.

11. MYRON MAGNET, *THE DREAM AND THE NIGHTMARE* (1993).

12. *Id.* at 15.

13. *Id.* at 15-16 (describing the "underclass culture they live in"). *But see id.* at 32 (stating "I am not arguing that the problem is a 'culture of poverty' . . .").

14. *Id.* at 26-32.

15. *Id.* at 30-32.

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1367

1960s.¹⁶ That attack undermined the very habits and beliefs that would have enabled the poor to better their lot.¹⁷

Murray and Magnet share the conviction that the economic system, uncorrupted by meddlesome and perverse government programs, provides the prerequisites for the success of all people. Both accept that ample opportunities exist within the current structure for able-bodied individuals to achieve a self-sufficient, decent life. For Magnet, welfare programs are not the primary culprit; rather, the adoption of bad ideas has proved pernicious.¹⁸ Although Magnet blames a perverse cultural shift, he concedes that welfare worsens the situation by reinforcing the belief that the poor are not responsible for their behavior, that they cannot overcome their problems through hard work, and that welfare is something to which they are “entitled.”¹⁹

For those interested in the problems of the disadvantaged, the work of Murray and Magnet could not be ignored. These authors challenged ways of thinking about poverty that were dominant in the legal academy. But the challenge was not just in the realm of theory. In thinking about causes and cures, poverty studies increasingly took an empirical turn. Reams of data were collected by think tanks, academic social scientists, and government agencies. Experts sought to describe and characterize poverty with the hope that new understandings would point the way towards effective cures.

The information generated in this effort created a new appreciation of the complexities of the problem. These insights could not help but work a sea change in the way economic deprivation was addressed within the law school curriculum and in other university courses. The growing recognition that poverty is a tangled amalgam of social, behavioral, and economic factors necessarily forced an abandonment of many of the assumptions behind the old-style poverty law courses. One could say that the old welfare law framework got mugged by reality. Although some offerings still hewed closely to that paradigm, a new-style welfare law course was born.

What are the characteristics of this new-style welfare law course, and how does it differ from the old poverty law of the 1960s and 1970s? Inspired by my experience as a Columbia Law student in a social welfare law and poverty class taught by visiting professor

16. *Id.* at 31.

17. *Id.* at 30-31.

18. *Id.* at 59-62.

19. *Id.* at 134-35.

Cass Sunstein in the mid-1980s, I decided to develop such a course when I began teaching at the University of Virginia Law School in 1994. I continue to teach the same course at the University of Pennsylvania Law School today. The new welfare law course relegates law, as conventionally understood, to but a minor part of the syllabus. In addition, litigation and advocacy no longer have pride of place. The focus is not on championing the poor by expanding and enforcing their rights through the judicial process. Nor is the task primarily to teach students how to advocate for the poor through the enforcement of existing rights and the enactment of new and more generous entitlements. Rather, the approach is far more analytic, agnostic, and broad-gauged: to understand the sources and causes of deprivation, and to think carefully about the full range of instruments and tactics to address it.

To be sure, the new approach to welfare law still retains a rather precarious foothold within law schools. The subject matter of a course like this cannot be adequately addressed without taking on complex policy issues. Indeed, any well-designed course in this area is properly entitled welfare law and *policy*. The heavy mixture of non-legal materials will make the course seem even more “unconventional” and “irrelevant” than before. For students, the pertinence to a future legal practice is not immediately obvious. Some students will find these unorthodox attributes attractive and some will find the course useful for future careers in government or legislation. But others can’t or won’t “waste time” on this class.

In addition to confronting doubts about the course’s relevance and importance, law professors teaching such a welfare course face other challenges. The course makes heavy demands. Because there is no set curriculum, instructors must create their own syllabus. This can be an arduous process. The field is dynamic and ever-changing, so substantial revisions in teaching materials are required from year to year. The subject matter is far-ranging and calls for an interdisciplinary approach. The professor should of course be familiar with intricate federal and state benefits programs designed to address disadvantage and redistribute income. He or she should also be learned in the aspects of tax law, administrative law, family law, and constitutional law that bear on the subject matter. On top of that, instructors should ideally possess more than a passing knowledge of social science subjects like labor economics, demography, social psychology, sociology, liberal political theory, and the sociology of education, and should try to keep abreast of relevant developments in these dynamic fields. Since

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1369

much of the work in these areas is empirical and quantitative, the instructor should also have some familiarity—and comfort—with the methods of ethnography, statistics, and regression analysis.

All in all, this is a tall order. These demands can be hard on teachers and students alike. Yet taking them on in this context holds rewards. Many issues that form the core of social welfare law and policy are treated piecemeal in other parts of the curriculum. Economic, legal, and social aspects of disadvantage are addressed in courses on race, feminism, taxation, and constitutional law. But much of what is interesting and important gets missed. Social welfare law and policy offers the opportunity to consider disadvantage more comprehensively and to integrate insights from other offerings and perspectives.

III. MUSICAL CHAIRS AND TALL BUILDINGS: FOUR DICHOTOMIES IN WELFARE LAW

As a teacher of welfare law and policy, I have concluded that the problems of social and economic disadvantage are best analyzed within a framework that rests on a handful of critical distinctions. Over time, four pairs of contrasting concepts have emerged as useful: inequality and poverty; structure and placement; external forces and individual performance; and causes and cures. Exploring these dichotomies helps organize the inquiry, dispel confusion, and shed light on key issues in social welfare.

The first of these distinctions raises an important initial question: What is the relationship between poverty and inequality as a whole? Poverty law courses have traditionally focused on the most deprived segment of society—“the poor.” Poverty law is about economic disadvantage. But, as fifty years of academic research and practical politics have revealed, it is difficult to cabin that subject. The problem is a lot more complicated than we thought, and an inquiry into poverty cannot avoid confronting social disadvantage and difference in all its aspects. It is difficult to do justice to that subject without discussing economic and social disparities in general. Indeed, one could argue that the proper subject of a social welfare law and policy course is inequality.

Framing welfare law and policy as a course on inequality has advantages. Inequality has long been considered a proper concern of the law school curriculum. It goes without saying that myriad laws in many areas make some people better off and decrease the welfare of others. And many laws are directly designed to mitigate inequality or reallocate tangible and intangible resources. Because

law affects the distribution of wealth, position, and other social goods, law and inequality are closely intertwined. Assuming that laws are the official instruments of collective action, one can regard social welfare law and policy as a course primarily about the distributive consequences of such collective decision making. Private conduct has distributive consequences too, and these also come within the purview of the inquiry. Indeed, it is a crucial part of this project to assess and disentangle the relative contributions of official enactments and private decisions to the distribution of social goods within society.

None of this is to deny that poverty should be the prime focus of a welfare course. Indeed, any welfare course worth its salt should begin by considering whether, and why, the most deprived—those stuck, as I put it to my students, on the “lowest rung” of society’s ladder—should elicit special concern. The point is only that deprivation is best understood in the context of the overall distribution of benefits and burdens within society. The inquiry should begin with a broad investigation of sources of economic and social disparity generally. Only then is it fruitful to analyze the nature of the relationship between inequality and disadvantage and to explore what (if anything) should be done about either.

In unpacking these questions, two key issues arise. The first is a pragmatic one about economies like our own that operate on free market principles. Such capitalist economies appear spontaneously to generate significant economic dispersion. Will systems like ours necessarily leave some people behind—so far behind that they are unable to meet basic needs? Or can robust capitalism co-exist comfortably with less poverty and more equality than is observed in the United States today? The second issue concerns whether poverty is an absolute or relative phenomenon. Will the people on the bottom rung of the ladder, even if reasonably well-provided for, necessarily view themselves as poor?

Both issues have generated serious disagreement. Alexis de Tocqueville, in his magisterial *Memoir on Pauperism* (the piece with which I open my social welfare course), anticipates and discusses both these questions.²⁰ Taking the proper measure of the controversy today requires an interdisciplinary approach and attention to data. Work in social psychology suggests that what matters to people is how they are doing relative to others: being located at the

20. ALEXIS DE TOCQUEVILLE, *MEMOIR ON PAUPERISM* (SEYMOUR DRESCHER TRANS., IVAN R. DEE 1997) (1835).

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1371

bottom of the heap generates feelings of deprivation.²¹ Epidemiological work from Britain, including studies on British civil servants, provides evidence that being in a low status job, even if it provides for basic needs, compromises health.²² On the other hand, there are ways in which today's poor are better off than even middle class people were only a few decades ago. Life expectancy and standards of living have increased across the board, with many of the least-well-off today possessing comforts, conveniences, and gadgets (such as televisions and microwave ovens) unknown to previous generations. There is thus room to argue about the actual status of those on the lowest rung and whether and how the government should intervene to improve their lot.

The second distinction that is critical to a proper study of poverty is that between two elements frequently conflated: structure and placement. Those poles are closely related to the third dichotomy: between external forces and individual performance. One trope that helps elucidate these relationships is the game of musical chairs, which is familiar to every student. A group of children surrounds a circle of chairs. There are enough chairs for all but one (or some) of the players. The music starts and the children walk, hop, or skip around the chairs. When the music stops, they scramble for a seat. The person or persons left standing are "out."

The losers in the game are stand-ins for society's losers—those who somehow fail in the competitive game of life. These are the people who end up poor. Why do some people lose the game of musical chairs? Their fate can be attributed both to the rules of the game and to the players' own performance. That chairs are missing is a fixed part of the game. The fact that there are too few places to sit dictates that someone must lose: someone will be ejected from the game on each round. That "structural" feature is not of the players' creation and is not within their control. On the other hand, which players will be out? Here a different set of factors comes to the fore. Who loses the game is a matter of performance.

In shedding light on distinctions between structure and placement, and between extrinsic factors and performance, the game of musical chairs not only illustrates those categories, but also shows how outcomes can be the mixed product of very different kinds of factors. The game's rules mandate that someone will be without a chair. That is independent of anyone's personal attributes or be-

21. See, e.g., ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* (1995).

22. See, e.g., MICHAEL MARMOT, *THE STATUS SYNDROME* 78-79 (2004).

havior. But an individual's fate within the game—whether he survives repeated rounds or eventually loses out—is very much a function of how the player conducts herself. The game rewards the most competitive players. Musical chairs is useful thus in illuminating the distinction between external factors and individual performance.

The game is likewise helpful in drawing the conceptual distinction between structure (the number of chairs plus the rules of play), on the one hand, and the placement of individuals within the structure (who wins, who loses, and how many there are in each category), and in showing how these can sometimes operate independently. Another helpful metaphor for this relationship can be found in James Galbraith's *Created Unequal*.²³ Galbraith draws a contrast between the shape of the economy as a whole (analogous to a skyscraper or tall building with a set number of floors of fixed size) and the position, or level, occupied by specific individuals within the building (analogous to the floor on which each person resides).²⁴ Galbraith analogizes the building to the economy as a whole, with particular emphasis on the structure of labor markets.²⁵ He writes, “[t]he wage structure, that is, the shape of the building and the number of spaces available on each floor, is a built structure.”²⁶ Galbraith also advances a particular theory of the origins of this structure. In his view, “[i]t is a product of history, built up by the rules, institutions, and political forces that influence how the economy works.”²⁷ But he acknowledges that not all embrace this account. Some neoclassical economists believe that labor markets are largely independent of politics and institutional priorities.²⁸ Rather, competitive free market forces dominate. Supply and demand for goods and services, levels of technological development, and the availability of wealth for investment determine the quality and quantity of jobs on offer and fix the levels of compensation. From this perspective, these factors are fairly autonomous within competitive economies and subject to only limited effective manipulation.

Leaving aside the question of whether the structure of the system is politically “constructed” or chiefly the product of difficult-

23. JAMES GALBRAITH, *CREATED UNEQUAL* 55 (1998).

24. *Id.* at 55-56.

25. *Id.*

26. *Id.* at 55.

27. *Id.*

28. *Id.* at 61-65.

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1373

to-manipulate free-market forces, the main point is that, for particular persons living within the system, the overall shape of the building, in Galbraith's metaphor, is a given. It is independent of the positions particular individuals come to occupy. In Galbraith's example, residents cannot directly control this structure or the number and position of places it provides.²⁹ Rather, they take the building as they find it. Where individuals end up within the structure, however, is another matter. As with musical chairs, it is largely a function of how they perform within the constraints established by space limits and the rules for shuttling between floors. In other words, "[t]he demographic composition of the distribution of people across the floors . . . is a matter of [people's] individual characteristics and of how those characteristics are treated."³⁰

Exploring the relationship between external forces and performance, as illustrated by the metaphors of tall buildings and musical chairs, gives rise to a host of difficult questions. What is the nature of the characteristics that lead to victory (in musical chairs) or high placement (in Galbraith's metaphor) and how do people acquire them? In both cases, final outcomes rest on performance. But what determines performance? In musical chairs, the losers may be those who possess fewer talents and attributes needed to follow the rules or excel at the game. Or perhaps the losers tried less hard than others, or have had less experience. These suggestions reveal that performance is a product of contrasting inputs. Innate endowments play a role. But choices, strategies, and cultivated attributes—such as experience, determination, and effort—also affect outcomes. Musical chairs, for example, is a meritocracy with a limited number of places and prizes. Winning at musical chairs depends on merit defined as natural talent put to good use. But how well people perform is ultimately the mixed product of endowments, luck, circumstances, and personal effort. In this respect, the game resembles our own society.

Likewise, Galbraith's tall building can be regarded as a meritocracy of sorts. His metaphor gives rise to a similar set of questions. How much of a person's placement is due to her own choices and how much to forces over which she exerts little or no control? What is the role of endowments like talent, ability, temperament, or upbringing? Can the crucial choices be viewed as closely conditioned or constrained by these givens, or do people retain a meaningful amount of freedom and discretion to deter-

29. *Id.* at 55-56.

30. *Id.* at 55.

mine their own fate? Finally—and perhaps most importantly—why does the system assign people who possess certain attributes or display certain behaviors a position on particular floors, whether high or low? What gives rise to the rules for transfer between floors? Why does society elevate some and demote others?

These types of questions—and the distinctions that help elucidate them—are crucial to understanding poverty and economic inequality in the United States and deciding what to do about it. One persistent fault line in discussions of disadvantage in America is the distinction between the deserving and the undeserving poor. As Martin Gilens has documented, voter surveys, focus groups, and data collected by social psychologists reveal that these categories are firmly entrenched in political discourse and strongly influence citizens' views on welfare policy and economic redistribution.³¹ The differential treatment of the deserving and undeserving in turn implicates the distinction between impersonal social forces and performance. Is deprivation due to chance—that is, factors or events beyond people's control? Or is it due to choice—that is, a person's own decisions and behavior? These questions have powerful resonance. Most people stand ready to assist the disadvantaged through centralized public welfare programs only if the recipients are needy through no fault of their own. In judging whether people meet this standard, voters apply the expectation that able-bodied persons will make reasonable good faith efforts to achieve economic self-sufficiency. Persons who fall short of this expectation are not generally regarded as entitled to public assistance.³²

The categories of the deserving and undeserving poor, so popular among voters, have come under relentless attack by academic commentators. Some claim that the popularity of the deserving-undeserving distinction is informed by nefarious motives like racism.³³ Others question the very concept of desert as incoherent.³⁴ The status of desert is a bone of contention within liberal political theory and is particularly important within a branch known as luck egalitarianism. The latter holds that a just society is one in which individuals are charged with responsibility for bad choices but not

31. MARTIN GILENS, *WHY AMERICANS HATE WELFARE* 91-93 (1999).

32. See, e.g., Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 *EMORY L.J.* 1, 5 (2003).

33. See, e.g., GILENS, *supra* note 31, at 139-40, 214-15.

34. See, e.g., LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 32 (2002).

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1375

for bad luck. Luck or undeserved endowments are morally arbitrary and ought not to influence individual prospects and the distribution of social goods.³⁵ But differential outcomes that are the product of individual free choice are not unfair. On this view, society is obligated to take steps to equalize or compensate for deficient natural endowments or other unchosen or uncontrollable factors.³⁶ In the context of social welfare, this obligation extends to relieving at least some types of poverty, including deprivations inflicted by forces or conditions a person cannot control.

Identifying these conditions is not simple, however. The difference between outcomes due to choice and those conditioned by chance is sometimes hard to discern. Because it is notoriously difficult to sort out and classify contributions to inequality, the precise scope of the collective obligation to mitigate disadvantage is disputed even among those who embrace basic luck egalitarian commitments. These complications are reflected in a split within liberal political theory on the very meaning of desert.

First, while some maintain that the distinction between choice and chance is not only valid but robust, others in effect question whether there is any such thing as meaningful choice. For those in the latter camp, all outcomes look to be fatally tainted by external factors.³⁷ On that view, no rewards within our society can meaningfully be viewed as “deserved.”

Second, even among those who believe in desert, there is no clear consensus on what should count as a compensable endowment, with disputes over the status of such factors as cultural background, inborn talents, and material accidents of birth. Are effort and prudence just the products of family environment or innate temperament, as some liberal theorists suggest?³⁸ Or do individuals make meaningful decisions, for which they can justly take credit, to cultivate good character and live up to moral ideals? Even if they sometimes do, how important are talent and other natural abilities, compared to effort, character, or prudence, for

35. See, e.g., Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 288 (1999).

36. For a review of luck egalitarian arguments, see for example, RONALD DWOR-KIN, *SOVEREIGN VIRTUE* 320-50 (2000) or ERIC RAKOWSKI, *EQUAL JUSTICE* 2 (1991).

37. Compare, e.g., RAKOWSKI, *supra* note 36, and DWOR-KIN, *supra* note 36 (claiming that choice is meaningful), with JOHN RAWLS, *A THEORY OF JUSTICE* 81-98 (rev. ed. 1999) (impugning pre-institutional desert and implying that even good character and right conduct are mainly the product of endowments), and MURPHY & NAGEL, *supra* note 34, at 106 (same); see generally Wax, *Something for Nothing*, *supra* note 32 (collecting sources on this controversy and luck egalitarianism in general).

38. See generally MURPHY & NAGEL, *supra* note 34; RAWLS, *supra* note 7, at 104.

R

R

R

particular social rewards? The apportioning of responsibility cannot always be answered in the abstract. Rather, it may depend on social and economic context and the particular outcomes under consideration.

These inquiries beg a further set of questions that arise when confronting the special problems of the disadvantaged. Is self-direction a real possibility for most people within our society? Might extreme childhood deprivation, for example, significantly undermine the ability to exercise meaningful choice? Given their insular lives, can the poor really advance? Are all people really so free to climb or fall that they can reasonably be held responsible for where they end up?

One way to approach these questions is to ask whether the opportunity to achieve basic economic self-sufficiency is available to able-bodied persons of all backgrounds who are determined to make a decent life and get ahead. What circumstances would satisfy this condition? At a minimum, it could be argued, society must provide a reasonably well-functioning economy that makes employment widely available to individuals with divergent levels of skill. In addition to ensuring that people who “play by the rules” can live a minimally decent life, society must also provide the prerequisites for self-development. As part of this, it must maintain social institutions designed to prepare people for the world of work, including well-functioning public schools that provide all with the opportunity to develop the skills for constructive citizenship and economic advancement. Higher education should also be open to everyone who has attained enough proficiency to complete advanced schooling.

Whether these prerequisites for self-help prevail in the United States today is hotly contested. Those who believe in the “opportunity society” point out that basic education and employment are widely available. They insist that jobs of some kind can be obtained by virtually all who aggressively seek them. Public schools provide basic instruction to those determined to learn, and few capable students are turned away from college due to inability to pay.³⁹ Most recognize that the government has a role in pursuing policies of a general kind that ensure minimal economic well-being. These arguably may include measures, such as subsidies for working families or progressive tax policies designed to “make work pay,” that allow people of all ability levels to live decently. They

39. See discussion *infra*.

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1377

note, however, that tax and transfer policies—including food stamps, public health insurance for poor children, and the Earned Income Tax Credit—are currently in place to help ensure that those who behave prudently will enjoy a minimum standard of living. Although acknowledging that achieving a decent life may sometimes require great effort, especially among the less skilled, defenders of the status quo insist that the necessary steps are well within the reach of most persons regardless of background or origins.⁴⁰ An oft-repeated formula for escaping poverty and achieving self-sufficiency involves three elements: complete high school, take a job and hold it, and marry after school but before bearing children.⁴¹ The assertion is that the three-part formula for success would seem to be well within the grasp of ordinary, able-bodied people within American society today.

Those who would question all of the above rely primarily on two types of arguments. As previously discussed, the notion that people can in fact engage in these simple behaviors and “save themselves” is regarded by some as overly simplistic and impractical. Forces beyond people’s control effectively prevent this. For many people, circumstances make it so difficult that economic advancement is not realistically within their grasp. In addition, the system is designed so that some people must fail. Indeed, many individuals who behave prudently are still struggling or falling through the cracks.

These assertions pose an empirical question concerning exactly what obstacles persons with few skills and advantages actually face. Is it really possible for everyone at the bottom to improve their situation or are there “structural” limits on how many people can do so? In implicating the relationship between performance and broader structural forces, these questions probe the musical chairs/tall-building metaphors. Is the structure of *our* building really fixed, or is there some elasticity? Can we reconfigure the building—perhaps by providing more space at higher levels? Can we change the game of musical chairs by adding chairs? The practical

40. *E.g.*, JUAN WILLIAMS, *ENOUGH* 215 (2006).

41. This three-part formula for escaping poverty, first proposed by Isabel Sawhill and Christopher Jencks, was recently restated by Juan Williams. “Finish high school, at least. Wait until your 20’s before marrying, and wait until you’re married before having children. Once you’re in the work force, stay in: take any job, because building on the experience will prepare you for a better job.” Juan Williams, *Getting Past Katrina*, N.Y. TIMES, Sept. 1, 2006, at A17. Williams adds that “[a]ny American who follows that prescription will be at almost no risk of falling into extreme poverty. Statistics show it.” *Id.*; see also generally WILLIAMS, *supra* note 40.

aspect of these inquiries cannot be separated from normative questions about why the current structure exists. Once again, much depends on whether, as Galbraith suggests, the building's configuration is a product of historic accident, political interests, and institutional choices, or whether it is the outgrowth of impersonal market forces. But whether it is open to us to radically transform the status quo does not end the inquiry. We can ask, for example, why our system rewards particular attributes—such as talent—and what the consequences might be if the reward structure were altered. Thus even assuming we know how to change the structure, the question is whether we should and what price will be paid if we do. For example, if talent and hard work are rewarded because they create wealth and lead to the efficient satisfaction of human wants, then muting those rewards might undermine some of these goods. But if talent is rewarded because it serves the powers that be, revising the rules of compensation might prove less costly for overall well-being. More generally, any proposal for change begs the question of whether the proposed transformation will generate unintended and undesirable consequences. The question comes down to what works: assuming we want to do so, can government action improve the economic structure and/or the fate of individuals within it?

That question is thrown into sharp relief by concerns over rising inequality within the American economy. A steady stream of stories in the press documents a dramatic exacerbation of this trend in the United States over the past few decades that has, if anything, recently accelerated.⁴² The distribution of income has become skewed towards the top, with the share of resources going to the highest-earning one percent of Americans doubling between 1980 and 2004 to sixteen percent, and the share going to the top 0.1 percent more than tripling over the same period, to seven percent.⁴³ Such factors as globalization of capital and labor, the decline of labor unions, growing returns to skill and education, and higher

42. See, e.g., Joel Kotkin & David Friedman, *Rebuilding the Middle Class*, L.A. TIMES, Dec. 3, 2006, at M6; Thomas Lemieux, *Increasing Residual Wage Inequality: Composition Effects, Noisy Data, or Rising Demand for Skill?*, 96 AM. ECON. REV. 461 (2006); Thomas Piketty & Emmanuel Saez, *The Evolution of Top Incomes: A Historical and International Perspective* (Nat'l Bureau of Econ. Research, Working Paper No. 11955, 2006); Arloc Sherman & Aviva Aron-Dine, *New CBO Data Show Income Inequality Continues to Widen: After-Tax-Income for Top 1 Percent Rose by \$146,000 in 2004*, Center on Budget and Policy Priorities, Jan. 23, 2007, <http://www.cbpp.org/1-23-07inc.htm>.

43. See *The Revenge of the Bell Curve*, ECONOMIST, Oct. 7, 2006, at 20.

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1379

costs for basics like housing, education, and health care, are all thought to contribute to these patterns. Additional factors like the class and race divergence in family structure, the increase in assortative mating, and the emergence of “winner take all” markets may also be influential.⁴⁴ Although some of these are a function of individual or private behavioral choices writ large, others lie beyond the direct control of persons or social groups and are largely independent of values and behavior. Most of these trends are not completely understood or are not readily manipulated by known policy instruments. Taxes and public benefits programs can mitigate some effects, but their efficacy is limited and all pose the potential threat of undesirable consequences. Proposals designed to reduce inequality must confront questions of feasibility, efficacy, fairness, costs, and consequences.

Not everyone believes that rising inequality warrants intervention. Some take the position that, since individuals have the power through prudent action and good choices to better their economic situation and avoid poverty, altering the distribution of resources is not the business of government. As already discussed, how individuals fare within the existing economic structure often depends on whether they pursue an education, live prudently, abide by the law, work steadily, and get and stay married. Likewise, whether particular individuals end up poor is, in significant part, a function of their conduct in these areas. The three-part formula noted above for escaping poverty and achieving basic self-sufficiency acknowledges that personal conduct matters. Becoming a single parent, being voluntarily idle, dropping out of school, and breaking the law all compromise success. Once again, the impact of those choices begs the hard questions of how many of these decisions are effectively within individual control. But however these deeper questions are resolved, it is clear that our capitalist free market society assigns rewards to those who are willing to grasp basic opportunities.⁴⁵

44. For a succinct review of these trends, see John Cassidy, *Who Killed the Middle Class*, *NEW YORKER*, Oct. 16, 1995. For a shortened version of Cassidy's article, see John Cassidy, *Death of the Middle Class*, *NEW INTERNATIONALIST*, Issue 281 (1996), available at <http://www.newint.org/issue281/death.htm>.

45. In suggesting that behavior is important to eventual economic position, Lawrence Mead states that “[t]he middle class and the poor appear to exemplify two different economic personalities. The first has responded to adversity with greater effort, the other with less.” LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 83 (1992).

Although even Galbraith concedes that behavior matters, there is still the structure to contend with. Galbraith's discussion of the tall-building metaphor implies that the existence and size of the poor population are a function of broad structural forces. On this model, the level of the building's lowest floor and the number of people perched there are fixed ahead of time. If so, then all this talk of behavior and performance is a cruel distraction. Individual conduct only affects which individuals end up in which positions. As in the game of musical chairs, someone is destined to be ejected from the game—that's an intrinsic feature of our system. The poor will always be with us, and that's no one's fault.

It is on this point that some proponents of an "opportunity society" would reject Galbraith's construct. Galbraith's metaphor of a tall building seems to assume that the number and height of the floors, and the slots available on each, are prescribed and unalterable. Likewise, in musical chairs, the number and position of the chairs are a given and are unaffected by how the players play the game. The very rigidity of these features, however, limits their value in illuminating our economic system and detracts from their pertinence to key issues in social welfare. The distinction between structure and placement is not so crisp in practice. In fact, these elements are dynamically interrelated. It is here that these metaphors' application to the real world potentially breaks down.

There is good reason to believe that the number of people who can attain different levels of well-being in our economy is fluid, with significant room for modification. Moreover, the shape of the economy as a whole and the choices individuals make within it cannot be so neatly separated. The level of the floors and the number of people who take their place on each partly depend on personal behavior and culture. In other words, the degree of inequality and well-being overall are importantly affected by performance.

This perspective implicitly assumes that achieving basic self-sufficiency is not a zero-sum game. There are some behaviors which, if adopted by everyone within the existing system, would sharply decrease the absolute number of people in poverty. It seems obvious that a society in which many people marry and stay married and drug use and crime are low would be one in which fewer people would be poor. If everyone hewed to basic standards of conduct—for example, if everyone followed the three-part formula detailed above—no one would be worse off and many would find their lot improved. But if this is so, the number of residents on the lowest

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1381

floors need not be a constant. A corollary is that higher floors have room for more.

Private sexual and reproductive behavior is especially important in this regard. Family structure has diverged dramatically by class as well as race over the past few decades.⁴⁶ Although the age of marriage has increased for all groups, class differences in overall marriage rates are stark, particularly among whites.⁴⁷ Lifetime marriage rates have declined for women with less education, while the affluent and well-educated still marry and stay married at high rates.⁴⁸ A similar pattern is evident for single-parent families. In this decade, the percentage of children born out of wedlock has increased to about twenty-five percent.⁴⁹ But out of wedlock childbearing is unevenly distributed.⁵⁰ The rate has climbed to over thirty-five percent for women with a high school education or less.⁵¹ In contrast, the percentage of children born out of wedlock to white women with four years of college or more remains in single digits.⁵² Finally, trends have diverged for divorce, with rates stabilizing and then declining since the 1980s among the well-educated but continuing to rise among those of lower socioeconomic status.⁵³ These developments for marriage, out of wedlock childbearing, and single parenthood have exacerbated inequality in society as a whole.⁵⁴ The rise in single-parenthood among those who can least afford it has increased the numbers in poverty. As Charles Murray has observed, the single parent family is not, and

46. David T. Ellwood & Christopher Jencks, *The Spread of Single-Parent Families in the United States Since 1960*, in *THE FUTURE OF THE FAMILY* 25-65 (Daniel P. Moynihan, Timothy M. Smeeding & Lee Rainwater eds., 2004) (identifying broad trends in family disruption according to race and class); David T. Ellwood & Christopher Jencks, *The Uneven Spread of Single-Parent Families: What Do We Know? Where Do We Look for Answers?*, in *SOCIAL INEQUALITY* 3-77 (Kathryn M. Neckerman ed., 2004) (providing statistical data on many axes of family life and structure).

47. See Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 *DEMOGRAPHY* 607, 607-27 (2004).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Ellwood & Jencks, *The Spread of Single-Parent Families in the United States Since 1960*, *supra* note 46, at 41.

53. See Megan M. Sweeney & Julie A. Phillips, *Understanding Racial Differences in Marital Disruption: Recent Trends and Explanations*, 66 *J. MARRIAGE & FAM.* 639, 643 (2004); Steven P. Martin, *Trends in Marital Dissolution by Women's Education in the United States*, 15 *DEMOGRAPHIC RES.* 537, 560 (2006) (noting declining divorce rate among well-educated whites).

54. See generally McLanahan, *supra* note 47.

R

R

never will be, a viable economic unit, save for the very rich.⁵⁵ A single parent must play two roles—caring for children and earning a living—that wives and husbands traditionally assumed together. As a result, many single-parent families end up poor.⁵⁶ Indeed, the vast majority of all poor families in the United States today consists of mothers with children.⁵⁷ Two-parent families, in contrast, have far lower poverty rates.⁵⁸

Paradoxically, marriage and family stability are especially important in improving the economic status of people with little education and few skills.⁵⁹ If families at the bottom of the income scale were stronger, family income would be less dispersed and current levels of inequality would shrink. Relatedly, if parents, however unskilled, would join forces through marriage to raise children together, many families would be lifted above the poverty line and fewer children would grow up poor. To carry forward Galbraith's analogy, these behavioral changes would improve the well-being of people on the building's lowest floor. Alternatively, they would alter the distribution of the building's population as a whole. Many fewer people would reside on the lowest levels. By implication, the building would "expand" to make room for more individuals on higher floors.

This elasticity may not hold to the same degree for every step that poor individuals might take to try to improve their own lives. The analysis may be somewhat different for factors like education, where the value generated is at least partly positional. In bemoaning the tendency to muddle the distinction between structure and placement in discussions of inequality,⁶⁰ Galbraith suggests that educational reform is often mistakenly cited as an effective anti-poverty measure or as a way to reduce inequality.⁶¹ He points out that a change in the quality or quantity of education society offers is not

55. Charles Murray, *What to Do About Welfare*, COMMENTARY, Dec. 1994, at 26-34.

56. See Amy L. Wax, *The Failure of Welfare Reform*, L.A. TIMES, Oct. 22, 2006, at Current 1.

57. Hilary Hoynes et al., Symposium, *Poverty in America: Trends and Explanations*, 20 J. ECON. PERSPECTIVES 47, 48 (2006).

58. *Id.* at 53-54.

59. See, e.g., Robert I. Lerman, Effects of Marriage on Family Economic Well-Being, available at <http://aspe.hhs.gov/HSP/marriage-well-being03/summary.htm>; Robert I. Lerman, How do Marriage, Cohabitation, and Single Parenthood Affect the Material Hardships of Families with Children?, available at <http://aspe.hhs.gov/HSP/marriage-well-being03/SimpPaper.htm>.

60. GALBRAITH, *supra* note 23, at 55.

61. *Id.*

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1383

an enduring solution to poverty, because such reforms will do nothing to alter “the height of the building or the number of places on each of the floors.”⁶² As he explains,

An increase in the supply of educated people . . . does not by itself create more spaces on the top floors. Instead, as education increases, more of the existing slots will be filled by workers of higher qualification. . . . Average levels of education will rise on the middle and lower floors. Positions on the topmost floors actually become ever harder to break into, and more remote.⁶³

Galbraith’s point is that the economy will not necessarily generate jobs appropriate for a more educated populace. Nor will the number of positions available at each level inevitably increase. Although selected individuals might benefit from more education, such reforms need not reduce overall inequality or decrease the number of people who are poor.

Galbraith’s concern with the potential zero sum effects of providing more education is not wholly unwarranted. Offering more educational opportunity will not cause low-paying service jobs to diminish in number. There will still be plenty of jobs at this level, and someone must fill them. Indeed, the demand for service jobs has, if anything, increased recently with expanding numbers of the very affluent. Nor will educational improvements necessarily increase the compensation for these positions. Whether demand for service workers will result in higher pay depends on labor supply—and that in turn depends on the availability of other jobs for workers.

Galbraith’s view that education only affects placement and has no consequences for structure is probably overly pessimistic. Galbraith’s analysis assumes that the number, type, and compensation for jobs that the economy generates is fixed and unaffected by the population’s level and quality of education. But this need not be so. The economy is not static. There may be a dynamic interplay between the availability of human capital and labor markets. Declines in the dropout rate or increases in learning or achievement can shape economic development and overall prosperity by encouraging expansion and investment in enterprises that depend on skilled labor.

Although Galbraith arguably implies too sharp a divide between factors bearing on placement and structure, his insights are none-

62. *Id.* at 56.

63. *Id.*

theless valuable in drawing attention to the contribution of personal choices as well as systemic factors to inequality and deprivation. The evidence indicates that observed patterns are a mixed function of individual performance and broader societal structures. Those structures are in turn influenced by private decisions, economic forces, and social policy.

IV. WELFARE POLICY THROUGH METAPHOR: WHAT IS TO BE DONE?

Recognizing the distinctions between placement and structure, and between private and social forces, is essential to any rigorous analysis of how the problems of deprivation and inequality should be addressed. These categories must be kept in mind in considering various options for government intervention, policy change, or legal reform. Once problems are properly categorized, then the right questions to ask are these: Can the government change the structure? Can the government change behavior? What aspects of the system will yield to politics and policy, and which are beyond the reach of those instruments of collective action? Experience has taught that some problems may be effectively alleviated by governmental action, while others resist manipulation through policy and are less responsive to programmatic initiatives. Although there is a great deal of disagreement about which problems fall into either category, it is important to air those controversies fully and fairly in any social welfare course.

In answering the question “What works?” it makes sense to start with what governments do best. Prime areas for government intervention are those that yield to uncomplicated solutions, such as throwing money at the problem. Our economy provides a large number of low-paid service jobs. We do not yet know how to change this—that is, we have no ready formula for significantly raising the “wage level” of the building’s lowest floor. But there would seem to be a role for public policy in ensuring that individuals at the bottom who play by the rules and work hard do not end up poor. To that end, certain programs already in place have proven effective in improving the lot of low-paid workers without generating intolerable side-effects. The Earned Income Tax Credit, in particular, has helped to lift many working families above the poverty line.⁶⁴ As a boost to hard-won earnings, it re-

64. See, e.g., Anne Alstott, *The Earned Income Tax Credit and the Oversimplified Case for Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 539-41 (1995).

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1385

wards people who behave responsibly and strive for self-support. In addition, other work-related programs that states have developed under federal welfare reform mandates have been successful.⁶⁵ Programs that help workers find reliable transportation and that subsidize child care offer effective supports for low-wage workers.⁶⁶ These programs need not be initiated by government. Private efforts may also make important contributions to the poor's well-being.⁶⁷

Another device for helping residents of the building's lowest floor is the minimum wage. There is currently a lively debate about whether this method is ultimately self-defeating or whether it is an effective mechanism for helping the least well-off.⁶⁸ Those critical of the minimum wage tend to buy into a neoclassical view of labor markets: wages are determined primarily by the economic forces of supply, demand, and profit margins.⁶⁹ They argue that raising the minimum wage hurts those it is designed to help by generating higher unemployment. The most vulnerable and least employable workers are most likely to be priced out of the market.⁷⁰ Other economists believe that economic forces alone do not so precisely fix wages. Rather, there is enough "play" in the system to support potentially positive outcomes from minimum wage hikes in some circumstances.⁷¹ Recent empirical research using the "natural laboratory" of minimum wage differences between states has provided some evidence that raising the minimum wage need not lead to higher unemployment or lower profits for businesses and may leave many low-wage workers better off.⁷²

65. Thomas Corbett, *The New Face of Welfare: From Income Transfers to Social Assistance?*, 2 *SOC. POL. & SOC'Y* 113, 113-15 (2002).

66. *Id.* at 118.

67. See, e.g., Michael Fitzgerald, *Thinks Big About the Little Guy*, *N.Y. TIMES*, Feb. 4, 2007, § 3, at 1; see also Joseph P. Friend, *From the Hope Program, A Path to a Fresh Start*, *N.Y. TIMES*, Feb. 4, 2007, § 3, at 19.

68. See Gary S. Becker & Richard A. Posner, *How to Make the Poor Poorer*, *WALL ST. J.*, Jan. 26, 2007, at A11 (summarizing economic arguments against the minimum wage); Edmund Phelps, *The Importance of Inclusion and the Power of Job Subsidies to Increase It*, *OECD Econ. Studies* No. 31 (2000) (discussing shortcomings of minimum wage rules).

69. Becker & Posner, *supra* note 68.

70. *Id.*

71. See, e.g., GALBRAITH, *supra* note 23, at 145.

72. See David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 *AM. ECON. REV.* 772, 792 (1994); see also Eduardo Porter, *Revisiting a Minimum-Wage Axiom*, *N.Y. TIMES*, Feb. 4, 2007, § 3, at 3.

R

R

A far more difficult task confronts those who would address the behavioral aspects of poverty and inequality. Particularly salient in this regard are problems like drug use, crime, family fragmentation, and educational failure. These patterns have a well-documented impact on economic success. Addressing these difficulties is complicated by the fact that they are not evenly distributed in the population, but are especially acute among blacks and on the increase among Hispanics.⁷³ Both of these groups continue to be disproportionately poor.⁷⁴

A key divide within the political and policy community is between those who believe that governments have an important role to play in correcting or reducing dysfunctional behaviors and those who think that the government's ability to address these problems is necessarily modest. Those who look to government see poor performance as, at bottom, a response to adverse social conditions.⁷⁵ If government can somehow remove or alleviate those, the behavioral problems will abate and disappear. On this perspective, "social engineering" can transform social life. In contrast, others see these problems as intransigent to external or official manipulation.⁷⁶ Dysfunctional behaviors are a matter of private choice and conduct, which are primarily shaped by informal norms. Change cannot be imposed. Rather, it must be self-initiated.

The perspective that looks to government fits best with a particular vision of human decision making that sees conduct as the product of material conditions and external constraints. Adverse circumstances—not individual or cultural differences—are the ultimate causes of disadvantage. Dysfunctional behaviors are best regarded as a "functional" or "rational" reaction to hardship, deprivation, or discrimination inflicted by others.⁷⁷ These understandings are the hallmark of what David Brooks calls "sociologi-

73. See generally New Century Foundation, *The Color of Crime: Race, Crime and Justice in America*, Second Expanded Version (2005).

74. Daniel T. Lichter, Zhenchao Qian & Martha L. Crowley, *Race and Poverty: Divergent Fortunes of America's Children?*, 24 FOCUS 8, 14 (2006).

75. MEAD, *supra* note 45, at 2.

76. *Id.*

77. For a characteristic statement along these lines, see J. David Greenstone, *Culture, Rationality and the Underclass*, in THE URBAN UNDERCLASS 399, 403 (Christopher Jencks & Paul E. Peterson eds., 1991). See also Linda M. Burton, *Teenage Childbearing as an Alternative Life-Course Strategy in Multigeneration Black Families*, 1 HUMAN NATURE 123, 124 (1990).

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1387

cal thinking.”⁷⁸ This outlook also fits with an embrace of situationism, the belief advanced by some social psychologists that variations in external conditions rather than individual differences account for most observed behaviors.⁷⁹ This perspective can be contrasted with a more moralistic, character-based focus on individual virtue and initiative. The character-based view comports with a robust conception of moral freedom and the possibility of meaningful choice. It also acknowledges a distinct role for group culture, values, and traditions in influencing the conduct of group members for good or ill.

Those who stress the influence of culture on behavior point to evidence that people with contrasting traditions and attitudes differ in their response to external constraints in ways that bear on economic success. Bourgeois virtues and a robust work ethic enhance productivity, and attributes like conscientiousness, which some cultures may foster more than others, are linked to occupational effectiveness.⁸⁰ Lawrence Mead, for example, has suggested that how people cope with setbacks, challenges, and hard times may be mediated by cultural assumptions that help define class.⁸¹ He states, “[t]he middle class and the poor appear to exemplify two different economic personalities. The first has responded to adversity with greater effort, the other with less.”⁸² In addition, the importance of culturally conditioned habits of behavior can be observed worldwide and across nations, with evidence that productivity-enhancing attributes can contribute to the health of the economy as a whole. Consider, for example, some Scandinavian countries’ signal success in maintaining economic growth while simultaneously reducing in-

78. On the dichotomy between character discourse and the sociological view, see David Brooks, *Virtues and Victims*, N.Y. TIMES, Apr. 9, 2006, § 4. See also JOHN M. DORIS, *LACK OF CHARACTER* (2002).

79. See, e.g., DORIS, *supra* note 78, at 146 (reviewing social psychological evidence on the role of dispositions and situational influence). The embrace of situationism has not been uncontroversial, as there is considerable evidence in social psychology and experimental economics that individual characteristics and dispositions do predict behavior. See, e.g., David Lubinski, *Scientific and Social Significance of Assessing Individual Differences: Sinking Shafts at a Few Critical Points*, 51 ANN. REV. PSYCHOL. 405, 405 (2000); Walter Mischel, *Toward an Integrative Science of the Person*, 55 ANN. REV. PSYCHOL. 1, 19 (2004); Daniel J. Ozer & Verónica Benet-Martinez, *Personality and the Prediction of Consequential Outcomes*, 57 ANN. REV. PSYCHOL. 401, 416 (2006).

80. See, e.g., Barrick et al., *Personality and Performance at the Beginning of the New Millennium: What Do We Know and Where Do We Go Next?*, 9 INT’L J. SELECTION & ASSESSMENT 9, 21-22 (2001).

81. MEAD, *supra* note 45, at 83.

82. *Id.*

R

R

equality and poverty through redistribution and high taxes.⁸³ Although economic policies have undeniably played some role, a culture that fosters social order, skill development, and solidarity has surely been an important factor as well.⁸⁴ These types of cultural influences are largely a product of private, historical, and informal forces.

In its antipathy towards cultural distinctions as explanations for behavior and in its commitment to “situationism” as a central principle of human affairs, sociological thinking makes little room for notions like sound values, moral virtue, or self-help. The assumption that external circumstances both explain and dictate human response regards the notion of spontaneous self-correction as both unjust and incoherent. The idea of surmounting social conditions and besting adverse circumstances through the embrace of superior or more functional values plays little role in this world view.

The sociological approach feeds into a belief in the necessity and the efficacy of external solutions to social problems. The notion that observed behavior is the expected outgrowth of existing patterns means that material and social circumstances are crucial to outcomes. Because human beings are the playthings of social forces, the power to manipulate and transform human response must lie with outsiders or society as a whole. Dysfunctional behaviors represent a “rational” response to ambient conditions, so individuals cannot be expected to change until conditions improve. It follows that better performance is impossible without structural reforms. It is incumbent on society to “produce” the necessary transformations. Government must solve the problems of the poor.

Policy experience to date challenges this approach. The cluster of behaviors that creates the risk of falling into poverty has so far proved resistant to manipulation through any known reforms or government intervention. There is growing evidence that patterns like low educational attainment, premature and extra-marital childbearing, paternal abandonment, and criminal activity have their roots within early, private experience and are reinforced by informal social forces and values.⁸⁵ Families and the immediate social circle shape attitudes and attributes that put people at risk. Early influences are particularly crucial in establishing key habits

83. See, e.g., Jonathan Cohn, *Great Danes*, NEW REPUBLIC, Jan. 1-15, 2007, at 13-15.

84. See *id.* at 17.

85. See KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 4 (2005).

2007] *STRUCTURAL CONSTITUTIONAL LAW COURSE* 1389

and understandings. The failure of governmental efforts directed at countering or overriding these influences begs the question of whether such measures can succeed. To the extent that values and culture are the dominant forces behind dysfunctional behavior, there is little evidence that the government can effectively intervene.

Consider, for example, the declining rate of marriage among the less educated and less well-off segments of the population in recent decades. The Bush administration has recently proposed initiatives designed to strengthen and encourage marriage.⁸⁶ But there is no evidence that pro-marriage programs work or have any effect at all.⁸⁷ Some scholars of the family assert that marriage is not “the solution” to economic deprivation because the men poor women would marry are abusive, irresponsible, and financially insecure.⁸⁸ But these attributes are in turn dependent on behavior.⁸⁹ Single-motherhood is an important engine of economic disadvantage.⁹⁰ If more men would behave like good husbands, this development would go a long way towards alleviating poverty among the least well-off. Nonetheless, most of those who look to government to solve the poverty problem do not see marriage as a reasonable anti-poverty measure.⁹¹ On the assumption that solutions must come from government, this stance makes some sense: it’s not obvious how the government can produce more and better marriages among the target population. Certainly, government programs can do little to influence the behaviors that make men marriageable. Those who look to private initiatives, on the other hand, will recognize that marriage enhances security and economic well-being and that marriage is attainable.⁹² For them, the problem of low marriage rates is amenable to self-help. It is up to the people themselves to see that marriage is desirable and then to respond by behaving appropriately, getting married, and staying married. The power lies within the poor to alleviate their own situation.

86. See, e.g., *id.* at 3.

87. Frank Furstenberg, *Can Marriage Be Saved?*, DISSENT, Summer 2005, at 5-6.

88. EDIN & KEFALAS, *supra* note 85, at 76, 216.

89. See Amy L. Wax, *Too Few Good Men*, 134 POL’Y REV. 69 (2006).

90. See David J. Eggebeen & Daniel T. Lichter, *Race, Family Structure, and Changing Poverty Among American Children*, 56 AM. SOC. REV. 801, 803 (1991); see also Lichter, Qian & Crowley, *supra* note 74, at 14.

91. EDIN & KEFALAS, *supra* note 85, at 4 (discussing how the Bush administration’s “marriage cure” has infuriated the political left).

92. See *id.* at 3.

R**R****R**

V. CONCLUSION

The purpose of this Essay is to articulate a vision of how a social welfare course should be designed and the issues that it should confront. Given what we know and what we have learned in past decades, any course in social welfare law and policy must consider the contribution of individual and systemic forces, and of behavior and structure, to the problems of inequality and poverty within our society. This exploration inevitably will reveal fault lines of political conviction and belief and will grapple with social science data and programmatic experience. Finally, courses on social welfare within law schools will inevitably confront practical questions. In past decades, advocacy was the watchword. Poverty law was directed at developing litigation tactics under existing law to procure rights and resources for the poor. The goal was to improve people's lot in life and meet their immediate needs. That focus is still valid, but time and experience have revealed its limitations. The content of some welfare law courses has consequently shifted to accommodate political realities and practical failures. In the wake of 1990s federal welfare reform, most policies are now designed to reward those who, in the words of former President Bill Clinton, "work and pay the taxes, raise the kids, and play by the rules."⁹³ To the extent that deprivation is still in part "structural"—that is, the product of larger economic and institutional forces shaping labor markets, economic opportunities, and the distribution of wealth—programs like work-support and tax credits for the working poor are now the instruments of choice. But decades of experience and study have revealed that some poverty is rooted in behavior. And programmatic attempts to improve performance have taught us that understanding causes does not necessarily point the way to effective solutions. Because behavior is hard for governments to control, the study of poverty reveals the limits of the government's power and counsels a more modest approach to what it can accomplish.

93. Bill Clinton, Acceptance Speech to the Democratic National Convention (July 16, 1992).